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THE FIFTY YEARS' DIGEST

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(Civil, Criminal & Revenue)

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BY

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Volume V

C. P. C., O. 34, R. 6

To

Crown Lands Act (1884) of New South Wales.

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PREFACE

No apology is needed for the publication of this Digest, which is a consolidated one covering the half century from 1901 to 1950. It will be easily appreciated that the bulk of our current case-law is contained in the decisions of this period. It is not necessary to expatiate at length on the virtues of consolidation, as otherwise, one will have to refer to a large number of publications for the same point.

On the importance of case-law, the late ir William Holdsworth wrote: "Codes are lifeless things compared with the living law evoked by the decision of cases which turn upon the actual happenings in the lives of human beings; and each individual case, which lays down living law based upon these actual happenings, can only cover a very small fraction of the field of law."

In the Preface to the Corpus Juris (American), the following passage occurs: "Often the particular application or illustration stated will precisely fit the state of facts in his (the lawyer's) own case, and the argument of reason and logic may be fortified by pointing out that in prior litigated cases the rule has been applied in the manner contended for. No lawyer is content to depend alone upon his own reason and knowledge. Few have the presumption to assume that they would, unaided by the experience of the past, present all arguments that could be made in any case as to the application of a general rule. Precedents are valuable the same as experience is valuable. Reported decisions are valuable the same as history and science are valuable. . . . There is more wisdom in the many than in the few. Lawyers should get wisdom from all sources, and in preparing a brief in an important case, should not stop until they find every case that has been decided upon the subject in question. (The Value of Precedents by J. W. McLoud in 28 Am Law Rev. 218)."

It can be seen from the above quotations how superficial is the oft-heard criticism against the growth of case-law in our country.

The enormous growth of case-law makes a Digest an indispensable publication for the legal profession. No doubt, we have now got in the field excellent commentaries and text books in which the decisions bearing on the respective subjects are exhaustively dealt with. But in our opinion, Commentaries and Digests are complementary to each other, and neither can dispense with the other.

In the first place, commentaries dealing exhaustively with the case law bearing on the respective subjects do not cover the entire field of law. In the next place, the point of view and the mode of treatment and dealing with the case-law in a Digest and a Commentary are entirely different. The approach, in each case, is, as it were, from opposite ends. Each system has its own special usefulness to the lawyer. If a lawyer is on the hunt for a parallel precedent, for a case on all fours, he naturally turns to a Digest. If he wants to study the principles bearing on a point, he first thinks of a Commentary or a text book. However exhaustive a Commentary may be, in point of case-law, the emphasis is more on the

underlying principles than on the facts and features of each case which are available only in a Digest. Though a Commentary may give a more correct insight into the legal position and the over-all state of case-law on any question, a Digest has to be resorted to for picking out the particular case which comes closest to the matter on hand.

Further, it has to be remembered that in a Commentary, the case-law is seen *as interpreted* by the Author. In a Digest, the reader has, as it were, a direct access to the case-law and he may bring to bear upon his study of the case-law his own point of view and may thereby be enabled to draw a conclusion which not only did not occur to the Author but was contrary to the Author's conclusion. In any case, a Digest will enable the reader to test the correctness of the conclusions set forth in the commentaries, before he proceeds to study the actual reports after he has selected the decisions for study by the above process.

As regards the special features of the present publication, the first point to be mentioned is that it is a Digest of full head-notes and not merely of short, truncated statements of the law. Separate points decided by a case are digested separately and are not jumbled up together in the same note.

Where the decisions bear upon statutory provisions they have been digested under the appropriate statutory headings. But care has been taken to give topical headings also in proper places with cross-references to the respective statutory headings.

Where the number of cases under a section or heading is very large, they are sub-divided into sub-headings. In such cases a synopsis of the headings and sub-headings also is given.

Where a decision overrules or reverses a previous ruling, this is noted under the decision.

Other features are like those of the well-known Digests published by the Madras Law Journal Office and All India Reporter hitherto, with which the Bar and Bench are already familiar and which they appreciate so much.

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CONTENTS

CIVIL P. C. (5 of 1908)

	Col.
O. 34, R. 6	
Against whom to be passed ...	1
Amount due ...	5
Appeal ...	8
Application for ...	12
Attachment before judgment. *See also* **Civil P. C., O. 38, R. 5** ...	13
Award or consent decree ...	13
Combined decree ...	17
Construction ...	20
Costs ...	22
Execution against other property ...	23
Ex parte decree ...	27
Limitation ...	27
Omission to claim ...	33
Personal decrees ...	35
Scope ...	48
O. 34, R. 7	
See also **Civil P. C., O. 34, Rr. 2, 4 and 10**	
Account ...	52
Applicability and scope ...	53
Burden of proof ...	54
Costs ...	54
Form of decree ...	55
Interest ...	58
Mesne profits ...	58
Mixed mortgage ...	60
Mortgage of undivided share ...	60
Mortgage executed by a minor ...	60
Nature of proceedings ...	61
Payment ...	61
Power of the Court ...	61
Rent ...	62
Retransfer of property to mortgagor ...	62
Successive suits ...	62
Time ...	64
Transferee ...	65
Usufructuary mortgage ...	65
O. 34, R. 8	
See also **O. 34, Rr. 3 and 5**	
Accounts ...	67
Appeal ...	67
Applicability and Scope ...	67
Decree for redemption ...	68
Extension of time ...	69
Final decree for foreclosure or sale ...	72
Interpretation ...	73
Limitation ...	73
Redemption after due date ...	74
O. 34, R. 8-A ...	76
O. 34, R. 9 ...	76
O. 34, R. 10	
Scope and application ...	76
Mortgagee, right of ...	77
Costs properly incurred ...	77
Costs of appeal ...	78
Other costs ...	79
Mode of realization ...	79
Costs, Liability for ...	79
Costs—Effect on mortgaged property ...	80
Costs—Whether a mortgage debt or damages ...	80
O. 34, R. 11	
See also **Civil P. C., S. 34 and O. 34. Rr. 2 and 4**	
Charge ...	80
Damdupat ...	81
Discretion ...	82
Interest as damages ...	83
Penal interest ...	83
Pendente lite ...	84
Post decree ...	85
Post diem ...	86
Prior to suit ...	87
Rate of ...	88
O. 34, R. 12 ...	91
See also **Civil P. C., S. 73**	
O. 34, R. 13 ...	96
O. 34, R. 14	
Applicability—Scope ...	98
Claim unconnected with mortgage ...	102
Claim under mortgage ...	105
Compromise Decree ...	115
Enforcement of Charge ...	116
Instalment Decree ...	119
Maintenance Decree ...	119
Personal Remedy ...	120
Sale in contravention—Effect ...	122
Security ...	124
O. 34, R. 15 ...	126
O. 35, R. 1 ...	127
See also **Civil P. C., S. 88**	
O. 35, R 2 ...	128
O. 35, R. 4 ...	128
O. 35, R. 5 ...	129
O. 35, R. 1 ...	129
O. 36, R. 5 ...	130
O. 37 ...	130
O. 37, R. 1 ...	131
O. 37, R. 2 ...	131
O. 37, R. 3.	
Tests for granting leave to defend ...	133
Unconditional leave ...	134
Conditional leave ...	134
Failure to fulfil condition ...	135
Refusal of leave to defend ...	135
Appeal ...	135
Revision ...	135
Other remedy for defendant ...	136
Charge on property ...	136
O. 37, R. 4 ...	136
O. 37, R. 6 ...	136
O. 38. *See also* **Civil P. C., Ss. 51, 94 and 95** ...	137
O. 38, R. 1. ...	137
See also **Civil P. C., S. 51 and O. 21, Rr. 37 to 40**	
O. 38, R. 2 ...	138
See also **Civil P. C., S. 145** ...	
O. 38, R. 3 ...	139
O. 38, R. 4 ...	140
O. 38, R. 5. *See also* **Civil P. C., Ss. 94, 95 and 145.**	
Appeal ...	140
Attachment before judgment ...	141
Conditional attachment ...	147
Effect of attachment ...	148
Jurisdiction ...	149
Legality. *See also* **Note 2** ...	152
Mortgage suit. *See also* **Civil P. C., O. 34, R. 6** ...	153
Surety. *See also* **Note 9** ...	155
Security ...	157
Scope and applicability ...	158
O. 38, R. 6.	
Scope ...	160
Appeal ...	161
Effect ...	162
Insolvency ...	162

	Col.
Continuance of attachment ...	162
Mortgage ...	163
O. 38, R. 7. *See also* Civil P. C., O. 21, R. 54 ...	164
O. 38, R. 8. *See also* Civil P. C., O. 21, R. 58 ...	164
O. 38, R. 9 ...	165
O. 38, R. 10.	
Scope and applicability ...	168
Effect on rights of third persons ...	168
Effect on right of other decree-holders	170
Death of judgment-debtor ...	172
O. 38, R. 11 ...	172
O. 38, R. 12 ...	175
O. 38, R. 13	176
O. 39. *See also* Civil P. C., Ss. 94, 95 and 151 ...	176
O. 39, R. 1. *See also* Civil P. C., S. 151 and O. 39, R. 2.	
Appeal ...	177
Applicability and scope. *See also* Note 12 ...	179
Arbitration ...	182
Discretion of Court ...	183
Duty of Court ...	184
Disobedience ...	185
Duration ...	188
Execution proceedings. *See also* N. 7A	189
Interpretation ...	193
Persons beyond jurisdiction ...	195
Power of High Court ...	196
Revision ...	200
Specific performance ...	200
When granted. *See also* Note 2 ...	200
O. 39, R. 3 ...	232
O. 39, R. 4 ...	233
O. 39, R. 5 ...	234
O. 39, R. 6 ...	234
O. 39, R. 7 ...	234
O. 39, R. 9 ...	236
O. 39, R. 10 ...	237
O. 40 ...	237
O. 40, R. 1. *See also* Civil P. C., Ss. 51, 94 and 95.	
Appeal ...	238
Appointment. *See* Notes 1, 5, 7, 9, 15 and 20 ...	248
Contempt ...	248
Continuation of, in appeal ...	248
Discharge and removal of receiver ...	249
Discretion ...	253
Effect. *See also* Note 14 ...	255
Grounds for appointment. *See also* Note 5 ...	261
Interim receiver ...	283
Jurisdiction. *See also* Note 15 ...	285
Mortgage. *See* Notes 6 and 7 ...	291
Partition suit ...	291
Partnership ...	295
Position of. *See also* Notes 17 and 18 ...	296
Possession. *See also* Note 6 ...	298
Powers of Court ...	301
Procedure ...	306
Proceedings by or against. *See also* Notes 13, 16, 18 and Civil P. C., S. 80 ...	307
Property outside subject-matter of suit. *See* Notes 9 and 19 ...	820
Rights and liabilities of. *See also* Notes 16, 17 ...	320
Scope ...	326
Termination of appointment. *See* Notes 3 and 4 ...	328
Who may be appointed ...	328
O. 40, R. 2 ...	331
O. 40, R. 3.	
Appeal ...	333
Liability of surety ...	333
Procedure ...	334
Power of Court ...	334
Receiver, duties and liabilities of ...	334
Revision ...	338
Surety, necessity of ...	338
O. 40, R. 4.	
Scope and applicability ...	338
"Court" ...	339
Receiver's rights and liabilities ...	339
Negligence of Receiver ...	339
Removal or death of receiver ...	340
Appeal ...	341
O. 40, R. 5 ...	342
O. 41 ...	342
See also (1) Appeal. (2) Civil P. C., Ss. 96 to 99, 107 and 108.	
O. 41, R. 1.	
Amendment of decree. *See also* Note 5 ...	343
Applicability and scope ...	344
Competency of. *See also* Note 13 ...	344
Connected appeals. *See also* Note 6 ...	345
Copy of decree ...	346
Copy of judgment ...	351
Copy of order ...	355
Court-fee. *See also* Note 10 ...	357
Cross suit and appeals ...	358
Evidence, appreciation of. *See also* Civil P. C., S. 107 ...	358
Limitation ...	360
Memo of appeal ...	363
Onus ...	364
Parties ...	365
Powers and duties of Court ...	366
Proper presentation. *See also* Notes 16 and 17 ...	367
Time for presentation. *See also* Note 15 ...	369
Vakalatnama. *See also* Note 15 ...	369
O. 41, R. 2.	
Appellate Court whether can set up new case ...	370
Grounds not set up in memorandum of appeal. *See also* Note 4 ...	371
Point of jurisdiction ...	372
New case or point. *See also* Civil P. C., S. 100 ...	373
Mixed point of law or fact ...	381
Point of law ...	382
Leave of Court ...	383
Point of limitation ...	384
Presentation of appeal ...	385
Res judicata, Plea of ...	385
Scope ...	385
Change of ground ...	385
Waiver ...	386
O. 41, R. 3.	
Amendment ...	389
"Within time to be fixed" ...	390
Substitution of representatives after period of limitation ...	390
"May be rejected" ...	391
Order of rejection, whether appealable ...	391
O. 41, R. 4. *See also* Civil P. C., O. 22, Rr. 3, 4 and O. 41, R. 32	
Abatement ...	392
Appeal ...	395
Applicability and scope ...	400
Common ground ...	402
Death of party ...	406
Interpretation ...	408

	Col.
"May reverse the decree . . . . all the plaintiffs or defendants". *See also* Note 5 ...	408
Partial abatement ...	413
Transposition of parties ...	415
O. 41, R. 5. *See also* Civil P. C., S. 151 and O. 41, R. 6	
Appeal and revision ...	416
Communication of order. *See* Note 2...	417
Effect of stay order ...	417
Inherent powers ...	420
Powers of Appellate Court ...	421
Powers of trial Court ...	424
Practice ...	424
Scope and object ...	428
Security ...	431
Substantial loss ...	435
Surety ...	439
When granted. *See* Notes 7 and 8 ...	440
O. 41, R. 6	
Appeal ...	440
Conditional Stay ...	440
Jurisdiction ...	441
Revision ...	443
Scope and Applicability ...	444
Security ...	445
O. 41, R. 7. ...	446
O. 41, R. 8. ...	447
O. 41, R. 9. ...	447
O. 41, R. 10. *See also* Civil P. C., S. 145.	
Appeal and revision ...	447
Applicability and scope ...	448
Grounds for ...	451
Powers of High Court ...	454
Practice ...	455
Restoration ...	455
Security ...	456
Specified time ...	458
O. 41, R. 11.	
Effect of dismissal ...	459
Judgment, form and contents ...	459
Amendment of decree ...	462
Partial admission ...	462
Practice ...	463
Review ...	465
Revision and second appeal ...	465
Scope and object ...	466
Time-barred appeal ...	467
O. 41, R. 14. ...	467
O. 41, R. 16. ...	469
O. 41, R. 17.	
Appeal ...	469
Appearance—Meaning of ...	470
Dismissal for default. *See also* Note 2.	471
Dismissal on merits ...	474
Dismissal for default of appeal from ex parte decree—Application to set aside ex parte decree ...	475
Effect of dismissal ...	475
Hearing of appeal ex parte ...	475
Notice of date for hearing ...	476
Restoration of appeal ...	476
Revision ...	478
O. 41, R. 18. ...	478
O. 41, R. 19.	
Scope ...	479
Sufficient cause ...	479
Who can apply ...	485
Limitation ...	485
Inherent powers ...	485
Non-payment of printing costs ...	486
Default in depositing process fees ...	486
Deficiency in court-fee ...	486
Other remedy ...	486
Right of fresh appeal ...	486
Notices ...	487

	Col.
O. 41, R. 20. *See also* Civil P. C., S. 151 and O. 41, R. 33.	
Adding parties ...	487
Applicability and scope ...	490
Discretion ...	492
Effect of non-joinder ...	493
Inherent power ...	495
"Interested". *See also* Note 1. ...	495
Limitation. *See also* Note 2A. ...	499
Misjoinder ...	507
O. 41, R. 21. ...	507
O. 41, R. 22.	
Against whom allowed ...	510
Applicability and scope ...	511
Attacks on decree ...	512
Cessation of appeal ...	513
Court-fee ...	517
Cross-appeals and cross-objections ...	517
Cross-objections against co-respondents ...	520
Effect of non-filing ...	526
Limitation ...	528
Nature of. *See* Note 6. ...	531
Powers and duties of Court ...	532
Res judicata ...	533
Revision ...	533
Right in second appeal. *See also* N. 16.	534
Right to support decree ...	534
Second appeal. *See also* Note 14. ...	538
When disallowed. *See also* Note 18. ...	539
Who may file. *See also* Notes 15 & 18.	539
O. 41, R. 23. *See also* Ss. 107, 151 and O. 41, R. 25.	
Appeal after decision of suit on remand ...	541
Appeal against an order of remand under this rule. *See also* Note 18 and Civil P. C., Ss. 104, 151 and O. 43, R. 1. ...	543
Costs ...	549
Distinction between O. 41, R. 23 and O. 41, R. 25 ...	549
Effect of order of remand ...	551
Exclusion of evidence by lower Court...	553
Grounds of remand ...	555
Inherent power of remand. *See also* Civil P. C., S. 151 ...	561
Jurisdiction after remand depends upon the order of remand ...	565
Matters decided by order of remand, finality of ...	565
No appeal in remand order under inherent power ...	567
Order of remand, when will amount to a decree ...	571
Powers and duties of the appellate Court ...	572
Powers and duties of the trial Court...	579
Powers of High Court in appeal from order of remand ...	579
Preliminary point—Meaning of ...	581
Return of plaint ...	588
Revision ...	590
Remand ...	591
Scope and applicability ...	606
O. 41, R. 24 ...	609
O. 41, R. 25. *See also* Civil P. C., S. 109 and O. 41, R. 23.	
Appeal. *See also* Civil P. C., Ss. 104 and 151, O. 41, R. 23 and O. 43, R. 1 ...	610
Court to which remand should be made ...	612
Discretion ...	612
Issue not decided in Lower Court ...	613
Legality of remand ...	613

	Col.
New issues raised before Appellate Court ...	614
Power of Appellate Court after return of findings ...	615
Power and duty of Court to which issues are remitted ...	616
Retrial ...	617
Remand if open for consideration by Appellate Court after return of findings. *See also* Civil P. C., S. 109 and O. 41, R. 23 ...	617
Remand under inherent power. See Note 17 ...	618
Remand under Rule 23. See Note 17...	618
Remand when necessary and can be made ...	618
Revision ...	619
Scope ...	620
O. 41, R. 26 ...	621
O. 41, R. 27	
Consent of party ...	623
Defect in evidence ...	624
Discretion of Court ...	626
Documents ...	628
Estoppel ...	634
Exclusion of evidence ...	635
Inherent lacuna ...	636
Mistake or negligence of party. *See aslo* Notes 21 and 22. ...	638
New evidence ...	642
Powers and duties of Court ...	645
Procedure *See also* (i) Note 13; (ii) Civil P. C., O. 41, R. 29. ...	645
Rebuttal ...	650
"Record the reason" ...	652
Remand *See also* Civil P. C., O. 41 Rr. 23 and 25 ...	655
Requirements of justice ...	657
Revision ...	660
Scope ...	660
Second appeal ...	662
Subsequent events ...	665
"Substantial Cause" ...	668
When admissible ...	671
When not admissible ...	672
O. 41, R. 28 ...	673
O. 41, R. 29 ...	673
O. 41, R. 30 ...	673
O. 41, R. 31.	
Applicability and scope ...	675
Contents of judgment ...	676
Duty of Court ...	678
Judgment of affirmance ...	680
Judgment of reversal ...	681
Non compliance—Effect ...	682
"Points for determination" ...	688
"Reasons for decision" ...	689
O. 41, R. 32 ...	690
O. 41, R. 33.	
See also Civil P. C., O. 41, Rr. 4 and 22.	
Addition of parties ...	691
Applicability and scope ...	692
Amendment ...	697
Connected suits ...	698
Co-respondent ...	698
Correction of error ...	699
Costs ...	699
Discretion ...	699
Duty of Court ...	700
Exonerated party ...	701
Ex parte decree ...	701
Finding of fact ...	702
Making new cause ...	702
Non-appealing defendants ...	703
Non-appealing parties ...	711
Non-appealing plaintiffs ...	713
Parties ...	715
Powers of Appellate Court—Refund of consideration ...	717
Relief ...	727
Remand ...	728
Second appeal ...	729
Subsequent events ...	731
O. 41, R. 35	
See also Civil P. C., O. 41, R. 31. ...	732
O. 41-A (Mad), R. 1 ...	734
O. 41-A (Mad), R. 2 ...	734
O. 41-A (Mad), R. 6 ...	734
O. 42 ...	734
O. 42, R. 1. *See also* Civil P. C., Ss. 100 to 103, 107 and 108 ...	735
O. 42, R. 2 ...	736
O. 43 ...	737
O. 43, R. 1	
See also Civil P. C., Ss. 104 and 106.	
Arrest and attachment before judgment, (O. 38, Rr. 2, 3 and 6) ...	738
An order of refusal to re-admit or rehear appeal (O. 41, Rr. 19 and 21) ...	739
Finding of fact ...	740
Interpretation ...	740
Jurisdiction ...	742
No appeal ...	744
Non-compliance with Order for discovery, (O. 11, R. 21) ...	745
Order for attachment (O. 16, R. 10) ...	746
Order as to costs ...	746
Order giving or refusing to give leave (O. 22, Rr. 3 and 10) ...	746
Order recording or refusing to record agreement, compromise or satisfaction (O. 23, R. 3) ...	746
Order refusing to set aside abatement or dismissal of a suit (O. 22, R. 9) ...	749
Order for setting aside or refusing to set aside sale (O. 21, Rr. 72, 90 or 92)	751
Pronouncing judgment against party (O. 8, R. 10) ...	753
Parties ...	753
Power of Court ...	754
Revision ...	754
Return of Memo of Appeal, and returning a plaint to be presented to proper Court (O. 7, R. 10) ...	756
Rejecting application to set aside decree passed ex parte (O. 9, R. 13)...	758
Remand (O. 41, R. 23) ...	761
Rejecting application to set aside dismissal of a suit (O. 9, Rr. 4 and 9)	765
Receiver (O. 40, Rr. 1, 3 and 4) ...	768
Review application ...	772
Scope ...	776
Second appeal ...	778
Temporary injunctions and Interloeutory Order (O 39, Rr. 1, 2, 4 or 10)...	780
Where the defendant shows cause or furnishes security (O. 38, R. 6 (2))...	781
O. 43, R. 2. ...	781
O. 43, R. 7. ...	782
O. 44. ...	782
O. 44, R. 1.	
Application for leave ...	782
Applicability ...	783
Cross-appeal or cross-objection ...	783
Costs ...	784
Court-fee ...	785
Leave ...	786
Limitation ...	787
Letters Patent ...	788
Proviso. *See also* Note 12 ...	789
Person ...	792

	Col.
Procedure. *See also* **Note 10.** ...	792
Pauperism. ...	795
Proper presentation ...	795
Power of Court ...	796
Revision ...	799
O. 44, R. 2. ...	799
O. 45. ...	799
See also **Civil P. C., Ss. 109 to 112.**	
O. 45, R. 2. ...	800
O. 45, R. 3. ...	800
O. 45, R. 4.	
Scope ...	802
Consolidation and its basis ...	803
"Same judgment" ...	805
Inherent Powers ...	805
Effect of Consolidation ...	806
O. 45, R. 5. ...	806
O. 45, R. 6. ...	807
O. 45, R. 7.	
Applicability—Scope ...	808
Decree ...	808
Extension of time ...	808
Record of case ...	813
Security and deposit ...	813
O. 45, R. 8. ...	817
O. 45, R. 9. ...	817
O. 45, R. 18.	
Court ...	818
Inherent powers. *See also* **Civil P. C., S. 151** ...	818
Stay till decision of Privy Council appeal ...	819
Stay before grant of certificate ...	820
Stay on taking security ...	821
Appointment of Receiver ...	821
Special leave—Stay of execution ...	821
Withdrawal of deposit ...	821
Compromise after leave ...	822
O. 45, R. 15.	
Scope and nature of ...	822
Jurisdiction to execute ...	823
Form of application ...	823
Execution—Meaning of ...	824
Restitution proceedings ...	825
Limitation ...	826
Order whether appealable ...	826
O. 45, R. 17. ...	826
O. 46, R. 1.	
Applicability and scope ...	826
Court, meaning of ...	828
Court to state its reasons ...	829
Matter relating to court-fee ...	829
Question of Law ...	829
Reasonable doubts ...	829
Reference to High Court ...	831
Small Cause Courts ...	832
O. 46, R. 5. ...	832
O. 46, R. 6. ...	833
O. 46, R. 7. ...	833
O. 47. ...	834
See also **Civil P. C., S. 114.**	
O. 47, R. 1.	
See also **Civil P. C., O. 9, R. 9.**	
Appeal. *See also* **Note 21.** ...	836
Appeal from decree ...	837
Applicability and scope ...	839
Cessation of appeal ...	840
Compromise after decree ...	843
Consent decree ...	843
Court-fee ...	844
Duties of Court ...	846
Effect of ...	846
Error or mistake. *See also* **Note 12.** ...	847
Ex parte order ...	864
Grounds for. *See also* **Notes 10, 17 and 18** ...	865

	Col.
Inherent power. *See also* **Note 12 and Civil P. C., S. 151** ...	874
Interpretation. *See also* **Note 18** ...	876
Limitation ...	877
Minors and pardanashin ladies ...	879
New evidence. *See also* **Note 12** ...	880
Other sufficient reason. *See also* **Notes 12 and 14** ...	886
Power of Court. *See also* **Note 3** ...	889
Procedure ...	890
Revision ...	894
Second appeal ...	895
Small cause case ...	896
O. 47, R. 2. ...	897
O. 47, R. 3. ...	899
O. 47, R. 4.	
See also **Civil P. C., O. 47, R. 7.**	
Appeal ...	900
Applicability and scope ...	901
"Discovery of new matter or evidence" ...	903
Grant of application ...	903
Limitation ...	903
Notice ...	904
Rejection ...	905
Revision ...	905
"Strict proof" ...	906
O. 47, R. 5 ...	908
O. 47, R. 7	
See also **Civil P. C., O. 43, R. 1 and O. 47 R. 4**	
Appeal from original decree after review ...	910
Refusal to readmit application for review dismissed for default — No appeal ...	910
Objections to order granting review may be taken in appeal from the final decree ...	910
Insolvency proceedings ...	912
Order granting review ...	913
Order rejecting review ...	921
Revision ...	921
Scope and applicability ...	922
"Sufficient cause"—Sub-r. (2) ...	922
O. 47, R. 8 ...	923
O. 47, R. 9 ...	925
O. 48, R. 1 ...	926
O. 48, R. 2 ...	926
O. 49, R. 1 ...	926
See **Civil P. C., O. 21, R. 54**	
O. 49, R. 2 ...	926
O. 49, R. 3 ...	927
O. 49, R. 4 (Cal) ...	927
O. 50 ...	927
O. 50, R. 1 ...	927
Sch. 1, App. A ...	927
Sch. 1, App B ...	928
Sch. 1, App. C ...	928
Sch. 1, App. D, Form 4 ...	928
Sch. 1, App. D, Form 5 ...	928
Sch. 1, App. D, Form 5-A ...	928
Sch. 1, App. D, Form 8 ...	928
Sch. 1, App. D, Form 9 ...	928
Sch. 1, App. D, Form 21 ...	928
Sch. 1, App. E, Form 29 ...	929
Sch. 1, App. E, Form 31 ...	929
Sch. 1, App. F, Form 6 ...	929
Sch. 1, App. F, Form 9 ...	929
Sch. 1, App. G, Form 3 ...	929
Sch. 1, App. G, Form 11 ...	929
Sch. 2 ...	939
See also **(1) Arbitration (2) Arbitration Acts, 1899 and 1940**	

	Col.
Applicability — Effect of S. 141, Civil P. C. ...	930
Execution proceedings ...	930
When company is party ...	930
Scope ...	930
Suit under S. 92, Civil P. C. ...	931
Sch. 2, Para 1.	
See also Arbitration Acts, 1899 and 1940	
Agreement for reference. *See also* C. P. C., O. 32, R. 7 ...	932
Appeal from decree ...	934
Applicability and Scope ...	935
Court as arbitrator ...	936
Interested party ...	937
Non-joinder of parties ...	940
Power of Appellate Court to refer ...	944
Presentation of application ...	944
Private reference ...	946
Revision ...	947
Subject of reference ...	948
Validity of reference and award. *See also* N. 1, 5 and para 20 ...	952
Sch. 2, Para. 2 ...	958
SCH. 2, PARA 3	
Court shall, by order, refer ...	958
Effect of order of reference ...	960
Matter in difference ...	962
Shall fix such time as it considers reasonable ...	962
Power of court after reference ...	963
Sch. 2, Para 4 ...	964
SCH. 2, PARA 5	
Appointment of new arbitrator or umpire ...	965
Arbitrator becoming incapable of acting ...	967
Arbitrator refusing to act. *See also* N. 1 ...	968
Order superseding arbitration ...	969
Revision ...	971
Sch. 2, Para 6 ...	971
Sch. 2, Para 7 ...	972
SCH. 2, PARA 8	
Extension of time ...	972
Supersession ...	975
Award after time fixed ...	976
Sch. 2, Para 9 ...	976
SCH. 2, PARA 10	
Award to be signed ...	977
Delivery of the award ...	978
Presence of arbitrators ...	978
Notice of filing ...	979
Depositions and documents ...	980
Sch. 2, Para 11 ...	980
SCH. 2, PARA 12	
Part award on matter not referred — Cl. (a) ...	981
Imperfect award—Cl. (b) ...	982
Clerical mistake—Cl. (c) ...	983
Arbitrator's power to review ...	983
Power of Court to modify award ...	983
Presidency Small Cause Courts ...	986
Sch. 2, Para 13 ...	986
Sch. 2, Para. 14	
Appeal ...	987
Award beyond reference ...	988
Indefinite award incapable of execution ...	989
Limitation ...	990
Objection—Apparent on face ...	991
Remittal in part. *See also* Note 4 ...	1000
Private awards ...	1000
Revision ...	1001
Scope ...	1001
Some matters referred undermined ...	1002

	Col.
Sch. 2, Para. 15.	
Absence of party ...	1003
Agreement ...	1005
Apparent error ...	1006
Appeal ...	1007
Applicability ...	1010
Application of law ...	1010
Award beyond time. *See* Note 16 ...	1011
Interpretation ...	1011
Jurisdiction ...	1012
Limitation ...	1015
Misconduct ...	1016
Notice ...	1023
Objection and waiver ...	1024
"Or otherwise invalid" ...	1027
Personal knowledge ...	1028
Procedure ...	1030
Revision. *See also* Civil P. C., S. 115 ...	1031
Setting aside ...	1034
Validity of reference ...	1037
Sch. 2, Para. 16.	
See also Civil P. C., Ss. 96 and 104.	
Appeal ...	1038
Applicability and scope ...	1047
Court as arbitrator. *See also* Note 1 ...	1047
Decree according to award. *See* Note 1	1048
Duties and powers of Court ...	1048
Effect of award ...	1048
Expiry of period for objection ...	1051
Functions of arbitrator ...	1052
Modified award. *See* Note 1 ...	1053
Objections to award ...	1053
Procedure ...	1053
Revision ...	1053
Second appeal. *See also* Note 12 ...	1056
"Suit" ...	1056
Sch. 2, Para. 17	
Applicability and scope ...	1057
Fees of pleader ...	1058
Limitation and laches ...	1058
Objections to award ...	1059
Death of or refusal by arbitrator ...	1059
Powers and duties of Court. *See also* Note 1 ...	1062
Forum. *See* Note 5 ...	1063
Reference to arbitration. *See also* Notes 1 and 10 ...	1063
Death of party ...	1066
Revision and appeal ...	1066
"Sufficient cause" ...	1067
Validity of reference. *See also* Notes 1 and 7 ...	1069
Decree on award ...	1071
Sch. 2, Para. 18.	
See also Arbitration Act 1940, S. 34	
Scope and object ...	1071
"Earliest opportunity" ...	1072
Award made prior to suit ...	1072
Sufficient cause—Burden of proof ...	1074
Direction of Court to stay suit ...	1075
Dispute as to agreement to refer—Validity of agreement ...	1075
Removal of stay order ...	1077
Appeal ...	1077
Presidency Small Cause Court's power to stay ...	1078
Sch. 2, Para. 19 ...	1079
Sch. 2, Para. 20	
Appeal ...	1079
Applicability and scope ...	1080
Award ...	1085
Jurisdiction ...	1091
Limitation ...	1096
Revision ...	1097
Sch. 2, Para. 21.	
See also Sch. 2, Para. 20	

	Col.
Scope of enquiry ...	1098
Satisfaction of Court ...	1100
Grounds of objection under Paras. 14 and 15 ...	1103
"Proved" ...	1104
Order filing or refusing to file award —Appeal ...	1104
Appeal against decree on award—Sub-Para. (2) ...	1106
Appeal to Privy Council ...	1108
Revision ...	1108
Suit to set aside award or decree on award. *See* Note 1 ...	1101
Decree on award — Nature of. *See* Notes 1 and 2 ...	1108
Sch. 2, Para. 22 ...	1109
Sch. 3 ...	1109
Sch. 3, Para. 1 ...	1109
Sch. 3, Para. 2 ...	1111
Sch. 3, Para. 3 ...	1111
Sch. 3, Para. 7 ...	1111
Sch. 3, Para. 9 ...	1111
Sch. 3, Para. 11. *See also* Civil P. C., S. 68	
Incompetency to transfer ...	1112
Alienation subsequent to adjustment...	1117
Permission of the collector ...	1119
Power of Civil Court to issue process...	1122
Termination of the collector's power	1123
Limitation ...	1124
Civil Procedure Code (Amendment) Act (21 of 1936) ...	1125
Civil Procedure Code (Second Amendment) Act (9 of 1937) ...	1125
SECTION 2. ...	1125
See also Civil P. C. (Act V of 1908), S. 60	
SECTION 3. ...	1125
See also Civil P. C. (1908), S. 60	
Civil Rules ...	1126
See Re ective High Courts.	
Civil Rules of Practice ...	1126
See Civil P. C., S. 157 and respective provinces.	
Civil Services (Classification, Control and Appeal) Rules ...	1126
See Government of India Act, 1915, S. 96-B.	
Civil Suit ...	1126
See (1) Civil P. C., S. 9. (2) Criminal P. C., S. 145. (3) Criminal Trial.	
Claim ...	1126
See Civil P. C., O. 21, Rr. 58 to 63.	
Claim petition ...	1126
See Civil P. C., O. 21, R. 58.	
Class. ...	1126
Gift to. *See* T. P. Act, S. 15.	
Clergy Discipline Act (1892) (55 and 56 Vict., Ch. 92) ...	1126
Conviction under — Offence must be clearly proved.	
SECTION 2. ...	1126
Clerical mistake ...	1126
See (1) Civil P. C., Ss. 151 and 152. (2) Criminal P. C., S. 561-A.	
Client ...	1126
See (1) Civil P. C., O. 3, R. 4. (2) Evidence Act, Ss. 126-129. (3) Legal Practitioner. (4) Legal Practitioners' Act.	
Clog ...	1127

	Col.
Equity of redemption. *See* (1) Deed—Construction — Mortgage of sale. (2) Mortgage—Redemption. (3) T. P. Act, S. 60.	
Club ...	1127
See also (1) Association. (2) Civil P. C., S. 9. (3) Company. (4) Racing.	
Co-accused ...	1130
See (1) Criminal P. C., Ss. 239, 337 to 339. (2) Evidence Act, Ss. 30, 114 and 133.	
Coasting Vessels Act (19 of 1838) ...	1130
SECTION 13.	
Vessel registered in name of father of joint Hindu family—Death of father —Son playing without license—Offence.	
Cochin Acts, Rules and Regulations ...	1130
Agriculturists' Relief Act (18 of 1114, M. E.)	
Cochin Agriculturists' Relief Act (18 of 1114 M. E.), Ss. 9, Expl. and 10 ...	1130
Cochin Buildings (Lease and Rent control) Act (XXIV of 1124, M. E.)...	1131
Cochin Chief Court Regulation (II of	
Cochin C. P. Code (XXIX of 1111, M. E.) ...	1131
1076 M. E.) ...	1131
SECTION 32 ...	1132
SECTION 41 ...	1132
SECTION 122 ...	1132
O. 2, R. 2 ...	1133
O, 12, R. 6 ...	1133
O. 21, R. 2 ...	1133
O. 25, R. 1 ...	1133
O. 37, R. 9 ...	1134
Cochin Civil Procedure Code (Regulation 1 of 1079, M. E.)	
SECTION 104	1134
SECTION 222 ...	1134
SECTION 251 ...	1134
SECTION 312 ...	1135
SECTION 328 *See* Civil P. C. (1908), O. 21, R. 97 ...	1135
SECTION 584 ...	1135
Cochin Companies Regulation (II of 1088) ...	1135
SECTION 3 ...	1135
Cochin Court-fees (Amendment) Act (14 of 1122)	
SECTION 4 ...	1136
Cochin Insolvency Regulation (7 of 1098 M. E.) ...	1136
Cochin Limitation Regulation	
SECTION 4 ...	1136
Cochin Negotiable Instruments Act (9 of 1097 M. E.)	
SECTION 134 ...	1137
Cochin Tenancy Act (15 of 1113)—(As Amended by Act 6 of 1115) ...	1137
Cochin Transfer of Property Act (17 of 1111) ...	1137
SECTION 54 ...	1138
SECTION 62 ...	1138
SECTION 88 ...	1138
Co-defendants ...	1139
See (1) Civil P. C., S. 11 (2) O. 41, R. 22	

Col.

Codicil. *See* (1) Succession Act, Ss. 59 to 62
(2) Will—Construction ... 1139
Codification ... 1139
See Interpretation of Statutes
Coercion ... 1139
See (1) Contract Act, S. 16
(2) Paradanashin lady
(3) Specific Relief Act, S. 28
(4) Will—Construction
Co-executors ... 1139
See (1) Executors
(2) Prob. and Admn. Act
(3) Succession Act S. 311
Cognizable offence ... 1139
See Criminal P. C., S. 4 (1) (f)
Co-habitation ... 1139
See (1) Contract Act, S. 23
(2) Evidence Act, S. 112
(3) Husband and wife
(4) Muhammadan Law — Marriage
(5) Penal Code, Ss. 493 to 498
Co-heir ... 1139
See (1) Contract Act, Ss. 43-45
(2) Co-sharer
(3) Muhammadan Law
Coin
Counterfeiting of ... 1139
See Penal Code, Ss. 231 to 243
Coinage Act (3 of 1906) ... 1139
S. 11—(As amended by Act 36 of 1920) —Exchange rate
Co-lessor ... 1139
See (1) Co-sharer
(2) Deed—Construction—Lease
(3) Lessor and Lessee ... 1140
(4) T. P. Act, S. 108
Collateral ... 1140
Agreement
See (1) Contract Act, Ss. 39, 58 and 62
(2) Evidence Act, Ss. 92, 96
(3) Registration Act, S. 49
Collection
Charges ... 1140
See (1) Contract Act, S. 219
(2) Principal and Agent
Papers ... 1140
See Evidence Act, S. 35
Profits ... 1140
See Co-sharer
Collector ... 1140
See Civil P. C., Ss. 68—72, 92 and Sch. III
Receiver
See Civil P. C., O. 40, R. 5
Collision ... 1140
See (1) Admiralty
(2) Admiralty Courts Act, 1861
(3) Shipping
(4) Tort
Collusion ... 1140
See (1) Benami
(2) Companies Act, S. 231
(3) Penal Code, Ss. 421—424
(4) Presidency Towns Insolvency Act, S. 55
(5) Provincial Insolvency Act, S. 53
(6) T. P. Act, S. 53
Colonization of Government Lands (Punjab) Act (V of 1912) ... 1140
See Punjab Colonization of Government Lands Act (V of 1912)
Colourable ... 1140

Col.

Imitation
See (1) Copyright ... 1140
(2) Copyright Act, S. 2
(3) Penal Code, Ss. 482 to 489
(4) Trade Mark
(5) Trade Marks Act, 1940
Transaction
See (1) Benami
(2) Companies Act, S. 231
(3) Penal Code, Ss. 421—424 ... 1140
(4) Presidency Towns Insolvency Act, S. 55
(5) Provincial Insolvency Act, S. 53
(6) T. P. Act, S. 53
Combines Investigation Act (Canada) 1927 ... 1140
Commensality ... 1141
See Hindu Law—Joint family—Partition
Commercial Intercourse with Enemies Ordinance (VI of 1914)
SECTION 3 ... 1141
Commission ... 1141
Commissioner ... 1141
Commissions ... 1141
Commitment ... 1142
Commitment to Sessions Court ... 1142
Common ... 1142
Communal Consideration ... 1142
Communal rights ... 1142
Communication ... 1142
Community ... 1142
Commutation ... 1142
Co-mortgagees ... 1142
Co-mortgagor ... 1142
Companies Act (6 of 1882) ... 1145
Companies Act (7 of 1913)
SECTION 1 ... 1145
SECTION 2 ... 1145
SECTION 2-A ... 1147
SECTION 3 ... 1148
Applicability and scope ... 1148
"High Court" ... 1149
Section 3 (1), Proviso ... 1150
Section 3 (2) ... 1151
Section 3 (3) ... 1151
Court's power to interfere with internal management ... 1151
SECTION 4
Applicability and scope ... 1151
Association ... 1152
Carrying on business ... 1153
Contravention of, sub-s. (5) ... 1154
Gain ... 1155
Illegal company, association or partnership ... 1156
Joint family trade, or business (sub-s. 3) ... 1157
Partnership ... 1158
Person ... 1158
SECTION 5 ... 1159
SECTION 6 ... 1161
SECTION 10 ... 1163
SECTION 11 ... 1163
SECTION 12 ... 1163
SECTION 17 ... 1164
SECTION 18 ... 1168
SECTION 20 ... 1168
SECTION 21 ... 1173
SECTION 22 ... 1176
SECTION 23 ... 1177
SECTION 24 ... 1178
SECTION 26 ... 1178
SECTION 28 ... 1179

	Col.
SECTION 29 ...	1181
SECTION 30 ...	1181
SECTION 31 ...	1185
SECTION 32 ...	1188
SECTION 33. ...	1190
SECTION 34. ...	1190
SECTION 36. ...	1193
SECTION 38. ...	1193
Application for rectification ...	1193
Application—Parties to ...	1198
Appeal ...	1199
Court, power of ...	1199
Questions relating to title ...	1202
SECTION 40. ...	1202
SECTION 48. ...	1203
SECTION 50. ...	1203
SECTION 54. ...	1203
SECTION 54-A. ...	1204
SECTION 55. ...	1204
SECTION 59. ...	1210
SECTION 67. ...	1210
SECTION 70. ...	1211
SECTION 71. ...	1211
SECTION 72. ...	1212
SECTION 73. ...	1212
SECTION 76. ...	1213
SECTION 77. ...	1214
SECTION 78. ...	1214
SECTION 79. ...	1215
SECTION 81. ...	1218
SECTION 82. ...	1219
SECTION 83.	
Directors ...	1220
Liability ...	1225
Meeting ...	1225
Suits, maintainability of ...	1226
SECTION 85. ...	1227
SECTION 86. ...	1227
SECTION 86-D. ...	1230
SECTION 87. ...	1230
SECTION 87-A. ...	1231
SECTION 87-B. ...	1233
SECTION 87-C. ...	1234
SECTION 88. ...	1234
SECTION 89. ...	1236
SECTION 91-A. ...	1239
SECTION 91-B. ...	1240
SECTION 92. ...	1242
SECTION 93. ...	1243
SECTION 96. ...	1245
SECTION 100. ...	1245
SECTION 101. ...	1245
SECTION 102. ...	1247
SECTION 103. ...	1248
SECTION 104. ...	1249
SECTION 105. ...	1251
SECTION 105-C. ...	1251
SECTION 109.	
Applicability and scope ...	1255
Floating charge ...	1256
Mortgage or charge on immovable property ...	1259
Mortgage or charge on book debts ...	1259
"Not being a pledge", sub-s. (e) ...	1260
Registration ...	1260
SECTION 114. ...	1260
SECTION 120. ...	1261
SECTION 126. ...	1262
SECTION 129. ...	1262
SECTION 130. ...	1262
SECTION 131. ...	1262
SECTION 132. ...	1264
SECTION 133. ...	1264
SECTION 134. ...	1265
SECTION 136. ...	1266
SECTION 137. ...	1266

	Col.
SECTION 140. ...	1266
SECTION 141-A. ...	1266
SECTION 142. ...	1267
SECTION 145. ...	1267
SECTION 146. ...	1268
SECTION 147. ...	1268
SECTION 148. ...	1268
SECTION 151. ...	1268
SECTION 152. ...	1269
SECTION 153.	
Appeal ...	1274
Applicability and scope ...	1274
Assent of creditors ...	1275
"Class" ...	1276
Creditors ...	1277
Court, powers and duties. *See* Note 11	1278
Court meetings ...	1281
Effect of sanction ...	1281
Foreign company ...	1284
Interpretation ...	1284
Procedure ...	1286
Proxy ...	1287
Sanction ...	1288
Scheme ...	1293
Valuation of scheme ...	1294
SECTION 153-A. ...	1296
SECTION 153-B. ...	1297
SECTION 154. ...	1298
SECTION 156.	
Applicability and scope ...	1298
"Assets of the company" ...	1302
Interest ...	1302
Members—Liability of ...	1302
Past members—Liability of ...	1304
Set-off ...	1304
SECTION 158. ...	1304
SECTION 159. ...	1306
SECTION 160. ...	1307
SECTION 162.	
General provisions ...	1308
"Inability to pay debts" ...	1310
Clause (v)	
"Just and equitable" ...	1312
Clause (vi)	
"Suspends its business" ...	1318
Clause (iii)	
"Special resolution" ...	1319
Clause (i)	
Winding up of insurance company ...	1319
SECTION 163. ...	1320
SECTION 164. ...	1322
SECTION 166. ...	1323
SECTION 168. ...	1325
SECTION 169. ...	1326
SECTION 171.	
Applicability and scope ...	1326
Distinction between S. 232 ...	1329
Leave for suits, necessity ...	1332
Leave for appeal and revision ...	1334
Leave, subsequent to institution of suit ...	1335
Powers of Court ...	1336
Proceedings under S. 145, Cr. P. C. ...	1338
Waiver ...	1338
SECTION 173. ...	1338
SECTION 174. ...	1339
SECTION 175. ...	1340
SECTION 176. ...	1341
SECTION 177. ...	1342
SECTION 177-A. ...	1343
SECTION 179.	
Clause (a) ...	1343
Clause (b). *See also* Companies Act, S. 212 (1) (b) ...	1344
Clause (c) ...	1345
Clause (f) ...	1346

	Col.
Clause (g) ...	1347
Clause (i) ...	1347
SECTION 181. ...	1347
SECTION 183. ...	1348
SECTION 184.	
Applicability and scope ...	1349
Assets ...	1349
Civil P. C., S. 86, application of ...	1350
List of contributories ...	1350
Notice ...	1352
"Power to rectify register of members" ...	1352
SECTION 185. ...	1353
SECTION 186.	
Applicability and scope ...	1355
Liability of contributory ...	1356
Limitation ...	1357
Powers of Court ...	1358
Set-off ...	1359
Transferee of order of payment ...	1360
SECTION 187.	
See also Companies Act, S. 186. ...	1360
SECTION 188. ...	1361
SECTION 189. ...	1362
SECTION 191. ...	1363
SECTION 192. ...	1363
SECTION 193. ...	1363
SECTION 194. ...	1363
SECTION 195. ...	1364
SECTION 196. ...	1366
SECTION 199. ...	1368
SECTION 200. ...	1370
SECTION 201. ...	1370
SECTION 202.	
Applicability and scope ...	1370
District Court — Order of — Appeal against ...	1372
Limitation for appeal ...	1373
Parties to appeal ...	1375
Orders ...	1376
Right to appeal ...	1378
Rehearing ...	1378
Review ...	1379
Revision ...	1379
Separate suit, if barred ...	1379
SECTION 203. ...	1379
SECTION 205. ...	1380
SECTION 207. ...	1380
SECTION 208. ...	1381
SECTION 208-A. ...	1382
SECTION 208-C. ...	1382
SECTION 208-E. ...	1382
SECTION 209. ...	1382
SECTION 209-A. ...	1383
SECTION 211. ...	1383
SECTION 212. ...	1384
SECTION 213. ...	1384
SECTION 215. ...	1385
SECTION 216. ...	1388
SECTION 218. ...	1389
SECTION 219. ...	1390
SECTION 221. ...	1390
SECTION 225. ...	1391
SECTION 227. ...	1391
SECTION 228. ...	1394
SECTION 229.	
Applicability and scope ...	1396
Debts—Proof of ...	1396
Floating charge ...	1398
Interest ...	1398
Power of winding up, judge to decide question of title ...	1398
Priority—Crown debts ...	1398
Priority—Trust money ...	1399
Secured creditor ...	1402
Set-off ...	1403

	Col.
SECTION 230.	
Sub-section 1 (a) ...	1405
Sub-section 1 (e) ...	1405
Sub-section (2) ...	1407
Sub-section (5) ...	1408
SECTION 230-A. ...	1408
SECTION 231. ...	1409
SECTION 232. ...	1410
SECTION 233. ...	1410
SECTION 234. ...	1411
SECTION 235.	
Applicability and scope ...	1412
Director, manager, etc., liability of ...	1414
Jurisdiction ...	1417
Joint trial ...	1417
Legal representatives, liability of ...	1418
Limitation ...	1419
Misfeasance ...	1421
Petitions, amendment of ...	1422
Promoters, auditors and share-brokers ...	1423
Right to appeal ...	1423
Right to costs ...	1424
Res judicata ...	1424
SECTION 236 ...	1424
SECTION 237. ...	1424
SECTION 238-A. ...	1426
SECTION 239. ...	1426
SECTION 240. ...	1426
SECTION 241. ...	1426
SECTION 243. ...	1426
SECTION 244-A. ...	1426
SECTION 246. ...	1427
SECTION 247. ...	1428
SECTION 248. ...	1429
SECTION 263. ...	1429
SECTION 265. ...	1429
SECTION 269. ...	1429
SECTION 270. ...	1429
SECTION 271. ...	1429
SECTION 277. ...	1430
SECTION 277-K. ...	1431
SECTION 277-L. ...	1432
SECTION 277-N ...	1432
SECTION 278. ...	1433
SECTION 280. ...	1433
SECTION 281. ...	1433
SECTION 282. ...	1436
SECTION 282-A. ...	1439
SECTION 282-B. ...	1439
SECTION 284. ...	1439
SECTION 287. ...	1440
Sch. I, Table A, Art. 28 ...	1440
Sch. I, Table A, Regn. 9, ...	1440
Sch. I, Table A, Regn. 12 ...	1440
Sch. I, Table A, Regn. 13 ...	1441
Sch. I, Table A, Regn. 14 ...	1441
Sch. I, Table A, Regn. 21 ...	1441
Sch. I, Table A, Regn. 24 ...	1441
Sch. I, Table A, Regn. 26 ...	1444
Sch. I, Table A, Regn. 27 ...	1444
Sch. I, Table A, Regn. 28 ...	1444
Sch. I, Table A, Regn. 42 ...	1444
Sch. I, Table A, Regn. 71 ...	1444
Sch. I, Table A, Regn. 73 ...	1445
Sch. I, Table A, Regn. 76 ...	1445
Sch. I Table A, Regn. 83 ...	1445
Sch. I, Table A, Regn. 87 ...	1445
Sch. I, Table A, Regn. 88 ...	1447
Sch. I, Table A, Regn. 89 ...	1447
Sch. I, Table A, Regn. 94 ...	1447
Sch. I, Table A, Regn. 95 ...	1447
Sch. I, Table A, Regn. 98 ...	1448
Company.	
See Companies Act (VII of 1913).	

	Col.
Accounts and audit. *See* Companies Act, Ss. 130 to 141-A ...	1449
Articles of Association. *See also* Companies Act, Ss. 17 to 23 ...	1449
Balance Sheet. *See* Companies Act, Ss. 133-134 ...	1450
Banking Companies. *See* Companies Act, Ss. 277-K to 277-N ...	1450
Capital ...	1450
Composition. *See* Companies Act, S. 153 ...	1450
Compromise with creditor. *See* Companies Act, S. 153 ...	1450
Contract ...	1450
Contributories. *See also* Companies Act, Ss. 156 to 160, 174, 184, 186, 192 and 218 ...	1451
Cost of proceedings. *See also* Companies Act, Ss. 2 and 179 ...	1452
Debentures ...	1452
Directors. *See also* Companies Act, Ss. 83-A and 83-B ...	1452
Liability ...	1457
Management and Administration. *See also* Companies Act, Ss. 72-154 ...	1458
Managing Agents. *See* Companies Act, Ss. 87-A to 87-C ...	1459
Meetings. *See also* Companies Act, Ss. 76 to 83 ...	1459
Memorandum of Association. *See also* Companies Act, Ss. 5 to 12 ...	1462
Prospectus. *See also* Companies Act, Ss. 92 to 100 ...	1462
Promoters. ...	1462
Resolution and proceedings. ...	1462
Receiver ...	1464
Scheme. *See* Companies Act, Ss. 153 to 153-B, 215 and 234 ...	1465
Secretary ...	1465
Shares ...	1466
Share-holder ...	1474
Status ...	1476
Winding up ...	1478
Compartment. *See* Railways Act. ...	1484
Compensation ...	1484
Competency ...	1484
Contract. *See* Contract Act, Ss. 11 to 14 ...	1484
Competent Court ...	1484
Competent persons to depose as witnesses ...	1484
Complaint ...	1484
Completion of Transfer. *See* T. P. Act, S. 54 ...	1484
Composition ...	1484
Compounding offence ...	1484
Compound interest ...	1484
Compromise ...	1485
Compromise by legal practitioner ...	1485
Compromise by guardian. *See* Civil P. C., O. 32, Rr. 3 to 5 and 7 ...	1486
Construction of ...	1486
Consideration ...	1489
Consent decree ...	1489
Effect of ...	1490
Fraud and Collusion ...	1492
Family settlement ...	1493
Registration of ...	1494
Setting aside ...	1494
Compromise decree ...	1495
Binding force ...	1495
Construction of. *See also* Civil P. C., S. 47, O. 20, R. 6 and O. 23, R. 3 ...	1496
Embodiment of terms ...	1496
Consent by guardian. *See also* Civil P. C., O. 32, R. 7 ...	1497
Effect of ...	1497
Execution ...	1497
Joint Hindu family ...	1498
Registration. *See also* Registration Act, S. 1 (2) (vi) ...	1498
Setting aside of. *See also* Civil P. C., S. 96 ...	1498
Time, whether essence ...	1500
Penal provisions in. *See also* Civil P. C., S. 47 ...	1501
Variation ...	1502
Appeal. *See* Civil P. C., S. 96 ...	1502
Compromise petition ...	1502
Compulsion ...	1502
Compulsory deposit ...	1502
Computation of time ...	1503
Concealment of birth ...	1503
Concealment of evidence ...	1503
Conciliation ...	1503
Concubine ...	1503
Concurrent Findings ...	1503
Condition ...	1503
Conditional gift ...	1503
Conduct ...	1503
Confession ...	1503
Confidence ...	1503
Confidential communications ...	1503
Confidential relation ...	1503
Confirmation ...	1503
Confiscation ...	1503
Confiscation, etc., for rebellion Act (X of 1858) ...	1503
SECTION 10 ...	1503
Conflict ...	1504
Conjugal rights ...	1504
Connivance ...	1504
Conquest jagir ...	1504
Consent ...	1504
Consent decree ...	1504
Consequential relief ...	1504
Consideration ...	1504
Consignment ...	1504
Consignor and consignee ...	1504
Consolidation ...	1504
Of suits ...	1505
Conspiracy ...	1505
Constitution Act, 1935 ...	1505
Coustitutional law ...	1505
Court ...	1505
Crown prerogative ...	1505
Dominion ...	1506
Jurisprudence. *See*—Jurisprudence ...	1513
Legislature ...	1513
Constitution of India (1950) ...	1521
ARTICLE 13 ...	1521
ARTICLE 15 ...	1523
ARTICLE 19 ...	1525
ARTICLE 21 ...	1527
ARTICLE 22 ...	1529
ARTICLE 29	1530
ARTICLE 32 ...	1531
ARTICLE 46 ...	1531
ARTICLE 132 ...	1531
ARTICLE 133 ...	1531
ARTICLE 134 ...	1532
ARTICLE 135 ...	1534
ARTICLE 213 ...	1534
ARTICLE 217 ...	1534
ARTICLE 225 ...	1534
ARTICLE 226 ...	1535
ARTICLE 227 ...	1540
ARTICLE 228 ...	1540
ARTICLE 254 ...	1541
ARTICLE 372 ...	1541
ARTICLE 373 ...	1542
ARTICLE 375 ...	1542

	Col.
ARTICLE 376 ...	1543
ARTICLE 385 ...	1543
ARTICLE 392 ...	1543
Sch. 7, List 1, Item 17—Sch. 7, List I, Items 17, 18 and 19, and List II, Item 1 — Scope — Bombay District Police Act, S. 46 (3)—If void ...	1543
Constitution of Irish free state ...	1544
Construction ..	1544
Construction of statutes ...	1544
Constructive estoppel ...	1544
Constructive notice ...	1544
Constructive possession ...	1544
Constructive res judicata ...	1544
Constructive trust ...	1544
Consummation of marriage ...	1544
Contemporaneous agreement ...	1544
Contempt ...	1544
Apology ...	1544
See Contempt of Courts Act (1926) S. 3	
Communication to judge ...	1545
Disobedience of orders of Courts ...	1547
Gross contempt ...	1550
Interference with administration of law ...	1552
Jurisdiction ...	1556
Matter sub judice ...	1564
Motive ...	1567
Nature of proceedings ...	1568
Newspaper comment ...	1575
Procedure ...	1585
Punishment ...	1589
See also N. 1 and Contempt of Courts Act (1926), S. 3	
Right of contemner ...	1589
Scandalizing court ...	1590
Test ...	1593
What is ...	1600
What is not ...	1607
Contempt of Courts ...	1609
Contempt of Courts Act 12 of 1926 ...	1609
SECTION 1 ...	1610
SECTION 2	
Sub-section (1)—General ...	1613
Practice and procedure ...	1615
"Courts subordinate to them" ...	1617
Appeals ...	1619
Sub-section (2) ...	1620
Sub-section (3) ...	1620
SECTION 3	
Scope ...	1622
Apology ...	1623
Contempt of lawful authority ...	1625
Contentious suit ...	1625
Contents of pleadings ...	1625
Contents of written statement ...	1625
Contingent request ...	1625
Contingent contract ...	1625
Continuance of legal proceedings ordinance (XII of 1948) ...	1626
Continuing breaches and wrongs ...	1626
Continuing guarantee ...	1626
Continuing offence ...	1626
Continuing wrong ...	1626
Continuous easement ...	1626
Contract ...	1626
Alteration. *See* Contract Act, S. 62 ...	1628
Alternative contract. *See* Specific Relief Act, S. 20 ...	1628
Alternative promise. *See* Contract Act S. 2 (d) ...	1628
Arbitration. *See also* Arbitration — Clause in contract ...	1628
Assignment. *See* Contract Act, S. 37 ...	1629
Bailment. *See also* Contract Act, Ss. 148, 180 ...	1629
Breach of ...	1629
Building contract. *See* Contract Act, S. 17 ...	1636
C. I. F. and F. O. B. Contract. *See also* Sale of Goods Act, Ss. 32,39 ...	1636
Carriers. *See also* carriers ...	1643
Compensation. *See* Contract Act, Ss. 73-75 ...	1643
Competency. See Contract Act, Ss. 11-14 ...	1643
Consideration. *See also* Contract Act, Ss. 2 (d), 23,25 ...	1643
Construction. *See also* Deed—Construction ...	1645
Contingent. *See also* Contract Act, Ss. 31-35 ...	1677
Continuing breaches. *See also* Limitation Act, S. 23 ...	1678
Contract of service. *See* Master and Servant ...	1678
Contract with Government ...	1678
Contribution. *See* Contract Act, Ss. 43, 69, 70 and 146 ...	1678
Forward. *See* Sale of Goods Act, Ss. 32-39 ...	1678
Fraud. *See* Contract Act, S. 17 ...	1678
Fraud and Misrepresentation. *See* Specific Relief Act, Ss. 26, 28, 31 and 35 ...	1678
Frustration. *See also* N. 4 and Contract Act, S. 56 ...	1678
Hire-purchase ...	1684
See also (1) Contract Act, S. 78 (2) Sale of Goods Act S. 4	
Indemnity and guarantee ...	1685
See (1) Contract Act, Ss. 124-146 (2) Limitation Act, Art. 83	
Insurance. *See* Insurance ...	1686
Joint promisors. *See* Contract Act, Ss. 38 and 42-45 ...	1686
Lease. ...	1686
See (1) Deed—Construction (2) Lessor and lessee. (3) T. P. Act, Ss. 105-117	
Legality. *See also* Contract Act, Ss. 23-30 ...	1686
Liability under. *See also* Specific Relief Act, S. 27 ...	1686
Lien. *See* Contract Act, Ss. 95, 168, 170, 171, 221	1687
Marriage. *See also* Contract Act, S.26...	1687
Married woman. *See* Contract Act, Act, Ss. 68 and 187 ...	1688
Minor. *See also* Contract Act, Ss. 11, 68 and 70 ...	1688
Misdescription. *See* Contract Act, S. 19 ...	1688
Mistake. *See also* Contract Act, Ss. 20, 21 ...	1688
Necessaries. *See* Contract Act, Ss. 11 68, 187 ...	1688
Negotiable instruments. ...	1688
Novation. *See also* Contract Act, Ss. 62 and 63 ...	1689
Offer and acceptance. *See also* Contract Act, Ss. 3-9 ...	1689
Pakka Adut and Kachcha adut. *See also* Contract Act, Ss. 211, 219 ...	1690
Pardanashin woman. *See* Contract Act, S. 16 ...	1691
Partnership ...	1691
See also (1) Contract Act, Ss. 239-266 (2) Partnership Act	

	Col.
Penalty. *See* **N. 7 and Contract Act S. 74** ...	1691
Performance. ...	1691
See also **(1) Contract Act, Ss. 37-57** **(2) Specific Relief Act**	
Pledge. *See* **Contract Act, Ss. 148-180**...	1691
Principal and agent, *See also* **Insurance** ...	1691
Principal debtor and surety, *See* **Contract Act, Ss. 124-146** ...	1693
Pre-emption ...	1693
Public policy. *See also* **Contract Act, S. 23**	1693
Reciprocal. *See* **Contract Act, Ss. 51-57** ...	1694
Rectification. *See* **Specific Relief Act, Ss. 31-32** ...	1694
Rescission. *See* **Specific Relief Act, Ss. 35-38** ...	1694
Restraint. *See* **Contract Act, Ss. 26-28** ...	1694
Revocation. *See also* **Contract Act, S. 6** ...	1694
Right to enforce. *See also* **Specific Relief Act, Ss. 23-25** ...	1697
Service contract ...	1697
See also **(1) Contract Act, S. 39** **(2) Master and Servant**	
Specific performance. *See also* **Specific Relief Act, Ss. 12-29** ...	1698
Stranger. *See* **Note 57** ...	1699
Stock exchange ...	1699
Surety. *See* **Contract Act, Ss. 124-146**...	1700
Tender. *See* **Contract Act, S. 1** ...	1700
Third party ...	1700
See also **(1) Contract Act, Ss. 2 (d), 19-A and 37** **(2) Specific Relief Act, S. 23**	
Time and place of performance. *See also* **Contract Act, Ss. 46-50** ...	1708
Time essence ...	1710
See **(1) Contract Act, Ss. 46 and 55** **(2) Deed—Construction** **(3) Sale of Goods Act, S. 11**	
Undue influence and misrepresentation. *See* **Contract Act, Ss. 16, 18, 19A and 74** ...	1710
Unlawful. *See* **Contract Act, S. 23** ...	1710
Variation. *See also* **Specific Relief Act, S. 26** ...	1710
Validity. *See also* **Contract Act, S. 2 (j)** ...	1711
Vendor and purchaser ...	1712
See also **(1) Contract Act, Ss. 76-146** **(2) Sale of Goods Act** **(3) Vendor and purchaser**	
Wager. *See also* **Contract Act, S. 30** ...	1713
Warranty. *See also* **Contract Act, Ss. 109-123** ...	1714
Alteration. *See* **Contract Act, S. 62**	
Alternative contract. *See* **Specific Relief Act, S. 20**	
Alternative promise. *See* **Contract Act, S. 2 (d)**	
CONTRACT ACT (IX of 1872)	
SECTION 1 ...	1714
SECTION 2	
Proposal .	1718
Invitation for offer ...	1718
Expression of intention ...	1718
Counter offers — *See also* **N. 11 and Section 7** ...	1719
Tenders—*See* **Section 5** ...	1719
Bidding at auction sale — *See also* **Section 5** ...	1719
General Offers—*See also* **Section 5** ...	1720
Acceptance ...	1720
Acceptance must be unconditional— *See also* **N. 12 and Section 7** ...	1721
Acceptance varying or adding to terms of offer—*See also* **N. 6 and 11 and Section 7** ...	1721
Silence ...	1722
Acceptance of shares — *See also* **Section 3** ...	1722
Contract by correspondence ...	1722
Promise ...	1723
Promise to pay subscription ...	1723
Promisee ...	1724
There must be two parties to contract	1724
Contract of insurance—*See also* **S. 3** ...	1725
Consideration—S. 2 (d) ...	1725
At the desire of the promisor ...	1726
Valuable consideration—Illustrations	1727
Absence of consideration — **Illustrations** ...	1729
Consideration need not be for the benefit of the promisor ...	1729
Stranger to contract cannot sue upon it ...	1731
Stranger when can sue—*See also* **N. 38**	1736
Right of stranger to challenge consideration ...	1740
Forbearance ...	1740
Agreement to give time ..	1745
Consideration in composition ...	1746
Compromise—*See also* **N. 37** ...	1746
Family arrangement—*See also* **N. 36**...	1749
Marriage as consideration — *See also* **N. 30** ...	1749
Past consideration ...	1749
Past services—*See* **Section 25** ...	1750
Motive and consideration ...	1750
Moral obligation ...	1751
Future promises, whether consideration ...	1751
Co-promisors — **Consideration to one if consideration to all** ...	1751
Executed and executory consideration *See* **Section 25** ...	1752
Inadequacy of consideration — *See* **Section 25** ...	1752
Agreement cl. (e) ...	1753
Reciprocal promises cl. (f) ...	1755
Void agreement cl. (g) ...	1756
Contract—cl. (h). ...	1756
Voidable contract—cl. (i) ...	1761
Void contract—cl. (j) ...	1761
SECTION 3. ...	1762
SECTION 4. ...	
Communication of acceptance ...	1763
Communication of proposal ...	1765
Communication of revocation ...	1766
"Put in course of transmission". *See also* **N. 1** ...	1766
Suits—Forum ...	1766
SECTION 5. ...	1769
SECTION 6. ...	1769
SECTION 7. ...	
Acceptance must be absolute and unqualified ...	1770
Conditional acceptance *See also* **N. 1**	1772
Execution of document if necessary	1773
Acceptance subject to approval *See also* **N. 1 and 2.** ...	1774
Effect of subsequent negotiations ...	1774
Acceptance with variation ...	1775
Counter proposal ...	1775
Manner of acceptance ...	1775
Acceptance by conduct ...	1776
Acceptance by printed forms ...	1776
SECTION 8. ...	1777

	Col.
SECTION 9. ...	
See also **Contract Act, S. 25.**	1777
SECTION 10.	
All agreements are contracts ...	1779
Intention to have further document. *See also* **S. 7** ...	1780
Parties competent to contract. *See also* **S. 11** ...	1780
Consideration necessary. *See also* **S. 2**	1782
Lawful object. *See also* **S. 23** ...	1782
Oral contracts ...	1782
Written contracts ...	1783
Place of contract ...	1783
Saving of formalities required by law in force—Contracts required to be in writing. ...	1784
Construction of contracts ...	1785
Contracts on printed forms ...	1786
SECTION 11.	
Benefits *See* **Notes 3, 5 and 9** ...	1787
Burden of proof ...	1787
Guardian. *See also* **N. 5** ...	1787
Misrepresentation. *See also* **N. 5.** ...	1791
Minor ...	1794
Necessaries. *See* **Note 5.** ...	1806
Other disqualifications ...	1806
Ratification. *See* **Note 5.** ...	1807
Refund. *See also* **N. 11** ...	1807
Scope ...	1807
Specific performance ...	1809
Subsequent majority. *See also* **Note 5** ...	1809
SECTION 12.	
Appreciation of evidence — Duty of Court ...	1809
Burden of proof ...	1810
Contract by persons of unsound mind	1810
Evidence ...	1811
Habitual drunkards ...	1811
Idiots	11
Person of sound mind—Test of soundness of mind ...	1811
SECTION 13. ...	1812
SECTION 14. ...	1812
SECTION 15. ...	1815
SECTION 16	
English doctrine of undue influence and its applicability ...	1818
Undue influence ...	1818
Question of fact or law ...	1824
Who can raise the plea. *See also* **Note 35.** ...	1825
Pleadings ...	1825
Forms of undue influence ...	1826
Person in authority ...	1826
Person in fiduciary relation ...	1826
Legal practitioner and client ...	1828
Parent and child ...	1830
Husband and wife ...	1830
Other relations ...	1830
Infirmity of body or mind ...	1831
Mental distress or incapacity ...	1831
Fear of punishment ...	1831
Transaction with ignorant person ...	1833
Proof ...	1834
Pardanashin ladies—Duty of court ...	1836
Pardanashin ladies — Application of principles to others ...	1838
Pardanashin ladies — Who can claim protection. *See also* **Note 27 and 28** ...	1838
Pardanashin ladies—Burden of proof. *See also* **Note 22 to 24** ...	1838
Pardanashin ladies — Necessity of independent advice ...	1839
Pardanashin ladies — To prove that deed was explained ...	1840
Pardanashin ladies — Intelligent and proper execution of deed ...	1842
Pardanashin ladies — Valid transaction ...	1844
Pardanashin ladies— Invalid transactions ...	1845
Pardanashin ladies — When will not be protected. *See also* **Note 20** ...	1845
Pardanashin ladies—Who are or are not. *See also* **Note 20** ...	1845
Burden of proving that such contract was not induced by undue influence.	1846
Presumption of undue influence. *See also* **Note 17, 21, 29 and 31** ...	1851
Position to dominate the will of the other ...	1853
Unconscionable transaction. *See also* **Note 31** ...	1857
Relief on grounds of excessive interest.	1858
Transaction with expectant heirs ...	1868
Undue influence and strangers, *See also* **Note 4** ...	1870
Limitalion, delay and acquiescence, *See also* **under S. 19-A** ...	1870
SECTION 17	
Fraud ...	1870
Fraud and misrepresentation ...	1872
Constructive fraud ...	1873
Party ...	1873
raud and agent ...	1873
Clause (1) — There must be representation of fact ...	1874
Representation must be made with the knowledge that it is false: *See also* **Contract Act, S. 19** ...	1874
Representation made with intention that it should be acted upon ...	1875
Representation must have been acted upon ...	1876
Clause (2)—Active concealment ...	1876
Clause (3) — Promise made without intention of performing it ...	1878
Non-disclosure in insurance cases ...	1878
Non-disclosure by company ...	1878
Explanation —Silence ...	1879
Plea of fraud ...	1880
Proof of fraud ...	1880
Inadequacy of consideration ...	1881
SECTION 19 *See also* **S. 17.**	
Scope ...	1885
Recission on the ground of fraud ...	1885
Marriages ...	1886
Party cannot avoid the consequence of his own fraud ...	1886
Misrepresentation ...	1886
Intimidation ...	1888
Representatives-in-interest and right to avoid ...	1889
Contract is valid until avoided ...	1889
Laches ...	1889
See **Note 17,**	
Restitution ...	1890
Evidence and proof ...	1891
Where truth can be ascertained ...	1891
Consent must have been induced by fraud etc. ...	1892
SECTION 20	
Scope and applicability ...	1894
Mistake of fact ...	1895
Mutual mistake of fact essential to agreement—Illustrative cases ...	1896
Mistake as to identity of person ...	1899
Mistake as to subject-matter ...	1900
Mistake as to quality of subject-matter ...	1900

	Col.
Mistake as to title ...	1901
Mistake as to term ...	1902
Unilateral mistake ...	1902
Rectification of mistake ...	1903
Money paid under mistake—Recovery back ...	1903
Pleadings and proof ...	1903
SECTION 21 ...	1904
SECTION 22 ...	1905
SECTION 23	
Principle and scope ...	1907
Law ...	1908
Agreement defeating provisions of any law ...	1908
Agreement forbidden by law ...	1907
Agreement forbidden by law — void and illegal agreements (Distinction) ...	1911
Motive, object and consideration of agreement ...	1911
Excise contracts and salt leases ...	1912
Lease of Tolls ...	1915
Personal law ...	1916
Agra Tenancy Act ...	1919
Bombay District Police Act, (IV of 1890) ...	1919
Bengal Public Demands Recovery Act.	1919
Patni Taluqs Regulations (Beng. Reg. 8 of 1819) ...	1920
C. P. Tenancy Act. ...	1920
C. P. Local Self Govt. Act. ...	1920
Jhansi Encumbered Estates Act. ...	1920
Oudh Rent Act. ...	1921
Punjab Colonisation of Government Land Act, 1912	1921
Punjab Government Tenants Act 1893.	1921
Madras District Municipalities Act 1884 ...	1921
U. P. Agriculturists' Relief Act ...	1921
Civil P. C., Sch. 3, para 7 ...	1921
Civil P. C. (1882), See. 257-A. ...	1922
Companies Law ...	1922
Cantonment Act ...	1923
Control orders ...	1923
Guardian and Minor ...	1924
Govt. Servant's Conduct Rules ...	1925
Forest Act ...	1916
Insolvency Law: *See also* Note 35 ...	1926
Law of Limitation ...	1926
Motor Vehicles Act 1914 ...	1927
Transfer of Property Act ...	1928
Fraudulent and injurious Acts ...	1930
Bargain in fraud of creditors ...	1932
Public Policy ...	1932
Traffic in Public offices ...	1934
Interference with the course of administration of justice and Govt. ...	1935
Bribe to Public officers ...	1938
Agreement creating interest against duty ...	1938
Bargain in restraint of legal proceedings ...	1940
Champerty and maintenance ...	1941
Stifling Prosecution ...	1950
Agreement between Counsel and client ...	1972
Agreement to pay pleader's clerk ...	1972
Bargain in restraint of trade ...	1972
Agreement against bidding ...	1974
Monopolies and combinations ...	1975
Contract to indemnify surety ...	1977
Brokerage ...	1977
Agreement against exercise of rights.	1978
Immoral Bargains ...	1980
ast and future co-habitation ...	1980
rostitution ...	1981

	Col.
Slavery bonds ...	1982
Wagering Contracts. *See also* S. 30 ...	1984
Bargains in regard to marriage. *See also* Note 9 ...	1987
Bargain collaterally connected with unlawful intent or object ...	1992
Effect o illegality ...	1992
Agreements not opposed to law and agreements not defeating provisions of law — Miscellaneous illustrative cases ...	1996
Agreements which are forbidden by law or are opposed to or defeat provisions of law —Miscellaneous illustrative cases ...	1997
Bargains opposed to public policy — Miscellaneous illustrative cases ...	1998
Bargains not opposed to public policy —Miscellaneous illustrative cases ...	1999
Pleadings and proof ...	2002
SECTION 24.	
Scope and applicability ...	2005
Principal of severability ...	2006
Indivisible contracts ...	2006
Divisible contracts ...	2008
Mortgage transactions ...	2009
Pleadings ...	2010
SECTION 25.	
See also S. 2.	
Authorised agent ...	2010
Barred debt. *See also* Note 12 ...	2011
Benami ...	2019
Compromise ...	2010
Consideration ...	2021
Debt ...	2027
Fresh contract. *See also* Note 2 ...	2027
Judgment debt ...	2028
Minor ...	2029
Natural love and affection ...	2031
Parties standing in near relation ...	2032
Persons under obligation to pay ...	2033
Promise to pay ...	2034
Scope and applicability ...	2037
SECTION 26. ...	2038
SECTION 27.	
Scope ...	2040
Agreements in restraint of trade ...	2040
Agreements not in restraint of trade...	2042
Service contracts ...	2043
Agreements for mutual benefit ...	2044
Sale of goodwill—Exception ...	2046
Burden of proof ...	2047
SECTION 28.	
Scope and applicability ...	2047
Agreements ousting jurisdiction of Courts ..	2048
Agreements restraining enforcement of rights ...	2051
Agreements to refer to arbitration ..	2053
Agreements affecting limitation ...	2053
Exception. *See also* Note 4 ...	2057
SECTION 29. ...	2057
SECTION 30.	
Essentials of wager ...	2060
Speculative Contracts ...	2060
Evidence and proof — Speculative transactions ...	2072
Badni Transactions ...	2074
Chit funds ...	2075
Teja Mandi ...	2076
Sale and purchase of shares ...	2079
Contracts of insurance ...	2079
Pakka Adatia transactions ...	2079
Lotteries ...	2083
Wagering contracts are void but not illegal ...	2083

	Col.
Enforceability of collateral agreements ...	2084
Agents employed for entering into wager contracts ...	2086
Suit for recovery of deposit from stake-holder ...	2087
Claim for money won at wager ...	2088
Gambling in litigation ...	2089
Para. 2 ...	2090
SECTION 31. ...	2090
SECTION 32. ...	2091
SECTION 33. ...	2092
SECTION 35. ...	2092
SECTION 37. ...	2094
SECTION 38.	
Scope ...	2096
Tender—Effect of refusal ...	2097
Tender must be in proper form ...	2098
Tender in part ...	2099
Conditional tender ...	2100
Proper time and place ...	2101
"Able and willing" ...	2101
Reasonable opportunity of inspection	2103
Waiver of objection to tender ...	2103
Tender to one of joint promisees ...	2105
SECTION 39. ...	2106
Scope ...	2106
"Disabled himself from performing ...	210
Insolvency of promisor ...	2107
"In its entirety" ...	2107
"Promisee may put an end to the Contract" ...	2107
Repudiation ...	2109
Lease ...	2111
Mortgages ...	2112
Sale of immovable property ...	2113
Contracts for sale of goods ...	2113
Contracts for carriage of goods ...	2114
Building contracts ...	2114
Agency contracts ...	2114
Other illustrative cases ...	2115
Party cannot take advantage of his own wrong ...	2116
Waiver of default ...	2116
SECTION 40. ...	2117
SECTION 41.	
SECTION 42. ...	2118
SECTION 43.	
See also Contribution.	
Scope ...	2120
Joint promise ...	2122
Promisee has option to sue all or some of joint promisors ...	2123
Suit for rent due from joint tenants ...	2126
Claims against partners ...	2127
Payment by one discharges all joint promisors ...	2127
Contribution among joint promisors ...	2128
Liability of co-mortgagors ...	2134
Right of judgment-debtor discharging entire joint decree ...	2131
Payment under joint decree for costs ...	2136
Joint tenant paying entire rent due ...	2138
Right to contribution among partners	2138
SECTION 44. ...	2141
SECTION 45.	
Applicability and scope ...	2143
Co-heirs ...	2143
Co-mortgagees ...	2144
Discharge by one of the joint-promisees ...	2146
Joint Hindu family ...	2147
Partnership ...	2148
Suit by one of the joint-promisees—Maintainability ...	2149

	Col.
SECTION 46. ...	2151
SECTION 47. ...	2154
SECTION 48. ...	2154
SECTION 49.	
See also Debtor and Creditor.	
Applicability ...	2155
Debtor to seek creditor. *See also* N. 1	2156
Place of performance ...	2157
Place of payment of rent ...	2158
Place of repayment of deposit ...	2158
Promissory note payable on demand ...	2158
SECTION 50. ...	2159
SECTION 51. ...	2160
SECTION 52. ...	2164
SECTION 53. ...	2165
SECTION 54. ...	2165
SECTION 55.	
See also Sale of Goods Act, S. 11.	
Principle and scope of the section ...	2169
When time is of essence of contract *See also* Note 6 ...	2170
When time is not of essence of contract. *See also* Note 7 ...	2173
Time not originally of essence of contract—Subsequent notice making it so. *See also* Note 5 and Note 7 ...	2177
Extension of time ...	2178
Mercantile contracts ...	2181
Sale of immoveable property ...	2182
Agreement to lease. *See also* Note 7 ...	2186
Acceptance of performance after the time fixed ...	2186
Effect of non-performance ...	2187
At or before a specified time ...	2189
SECTION 56.	
Agreements to do impossible acts ...	2189
"Becomes impossible", ...	2190
Contracts of demise in land ...	2192
Contract which becomes impossible or unlawful is dissolved ...	2193
Express agreement to the contrary ...	2197
Force majeure, act of God and vis major. *See also* Note 12 ...	2198
Frustration. *See also* Note 4 ...	2201
Restoration of benefit ...	2201
Self-induced impossibility ...	2202
Subsequent change in law ...	2202
Temporary and partial interruptions	2205
War ...	2207
SECTION 57. ...	2208
SECTION 58. ...	2209
SECTION 59.	
Scope of the section ...	2209
Principle of appropriation. *See* N. 1 ...	2211
Distinct debts ...	2211
Principal and interest ...	2212
Intimation when to be made ...	2212
Circumstances implying appropriation	2213
Payment of Government dues ...	2213
SECTION 60.	
Scope and applicability ...	2215
Time for making appropriation ...	2215
Any lawful debt ...	2212
Circumstances indicating appropriation ...	2216
Appropriation by creditors ...	2217
Appropriation towards interest ...	2219
Burden of proof ...	2220
Where no appropriation is made. *See also* Note 1 ...	2220
SECTION 61. ...	2220
SECTION 62.	
Applicability ...	2223
Compromise ...	2225
Discharge ...	2226
Effect of ...	2227

	Col.
Essential of ...	2233
Invalid novation ...	2237
Material alteration ...	2239
Negotiable instrument ...	2244
No novation ...	2247
Oral agreement ...	2250
Scope ...	2251
Tampered document ...	2253
SECTION 63.	
See also Evidence Act, S. 92.	
English law ...	2254
Scope and applicability ...	2255
Promise ...	2255
Dispense with or remit ...	2256
Extention of time ...	2256
May accept instead of it any satisfaction ...	2257
Necessity for consideration ...	2258
Section if refers to agreement ...	2260
Evidence. *See also* Evidence Act, S. 92	2261
Composition with creditors ...	2263
SECTION 64.	
Seope and applicability ...	2264
Contracts by minors and their guardians ...	2266
Option to rescind ...	2269
Restoration of benefit ...	2269
Refund of deposit ...	2271
Limitation ...	2272
SECTION 65.	
Scope and applicability ...	2272
Discovered to be void ...	2276
When contract becomes void ...	2281
Restoration of benefit ...	2283
Incapacity to contract ...	2288
Minor ...	2289
Illegal contracts ...	2295
Money paid under contracts for marriage ...	2298
Compensation ...	2300
Frame of suit and relief under section ...	2305
Limitation ...	2308
SECTION 66	
SECTION 67 ...	2309
SECTION 68	
Scope and applicability ...	2310
Liability of minor's estate ...	2311
Debts incurred by guardian ...	2312
Alienation by guardian ...	2313
Necessaries—Meaning of ...	2314
Expenses of litigation ...	2315
Marriage expenses ...	2315
What are not necessaries ...	2316
Enquiry as to necessaries ...	2216
Interest on value of necessaries ...	2316
Husband's liability for wife's necessaries ...	2316
SECTION 69	
Scope and applicability ...	2317
Interested ...	2319
Co-sharers ...	2329
Attaching creditor ...	2330
Joint liability ...	2330
Landlord and tenant ...	2332
Money paid to save mortgaged property ...	2336
Payment made to raise wrongful attachment ...	2342
Purchases of property ...	2343
Reversioners ...	2346
Other cases ...	2346
"Bound by law" ...	2348
Payment in good faith ...	2353
Voluntary payment ...	2355
Suit for contribution ...	2356
Limitation ...	2362
1. Scope and applicability	
General	
This section and Section 70 of the Contract Act	
SECTION 70	
See also S. 69	
Action for money had and received ...	2363
Action for money paid at defendant's request ...	2364
Compulsory payment ...	2364
Scope and applicability ...	2365
"Lawfully does anything" ...	2369
"For another" ...	2371
"Not intending to do so gratuitously" ...	2372
"Enjoy's the benefit" ...	2374
Illustrative cases ...	2379
Obligation to pay—Implied promise ...	2386
Compensation—Interest ...	2387
Compensation for services rendered ...	2388
SECTION 72	
Scope and applicability ...	2389
Mistake of fact ...	2390
Nature of mistake ...	2393
Mistaken payment ...	2393
Forgetfulness and negligence ...	2393
Overpayments ...	2394
Payment induced by fraud ...	2394
Payment made to agent ...	2394
Payment of rent, tax etc., under mistake ...	2395
Other illustrations ...	2395
Voluntary payment—Payment not recoverable under section ...	2395
Mistake of law ...	2396
Coercion. *See also* Note 11 ...	2398
Payment of tax, cess etc., under coercion ...	2398
Money paid under compulsion of legal process ...	2402
SECTION 73	
Anticipatory breach ...	2405
Applicability ...	2406
Assessment of damages ...	2409
Breach of contract—Remedy ...	2431
Breach of marriage contract ...	2432
Breach of warranty ...	2434
See also Note 3	
Contributory negligence—Liability ...	2435
Contracts of affreightment and carriage—Damages ...	2436
Contractual obligation — Damages on breach ...	2437
Damages must have naturally arisen from breach ...	2438
Extent of damages. *See also* Note 3 ...	2440
Interest as damages. *See also* Note 2 ...	2442
Interest on damages ...	2448
Interpretation ...	2450
Limitation ...	2451
Mitigate loss—Duty ...	2452
Nominal damages ...	2453
Party in breach—Liability ...	2453
Parties must have comtemplated the damages ...	2461
Plaintiff's default ...	2461
Proof of damages ...	2464
Quantum meruit ...	2467
Refund of earnest money ...	2467
Remote or indirect loss. *See also* N. 3...	2469
Sale of immovable property with defective title—Effect ...	2471
Sale of goods—Damages. *See also* N. 3...	2473
Special damages ...	2476

	Col.
SECTION 74	
Scope and applicability ...	2476
Compound interest ...	2479
Compromise decree ...	2486
Contract of service ...	2488
Enhanced rate of interest ...	2488
Exception ...	2497
Extent of damages ...	2497
Forfeiture of deposit ...	2500
Lease ...	2506
High rate of interest. *See also* Note No. 5 ...	2508
Meaning of penalty. *See also* N. 2, 5 and 10 ...	2514
Measure of damages ...	2527
Proof of damages ...	2529
Reduction for punctual payments. *See also* Note 10 sub-head (d) ...	2530
Powers of Court. *See also* N. 10 ...	2530
Hire purchase ...	2533
SECTION 75. ...	2535
SECTION 76. ...	2537
SECTION 77 ...	2537
SECTION 78.	
Scope and application ...	2538
Ascertained goods ...	2538
Passing of property ...	2538
Stranger in possession ...	2542
Other illustrations ...	2542
SECTION 79 ...	2542
SECTION 80 ...	2543
SECTION 81 ...	2543
SECTION 82 ...	2544
SECTION 83 ...	2545
SECTION 84 ...	2548
SECTION 85 ...	2548
SECTION 86 ...	2548
SECTION 87 ...	2550
SECTION 90 ...	2550
SECTION 91 ...	2551
SECTION 92 ...	2553
SECTION 93 ...	2553
SECTION 94 ...	2554
SECTION 95 ...	2554
SECTION 96 ...	2556
SECTION 99 ...	2556
SECTION 101 ...	2559
SECTION 102 ...	2559
SECTION 103 ...	2559
SECTION 104 ...	2560
SECTION 106 ...	2560
SECTION 107.	
Right of resale — When can be exercised ...	2560
Other remedies not barred ...	2560
Property in goods must pass to the buyer ...	2562
Resale—Conditions of ...	2564
Purchase by seller at resale ...	2566
Sale from day to day ...	2566
Effect of resale ...	2567
Plea of resale ...	2567
Buyer's rights ...	2567
Measure of damages ...	2567
SECTION 108.	
Scope and applicability ...	2570
Validity of sale by hirer ...	2570
Document of title ...	2571
Seller's defective title ...	2573
Passing of title from seller to buyer ...	2574
Validity of sale by bailee ...	2574
Validity of sale by custodian ...	2575
Title of pledgee ...	2575
Title of purchaser of mortgaged goods	2575
Title of purchaser from agent ...	2576

	Col.
SECTION 109 ...	2577
SECTION 111 ...	2577
SECTION 112 ...	2577
SECTION 113 ...	2577
SECTION 114 ...	2579
SECTION 116 ...	2579
SECTION 117 ...	2579
SECTION 118 ...	2579
SECTION 119 ...	2582
SECTION 120 ...	2582
SECTION 121 ...	2583
SECTION 123 ...	2583
SECTION 124 ...	2584
Contract of indemnity ...	2584
Contract of indemnity and contract of guarantee ...	2585
Contract of indemnity and damages ...	2587
Implied contract of indemnity ...	2588
Authority to sue on contract of indemnity ...	2591
Limitation ...	2591
SECTION 125	
Scope and applicability ...	2592
Rights of promisee to sue the promisor —When can be enforced ...	2592
Right of promisee to recover costs ...	2596
Right of promisee when claim is compromised ...	2596
Limitation ...	2597
SECTION 126	
Contract of guarantee ...	2597
Illustrations ...	2599
Oral or written ...	2600
Guarantee for honesty ...	2601
Surety becoming principal debtor ...	2601
Liability ...	2601
SECTION 127 ...	2604
SECTION 128 *See also* ContractAct, S. 43	
Liability of surety ...	2607
Joint decree against debtor and surety, liability under ...	2608
Liability arising on happening of contingency ...	2608
Liability to pay interest ...	2610
Death of principal—Effect on surety's liability	
Original agreement void — Effect on surety's liability ...	2610
Scheme of arrangement — Effect on surety's liability ...	2610
Surety for minor ...	2611
Surety bond to court ...	2611
Extent of liability ...	2612
Limitation upon liability provided by contract ...	2613
Remedy against surety ...	2614
Surety if necessary party to suit against debtor ...	2615
Proof of surety's liability ...	2617
Construction of guarantees ...	2617
SECTION 129	
Continuing guarantee ...	2617
Illustrative Cases ...	2619
Burden of proof ...	2620
SECTION 130 ...	2620
SECTION 131 ...	2623
SECTION 132 ...	2623
SECTION 133 *See also* Civil P. C., S. 145	
Scope and applicability ...	2624
Variation operating as discharge ...	2625
Variation not operating as discharge ...	2628
SECTION 13	
Scope of section ...	2631

	Col.
Discharge of surety by creditor's discharge of principal debtor ...	2634
Act or omission of creditor ...	2635
Failure to sue principal debtor within limitation ...	2636
Discharge by operation of law ...	2638
Forbearance. *See also* Notes 1 and 3 ...	2638
SECTION 135	
Scope and applicability ...	2638
Composition ...	2638
Promise to give time ...	2640
Accommodation—Extension of time ...	2640
Surety bond given to court—Extension of time ...	2641
Omission to sue principal debtor. *See also* Notes 3 and 4 ...	2643
Assent of surety ...	2643
Acknowledgment by debtor—Effect on limitation against surety ...	2644
ischarge of surety — Circumstances which do and do not constitute discharge ...	2644
SECTION 136 ...	2645
SECTION 137 ...	2645
SECTION 139 ...	2647
SECTION 140 ...	2650
SECTION 141	
See also Contract Act, S. 140 ...	2654
SECTION 142 ...	2655
SECTION 143 ...	2655
SECTION 145	
Decree against surety ...	2655
Indemnification before actual payment ...	2655
Payment ...	2655
Rights of surety ...	2657
Surety for decretal amount ...	2658
SECTION 146 ...	2658
SECTION 148 ...	2659
SECTION 149	
See also Contract Act, S. 148 ...	2662
SECTION 151	
See also Railways Act (1890), S. 72	
Scope and applicability ...	2662
Bailee and his liability ...	2663
Amount of care ...	2666
Cases of negligence or inadequate care ...	2668
Nature and burden of proof ...	2669
Limitation for a claim under bailment ...	2670
SECTION 152	
See also Contract Act, S. 151 ...	2671
SECTION 154 ...	2671
SECTION 160 ...	2672
SECTION 161	
See also Contract Act, S. 160 ...	2673
SECTION 162 ...	2674
SECTION 163 ...	2674
SECTION 165 ...	2675
SECTION 166 ...	2675
SECTION 168 ...	2675
SECTION 170 ...	2675
SECTION 171	
Applicability—Deposit ...	2676
Factor—Who is ...	2676
Caretaker's lien ...	2677
Banker's lien ...	2677
Attorney's lien ...	2680
Sale by bailee ...	2681
Limitation ...	2681
SECTION 172 ...	2681
SECTION 173 ...	2684
SECTION 174 ...	2685

	Col.
SECTION 176	
Scope and applicability ...	2685
Debtor in default, when is ...	2686
Right of pawnee ...	2686
Notice to pawnor before sale ...	2687
Conditions of sale ...	2689
Rights of pledgor ...	2689
Limitation ...	2690
SECTION 177 ...	2690
SECTION 178	
Acting in the ordinary course of business ...	2690
Burden of proof ...	2690
Government securities ...	2691
Document of title ...	2691
Goods ...	2694
Good faith ...	2696
Mercantile agent ...	2696
Possession ...	2697
Scope ...	2702
SECTION 178-A. ...	2703
SECTION 179. ...	2704
SECTION 180. ...	2705
SECTION 182.	
Scope—General Principles of Agency	2705
Definition of agent and principal ...	2706
Ageney—Creation of ...	2707
Instance of agency ...	2708
Relations of Principal and Agent ...	2711
Agent's authority and liability — In relation with principal and third parties ...	2711
SECTION 183. ...	2712
SEGTION 184. ...	2712
SECTION 185. ...	2713
SECTION 186. ...	2713
SECTION 187. ...	2715
SECTION 188.	
Acting beyond authority ...	2716
Authority to receive money ...	2716
Co-agents ...	2717
Customs and usages of trade ...	2717
Insurance ...	2718
Lawful ...	2718
Power of agent ...	2718
Wagering contract ...	2721
SECTION 189. ...	2721
SECTION 190. ...	2722
SECTION 192. ...	2723
SECTION 194. ...	2723
SECTION 195. ...	2725
SECTION 196.	
Applicability. *See also* Contract Act, S. 197. ...	2725
Evidence and Proof ...	2726
Illegal acts ...	2726
Minors ...	2727
Principal's liability for acts of agent within authority ...	2729
Ratification—Effect ...	2730
Ratification, meaning of ...	2730
SECTION 197.	
See also Contract Act, S. 196 ...	2732
SECTION 198.	
See also Contract Act, S. 197. ...	2734
SECTION 199. ...	2734
SECTION 200. ...	2735
SECTION 201. ...	2736
SECTION 202. ...	2739
SECTION 203. ...	2740
SECTION 205. ...	2741
SECTION 207. ...	2742
SECTION 208. ...	2742
SECTION 209. ...	2743
SECTION 211. ...	2743
SECTION 212. ...	2747

	Col.
SECTION 213.	
Duty and liability to accounts ...	2749
Legal Representatives ...	2750
Relation with the Principal ...	2751
Suits ...	2753
SECTION 214. ...	2754
SECTION 215. ...	2755
SECTION 216. ...	2757
SECTION 217.	
See also Legal Practitioner ...	2758
SECTION 218. ...	2760
SECTION 219. ...	2760
SECTION 220. ...	2763
SECTION 221. ...	2763
SECTION 222. ...	2765
SECTION 223. ...	2768
SECTION 226.	
Agent's contract with third person—Effect ...	2769
Agent's liablility ...	2769
Burden of proof ...	2771
Principal's liability ...	2771
SECTION 227. ...	2773
SECTION 229. ...	2773
SECTION 230.	
Applicability. ...	2776
Personal liability of agents ...	2777
Joint liability of agents ...	2779
Auctioneer and auction purchaser ...	2779
"Disclosure" of Principal ...	2779
Principal living abroad ...	2781
Suit by agent in his own name ...	2782
SECTION 231. ...	2784
SECTION 232. ...	2785
SECTION 233.	
See also Contract Act, S. 230. ...	2785
SECTION 235. ...	2787
SECTION 236. ...	2788
SECTION 237. ...	2788
SECTION 238. ...	2791
SECTION 239.	
See also Partnership Act ...	2793
Partnership—Tests ...	2793
Creation ...	2797
Dissolution ...	2798
Joint Hindu family ...	2798
Partnership with firm ...	2799
Rights of Partner ...	2801
SECTION 240 ...	2801
SECTION 241 ...	2802
SECTION 242 ...	2803
SECTION 243 ...	2804
SECTION 245 ...	2304
SECTION 247	
Minor, partnership with ...	2805
Insolvency of minor	2806
Liability ...	2807
SECTION 248 ...	2809
SECTION 249 ...	2809
SECTION 251.	
Implied authority ...	2811
Powers of Managing Partner ...	2815
Restriction of authority ...	2815
Co-partners, when not bound ...	2816
Evidence and proof ...	2818
Liability of heirs of deceased partner ...	2818
SECTION 253.	
Sub-s. (1)—Partnership property ...	2818
Sub-s. (2)—Shares in partnership property—Shares in profits and losses...	2819
Sub-s. (3)—Management ...	2821
Sub-s. (4)—Negligence ...	2822
Sub-s. (5)—Illegal contracts ...	2822
Sub-s. (6)—New partners, assignment of share ...	2822
Sub-s. (7)—Retirement of one partner	2823
Sub-s. (8)—Continuance of partnership after death ...	2825
Sub-s. (9)—Expulsion ...	2826
Sub-s. (10)—Dissolution by death ...	2826
SECTION 254 ...	2829
SECTION 257 ...	2831
SECTION 258 ...	2831
SECTION 259 ...	2832
SECTION 261 ...	2832
SECTION 262.	
See also Contract Act, S. 253 ...	2833
SECTION 263 ...	2834
SECTION 264.	
Scope and application ...	2837
Public notice of dissolution ...	2837
Absence of notice of dissolution ...	2838
Retired partner—Liabilities contracted after retirement ...	2839
Dormant partner ...	2841
SECTION 265 ...	2841
CONTRIBUTION	
See also Contract Act, S. 43 ...	2842
Cause of action ...	2842
Co-debtors and co-judgment-debtors	2842
Co-sharers and co-tenants ...	2844
Costs ...	2845
Joint heirs ...	2848
Joint tort-feasors ...	2848
Limitation ...	2849
Mortgagors ...	2850
Partners ...	2851
Principles of ...	2851
Other illustrations ...	2853
Contributory Liability	
See (1) Companies Act, S. 158 ...	2856
(2) Tort	
Contributory Negligence.	
See (1) Railways Act, S. 72 ...	2856
(2) Tort—Negligence.	
Contradictory Statements.	
See (1) Criminal P.C., Ss. 161&162...	2856
(2) Evidence Act, Ss. 144 & 145.	
(3) Penal Code, S. 193.	
Conversion.	
See (1) Caste Disabilities Removal Act.	2856
(2) Divorce.	
(3) Hindu Law—Succession.	
(4) Muhammadan Law—Divorce.	
(5) Muhammadan Law—Succession.	
(6) Penal Code, Ss. 403, 404 & 405.	
(7) Sale of Goods Act, Ss. 23, 25 & 57.	
(8) Tort.	
(9) Trusts Act, S. 53	
Crown Grants.	
See (1) Grant.	2856
(2) Crown Grants Act.	
(3) Govt. of India Act, 1935, S. 300 ...	
Crown Lands Act (1884) of New South Wales.	
See Grant—Crown Grant ...	2856

ABBREVIATIONS

REPORTS

A.I.R. 1914 All., Bom., etc. ... All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
A. M. L. J. ... Ajmer-Merwara Law Journal.
Agra. H. C. R. ... Agra High Court Reports.
All. or I. L. R. All. ... Indian Law Reports, Allahabad Series.
All. L. Jour. ... Allahabad Law Journal.
All. W. N. ... Allahabad Weekly Notes.
All. W. R. ... Allahabad Weekly Reporter.
I. L. R. Assam ... Indian Law Reports, Assam Series.
Avadh W. N. ... Avadh (or Oudh) Weekly Notes.
B. R. ... Bihar Reports.
Beng. L. R. ... Bengal Law Reports.
B. L. J. R. or Bihar L. J. R. ... Bihar Law Journal Reports.
Bom. or I. L. R. Bom. ... Indian Law Reports, Bombay Series.
Bom. H. C. R. ... Bombay High Court Reports.
Bom. L. R. ... Bombay Law Reporter.
Bom. P. J. ... Bombay Printed Judgments.
Bur. L. Jour. ... Burma Law Journal.
Bur. L. R. ... Burma Law Reports.
Bur. L. Tim. ... Burma Law Times.
Cal. or I. L. R. Cal. ... Indian Law Reports, Calcutta Series.
Cal. L. Jour. ... Calcutta Law Journal.
Cal. L. R. ... Calcutta Law Reports.
Cal. W. N. ... Calcutta Weekly Notes.
Cal. W. N. (D. R.) ... Calcutta Weekly Notes (Dacca Reports).
C. P. L. R. ... Central Provinces Law Reports.
Cr. App. Rep. ... Cohen's Criminal Appeal Reports.
Cr. or Cri. L. Jour. ... Criminal Law Journal.
I. L. R. Cut. ... Indian Law Reports, Cuttack Series.
Cut. L. T. ... Cuttack Law Times.
E. P. ... East Punjab.
I. L. R. E. P. or East Punj. ... Indian Law Reports, East Punjab Series.
F. C. R. ... Federal Court Reports.
F. L. J. ... Federal Law Journal.
I. L. R. Hyd. ... Indian Law Reports Hyderabad Series.
Ind. App. ... Law Reports, Indian Appeals.
Ind. Cas. ... Indian Cases.
I. R. or Rul. ... Indian Rulings or Ruling.
I. T. R. ... Income Tax Reports.
J. & K. ... Jammu & Kashmir.
J. & K. L. R. ... Jammu & Kashmir Law Reports.
J. L. R. or Jaipur L. R. ... Jaipur Law Reports.
I. L. R. Kar. ... Indian Law Reports, Karachi Series.
K. B. ... (Law Reports) King's Bench Division.
(L. J.) K. B. ... Law Journal Reports, King's Bench.
K. L. T. or Ker. L. T. ... Kerala Law Times.
I. L. R. Lah. ... Indian Law Reports, Lahore Series.
Lah. L. Jour. ... Lahore Law Journal.
Lah. L. T. ... Lahore Law Times.
L. R. A. ... Law Reporter, Allahabad.
Low. Bur. Rul. ... Lower Burma Rulings.
Luck. or I. L. R. Luck. ... Indian Law Reports, Lucknow Series.
Madh. B. or M. B. ... Madhya Bharat.
I. L. R. Madh. B. ... Indian Law Reports Madhya Bharat Series.
Madh. B. L. J. ... Madhya Bharat Law Journal
Madh. B. L. R. ... Madhya Bharat Law Reporter.
Mad. or I. L. R. Mad. ... Indian Law Reports, Madras Series.
Mad. H. C. R. ... Madras High Court Reports.
Mad. L. Jour. ... Madras Law Journal.
Mad. L. Tim. ... Madras Law Times.
Mad. L. W. ... Madras Law Weekly.
Mad. W. N. ... Madras Weekly Notes.
M. L. R. or Marwar L. R. ... Marwar Law Reporter.
Moo. Ind. App. ... Moore's Indian Appeals.
Moo. P. C. C. ... Moore's Privy Council Cases.
Mys. ... Mysore.
I. L. R. Mys. ... Indian Law Reports, Mysore Series.
Mys. H. C. R. ... Mysore High Court Reports.
Mys. L. J. ... Mysore Law Journal.
I. L. R. Nag. ... Indian Law Reports, Nagpur Series.
Nag. L. Jour. ... Nagpur Law Journal.
Nag. L. R. ... Nagpur Law Reports.
N.-W. P. H. C. R. ... North-West Provinces High Court Reports.
Oudh Cas. ... Oudh Cases.
Oudh L. Jour. ... Oudh Law Journal.
Oudh L. R. ... Oudh Law Reports.
Oudh S. C. ... Oudh Select Cases.
Oudh W. N. ... Oudh Weekly Notes.
Pak. Cas. ... Pakistan Cases.
Pak. L. R. Lahore ... Pakistan Law Reports, Lahore.
Pat. or I. L. R. Pat. ... Indian Law Reports, Patna Series.
Pat. L. Jour. ... Patna Law Journal.
Pat. L. Tim. ... Patna Law Times.
Pat. L. W. ... Patna Law Weekly.

Pat. W. N. ... Patna Weekly Notes.
I. L. R. Patiala ... Indian Law Reports, Patiala Series.
Pepsu L. R. ... Pepsu Law Reports.
I. L. R. Punj. ... Indian Law Reports, Punjab Series.
Pun. L. R. ... Punjab Law Reporter.
Pun. Re. ... Punjab Records.
Pun. W. R. ... Punjab Weekly Reporter.
I. L. R. Raj. ... Indian Law Reports, Rajasthan Series.
R. L. W. or Raj. L. W. ... The Rajasthan Law Weekly.
Rang. or I. L. R. Rang. ... Indian Law Reports, Rangoon Series.
Rang. L. R. ... Rangoon Law Reports.
Rat. or Rat. Un. Cr. C. ... Ratanlal's Unreported Criminal Cases.
R. D. ... Revenue Decisions.
Sau. ... Saurashtra.
Sau. L. R. ... Saurashtra Law Reporte
Sind L. R. ... Sind Law Reporter.
S. C. J. ... Supreme Court Journal.
S. C. R. ... Supreme Court Reports.
Suth. W. R. ... Sutherland's Weekly Reporter.
I. L. R. Trav. Co. or T. C. ... Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav. Co. L. R. ... Travancore-Cochin Law Reports.
T. L. J. or Trav. L. J. ... Travancore Law Journal.
U. P. L. R. ... United Provinces Law Reports.
Upp. Bur. Rul. ... Upper Burma Rulings.
Vind.-Pra. or V. P. ... Vindhya Pradesh.
Weir. ... Weir's Criminal Rulings.

Other Abbreviations.

A. C. ... Appellate Jurisdiction, Civil.
A. Cr. ... Appellate Jurisdiction, Criminal.
App. ... Appendix or Appeal.
Appr. ... Approved.
Art. ... Article.
B. R. ... Board of Revenue.
C. A. ... Court of Appeal.
Civ. ... Civil.
Cl. ... Clause.
Cons. ... Considered.
Cr. ... Criminal.
Diss. ... Dissented.
Dist. ... Distinguished.
D. B. ... Division Bench.
Expl. ... Explained.
F. A. ... First Appeal.
F. B. ... Full Bench.
F. C. ... Federal Court.
Foll. ... Followed.
Illu. ... Illustrations.
Jour. ... Journal.
L. P. ... Letters Patent.
N. ... Note.
No. ... Number.
O. ... Order.
O. C. ... Original Jurisdiction, Civil.
O. Cr. ... Original Jurisdiction, Criminal.
Over. ... Overruled.
P. ... Page.
Pr. ... Para.
Pt. ... Point.
P. C. ... Privy Council.
Pre. ... Preamble.
R. ... Rule.
Ref. ... Referred or Reference.
Rel. on. ... Relied on.
Rev. ... Revenue.
S. ... Section.
S. A. ... Second Appeal.
S. B. ... Special Bench.
S. C. ... Supreme Court.
S. N. ... Short Notes of cases.
V. ... Volume Number.

THE FIFTY YEARS' DIGEST
1901--1950

(Civil, Criminal & Revenue.)

VOLUME V

CIVIL P. C. (5 of 1908)

——O. 34, R. 6.
1. **Against whom to be passed.**
2. **Amount due.**
3. **Appeal.**
4. **Application for.**
5. **Attachment before judgment.**
   See also Civil P. C., O. 38, R. 5.
6. **Award or consent decree.**
7. **Combined decree.**
8. **Construction.**
9. **Costs.**
10. **Execution against other property.**
11. **Ex parte decree.**
12. **Limitation.**
13. **Omission to claim.**
14. **Personal decrees.**
15. **Scope.**

1. Against whom to be passed.

——O. 34, R. 6 — Against transferee.

Under O. 34, R. 6, Civil P. C., a decree could be passed only against the mortgagor and not against the purchaser of equity of redemption, the cause of action for such a decree being a personal covenant in the mortgage-deed. AIR (V 32) 1945 Oudh 65 : 1944 Oudh WN (CC) 278 : 1944 AWR (CC) 198 : 20 Luck 179.

——O. 34, R. 6 — Against transferee.

Where in a mortgage suit against the mortgagor and subsequent transferee of the equity, a preliminary decree providing liberty to apply for personal decree in case sale proceeds are insufficient is passed, the transferee can contest the mortgagee's right to proceed against him personally when application is made, and the direction in the decree does not operate as 'res judicata'. (1942) 1942 NLJ 144.

——O. 34, R. 6 — Against surety — Independent contract.

The mortgagee was given possession from the date of the mortgage and the mortgagor agreed to redeem the property after two years by payment of the mortgage sum. Until redemption he was to remain in possession and to pay Rs. 10 per month as rent. If he failed to pay rent for three months, then he agreed to pay the remainder of the rent on demand and to pay at an enhanced rate for the future. It was specifically stated that the rent would also be a charge on the mortgaged property. For the payment of the mortgage-money and the rent, the mortgaged property, the person and other property of the principal were made liable and the surety then agreed that if the mortgagor did not pay the mortgage money and the rent according to the terms of the deed, then he (the surety), would from his pocket pay the mortgage-money and the rent on demand and for this payment he made his person and his property of every kind liable:

Held, that in these circumstances there was an independent contract to pay rent and that even if the rent be regarded as interest, it was recoverable as being due under a special contract even if the principal was irrecoverable. AIR (V 29) 1942 Pesh 85 : 204 Ind Cas 509.

——O. 34, R. 6 — Suit for royalty against lessees and sub-lessees by sale of property — Decree — Sale — Personal decree for balance against both the lessees and sub-lessees.

Where the lessees of minerals had hypothecated certain property to secure sums due by way of royalty, and the lessor in his suit asks that the amount due for royalty should be recovered by sale of the properties hypothecated and impleads the sub-lessees, a mortgage decree can be passed against the sub-lessees together with the lessees because they are interested in the property sought to be sold.

But where the amount recovered by the sale does not prove sufficient, a personal decree under O. 34, R. 6, Civil P. C., cannot be obtained against the sub-lessees merely because they are interested in the property. They were in no way personally liable to the plaintiff and, therefore, a personal decree cannot be passed against them. AIR (V 28) 1941 Pat 416 : 7 BR 503 : 193 Ind Cas 32 (DB).

——O. 34, R. 6 — Decree awarding costs against puisne mortgagee — If can be executed personally.

So far as costs are concerned, unless there is anything in the decree of the Appellate Court to show that the normal right of the litigant to recover costs personally against his opponent is taken away, the costs given by the decree against a puisne mortgagee can be executed personally against the mortgagee and such right is independent of and exists whether or not O. 34, R. 6 is applicable and is founded on the broad ground that where a Court orders costs to be paid, the costs have to be paid, and the obligation to pay is not in any way depending upon the mortgaged property proving sufficient or insufficient. AIR (V 25) 1938 Nag 237 : ILR (1939) Nag 261 : 175 Ind Cas 561 (DB).

——O. 34, Rr. 6, 5 — Property not available for sale under R. 5 — Personal decree, if can be passed against mortgagor.

Order 34, R. 6, applies only to those cases where there is available some property which could be sold and if there be none whatsoever, a mortgagee cannot be expected to have a non existing thing sold before being able to realise his demand. If there is no property available for sale under O. 34, R. 5, a personal decree can still be passed against the mortgagor. AIR (V 22) 1935 Lah 850 : 37 PLR 285 : 17 Lah 67 : 159 Ind Cas 927 (DB).

——O. 34, R. 6 — Mortgagee's right to apply for personal decree before selling transferred item.

There is no inflexible rule of law that a mortgagee should first bring to sale all the mortgaged items.

Where four items were mortgaged and the mortgagor subsequently transferred one of those items representing that it was free from encumbrance and the mortgagee obtained a decree for sale without impleading the purchaser as a party:

Held, that in the circumstances of the case the mortgagee was entitled to apply for a personal decree without bringing the fourth item also to sale. AIR (V 21) 1934 Mad 82 (1) : (1933) MWN 744 : 39 MLW 67 : 147 Ind Cas 839 (2).

——O. 34, R. 6 — Mortgage — Suit against mortgagor and surety — Personal decree against surety.

Where a person executes a mortgage and others who are not interested in the mortgaged property join in the execution of the deed undertaking personal liability, a personal decree can be passed under O. 34, R. 6, not only against the mortgagor but also against the other executants, after the sale of the mortgaged property. It is not necessary that a simple money-decree should be passed against the latter in the first instance. AIR (V 18) 1931 All 631 : (1931) ALJ 559 : 53 All 695 : 132 Ind Cas 561 (DB).

——O. 34, R. 6 — Against party other than the mortgagor.

Though as between mortgagees and mortgagors in a mortgage decree no separate order making the defendant mortgagors personally liable for the costs can be passed, yet it is not illegal to award a personal decree for costs against a party to the suit who is not himself the mortgagor. AIR (Vol 18) 1931 Mad 272: 33 MLW 263 :131 Ind Cas 151 (1).

——O. 34 R. 6 — Right to execute order against puisne mortgagee personally.

Where in a mortgage suit additional costs have been incurred by reason of a third party's unsuccessful defence, where an order for payment of those additional costs by the third party has actually been made, where the sale-proceeds of the mortgaged property have been found to be insufficient to satisfy the mortgage-debt, and where a final personal money-decree has not been made, and cannot be made under O. 34, R. 6 in respect of the special costs awarded against the third person, an order for costs against the third person, whether made in the preliminary or final decree for sale or by a subsequent order in respect of costs, should be executable against the third person. AIR (V 18) 1931 Rang 181 (2) : 133 Ind Cas 93 (DB).

——O. 34, R. 6 — Suit by puisne mortgagee — Prior mortgagee made party and contesting suit — Preliminary decree awarding costs jointly — If can be executed for costs personally against prior mortgagee.

Where the judgment and decree in a suit brought by the mortgagee, make a person other than the mortgagor liable for costs jointly with the mortgagor, it is a proper interpretation of the order for costs against the person other than the mortgagor that the latter should be liable personally.

Therefore, where a preliminary mortgage-decree for sale declares that the prior mortgagees who were necessary parties to the puisne mortgagee's suit and who had contested that suit and had been relegated to the position of puisne mortgagees are liable for the costs of the suit jointly with the mortgagor, it can be executed against the prior mortgagees personally in respect of costs, even though those costs are merely included in the amount payable for redemption of the puisne mortgage and the decree contains no express order for the payment of those costs by the prior mortgagees.

It is eminently desirable that in mortgage suits to which persons other than the parties to the mortgage are parties, the judgment and the decree should state specifically whether or not costs awarded against parties to the suit who were not parties to the mortgage, are to be payable personally. AIR (V 18) 1931 Rang 153 : 9 Rang 186 : 133 Ind Cas 225 (DB).

——O. 34, R. 6 — Only against parties to suit.

Under R. 6 a Court has no jurisdiction to pass a decree against persons who were not parties to the original suit. AIR (V 14) 1927 All 691 : 103 Ind Cas 264.

——O. 34, R. 6 — Personal liability — Purchaser of property.

A purchaser is not personally liable for the deficiency when the sale-proceeds do not cover the costs and mortgage money. "Defendant" under the rule means only the mortgagor. AIR (V 3) 1916 Mad 763 : 29 MLJ 120 : 30 Ind Cas 188 (DB).

——O. 34, R. 6 — Personal liability — Mortgage decree against two defendants — Private sale by one defendant to decree-holder for part of decretal money — Whether application for personal decree against both competent.

Where a mortgage decree is passed against two defendants one of whom sold the property to the decree-holder in private sale, in part adjustment of the decree, a decree under O. 34, R. 6 can be passed against that defendant but not against the other. AIR (V 1) 1914 Mad 251 : 15 MLT 235 : 1 LW 294 : 26 MLJ 375 : (1914) MWN 316 : 23 Ind Cas 544 (DB).

——O. 34, R. 6 — Personal liability — Purchasers of equity of redemption.

A personal decree cannot be made against the purchasers of the equity of redemption. (1913) 17 CWN 457 : 17 CLJ 120 : 18 Ind Cas 747 (DB).

——O. 34, R. 6 — Personal liability — Puisne mortgagee — Holder of equity of redemption.

A puisne mortgagee as holder of the equity of redemption cannot be held to be personally liable for the re-payment of the mortgage debt, which is primarily payable by the mortgagors. (1912) 16 CLJ 394 : 17 Ind Cas 927 (DB).

——O. 34, R. 6 — Personal liability — Purchaser from mortgagor.

The purchaser of an equity of redemption who, by agreement with his vendor (the mortgagor) retains the amount of the mortgage debt out of the price due, is not personally liable to the mortgagee in respect of the mortgage debt. Consequently a personal decree under S. 90 of the T. P. Act (O. 34, R. 6) could not be passed against the purchaser. (1912) 34 All 63 : 39 IA 7 : 16 CWN 97 : 11 MLT 6 : 9 ALJ 37 : 1912 MWN 32 : 15 CLJ 68 : 14 Bom LR 1 : 21 MLJ 1153 : 13 Ind Cas 304 (PC).

[Affirming (1909) 31 All 352 : 6 ALJ 427 : 2 Ind Cas 460.]

——O. 34, R. 6 — Personal liability — Vendee of hypotheca.

The word "defendant" in S. 90 of the T. P. Act (O. 34, R. 6, C. P. C.) means the mortgagor defend-

ant and as such no personal decree for costs can be passed against the purchaser of the properties. (1909) 3 Ind Cas 33 (All) (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — Personal decree — Transferee of the equity of redemption, liability.

The transferee of the equity of redemption in mortgaged property does not become personally liable to the mortgagee. A mortgaged to B certain property and sub-mortgaged certain other property by one and the same deed. A subsequently sold the whole of this property to C and left with him the bulk of the consideration for the sale for redemption of the mortgage and sub-mortgage. B obtained a decree for sale of the mortgaged property but not of the sub-mortgaged property; the Court considering itself bound by some rulings, refused such a decree under S. 83, Transfer of Property Act, but remarking "if the rest of the mortgaged property does not prove of sufficient value to satisfy the plaintiff's mortgage in full it will be open to him to apply in execution for a sale of the mortgage rights in question". The proceeds of the sale directed under Ss. 88 and 89 proving insufficient, the decree-holder applied for a decree under S. 90 against C and the personal representative of A.

Held, that by retaining in his hands part of the purchase-money and expressly or impliedly agreeing to pay the amount to B, C did not become personally liable and a decree under S. 90, Transfer of Property Act, could not be made against him. (1909) 6 ALJ 427 : 31 A 352 (358, 359) : 2 Ind Cas 460 (DB).

2. Amount due.

——O. 34, R. 6 and S. 34 (2) — Personal decree silent as to future interest — Such interest, if can be granted by executing Court.

If a personal decree passed under O. 34, R. 6, C. P. Code, is completely silent with respect to the payment of future interest, a claim for the grant of future interest, must be rejected by the executing Court. AIR (V 36) 1949 EP 213 : 50 PLR 294.

——O. 34, R. 6 — Application by mortgagee-decree-holder for decretal balance — Application by judgment-debtor under Ben. Agri. Debtors' Act, S. 5.

Where interest more than 8 per cent has been allowed under a mortgage decree, it is the duty of the Court to re-open the transaction between the lender and the borrower and to take an account of what has been paid and also what ought to have been paid according to the Act and on such re-opening and taking of accounts, to give the debtor such relief as he is entitled to under the Act. AIR (V 29) 1942 Cal 568 : 75 CLJ 299 : 203 Ind Cas 485 (DB).

——O. 34, R. 6 — Costs.

A personal decree for costs in a mortgage suit cannot be passed. (1938) 68 CLJ 409 : 42 CWN 888.

——O. 34, R. 6 — Interest, if can accrue to principal amount which is not legally recoverable — Claim for personal decree for principal barred — Interest for six years preceding suit — Whether can be decreed.

Interest cannot be held to accrue to a principal amount which is not legally recoverable; interest itself being essentially not an inherent right but a right which is given by law. Where the claim for personal decree for the principal amount is barred by time, claim for interest during six years preceding institution of the suit is also barred. AIR (V 23) 1936 Lah 387 : 38 PLR 74 : 163 Ind Cas 100 (DB).

——O. 34, R. 6 — Presumption as to decree for balance under R. 6, if arises.

There can be no presumption that when a decree for sale is made under R. 5 of O. 34, Civil P. C., a decree for the balance under R. 6 is passed at the same time. In fact, the presumption would be to the contrary, namely, that a decree under R. 6 would not be passed until the property had been sold under R. 5. AIR (V 23) 1936 Pesh 71 : 161 Ind Cas 633.

——O. 34, R. 6 — Additional sum paid by mortgagee to save property from sale.

In a mortgage bond after acknowledging receipt in the loan, the mortgagor stated that after repaying the amount in a year from date, he would take back the document. He then stipulated that if he should pay by instalments, the payments shall be endorsed on the back of the bond, being appropriated first towards interest and then towards principal. If he defaulted in re-paying this amount, the lender could sue him for realisation of the principal and interest, get the mortgaged property attached and sold and realise his dues out of the sale proceeds. During the pendency of the mortgage, the mortgagee had to pay the sum of Rs. 244 in order to save the mortgaged property from sale for arrears of rent. The amount was added to the principal money claimed as secured by the mortgage and was included in the decree. The mortgaged property realised on sale some portion of the mortgage debt and the mortgagee applied for personal decree for the balance:

Held, that unless there was some specific condition in the bond absolving the borrower from liability to repay the loan, he must be held liable on the implied covenant contained in his unconditional acknowledgment of the fact that he was taking a loan.

Held also, that when the mortgagee made the payment of Rs. 244 to save the property from sale, he was entitled to add this amount to the mortgage debt and the proper method of suing for recovery of the amount was by suing at the same time as he sued for the mortgage money and that the mortgagee was entitled to a decree under O. 34, R. 6, for that portion of the mortgage-money which represented the amount paid to save the mortgage property from sale. AIR (V 21) 1934 Pat 433 : 149 Ind Cas 1197.

——O. 34, R. 6 — Mortgage suit for sale — Decree varied by consent — Receivers appointed — Receivers unable to collect rent — Money advanced to Receiver under orders of Court — Plaintiff also obtaining another decree for amounts paid on account of rent — In execution of decree, plaintiff herself purchasing property — Application by plaintiff under O. 34, R. 6 claiming: (i) amount under decrees with interest; (ii) amount advanced on account of sadar rent; (iii) amount advanced to Receivers and (iv) amount paid into Court for rent:

Held, that S. 47 applied to item (i); as regards other items they fell under S. 47 and that S. 151 also applied.

Held also, that where payments were made without order of Court, a separate suit should be instituted. AIR (V 19) 1932 Cal 414 : 55 CLJ 1 : 139 Ind Cas 247 (DB).

——O. 34, R. 6 — For costs after sale of property.

Where a mortgagee brought a suit for sale against the mortgagor and his sons and after the hypotheca had been sold under the decree for the aggregate amount due under the decree including interest and costs, he applied for a personal decree against the mortgagor for the balance due under

the mortgage and costs, and against the mortgagor's sons for the amount due for costs:

Held, that even though the amount due under the mortgage, the subsequent interest and costs had been amalgamated into one sum, and the hypotheca had been sold, it was still open to the plaintiff to assume that costs were part of the remaining balance, and to ask for a personal decree for costs as though they were still legally recoverable from the defendants as provided by O. 34, R. 6. AIR (V 19) 1932 Mad 155 (2) : 34 MLW 961 : 62 MLJ 93 : 55 Mad 332 : (1932) MWN 554 : 135 Ind Cas 578 (DB).

——**O. 34, Rr. 6, 5 — Decree for sale — Costs of Appellate Court, whether part of mortgage amount — Execution against mortgagor personally — Construction of decree.**

In the case of a decree for sale unless there was in the judgment a specific direction that the costs should be recovered from the mortgagor personally, the presumption must be that the decree directed costs to be added to the mortgage amount.

Where a decree passed in an appeal preferred by the mortgagors from a decree for sale provided as follows: "This appeal be and hereby is dismissed and it is further ordered that the appellant aforesaid do pay to the respondent No. 1 aforesaid the sum of Rs. 578-5-0, the amount of costs incurred by the latter in this Court, and it is further ordered that the costs incurred in the lower Court be paid with interest thereon as awarded by the said Court", and the decree-holder sought to execute the decree for the costs incurred in the Appellate Court against the mortgagor as a simple money-decree:

Held, that the costs of the Appellate Court should also be included in the total amount for which the property was to be sold and execution could be taken out against the mortgagor only after obtaining a decree under O. 34, R. 6, Civil P. C. AIR (V 18) 1931 All 124 : 129 Ind Cas 554.

——**O. 34, R. 6 — Costs — Final personal decree for costs, if can be made against prior or puisne mortgagee.**

In a suit by a mortgagee against the mortgagor, costs in favour of mortgagee do not have priority over the actual mortgage-debt; and, therefore, a final personal mortgage decree for costs may be given against the mortgagor in a case where the personal remedy of the mortgagee against the mortgagor for the mortgage money and interest thereon is time-barred.

But a final personal money-decree can be made only against the mortgagor. Such a decree cannot be made against a puisne mortgagee or a prior mortgagee who happens to be a necessary party to the suit. AIR (V 18) 1931 Rang 158 : 9 Rang 186 : 133 Ind Cas 225 (DB).

——**O. 34, R. 6 — Scope and meaning of.**

Rule 6 contemplates the insufficiency of the net proceeds of the sale to pay the "amount due" which expression means the amount, to recover which a decree for sale has been previously passed. AIR (V 16) 1929 All 15 : 111 Ind Cas 221 : 26 ALJ 1374 (DB).

——**O. 34, R. 6 (S. 90, T. P. Act) — Personal decree — Decree for sale on a mortgage — Property ordered to be sold in part not susceptible of sale — Abandonment of claim to sell such part.**

Held, that on the true construction of the provisions of the Transfer of Property Act, 1882, a mortgagee is entitled at any stage to abandon his claim against any portion of the mortgaged property and then obtain a decree under S. 90, for any balance due after crediting the amount realized by the sale of the property actually sold. (1907) 1907 AWN 83 (84, 85) : 29 All 369.

3. Appeal.

——**O. 34, R. 6 — Court-fee.**

An order granting a personal decree to the assignee of a decree under O. 34, R. 6 is a 'decree' within the meaning of the Code, and therefore, an appeal from such an order, must bear an ad valorem court-fee. The appellant cannot be permitted to file a Civil Miscellaneous Appeal and pay a lesser court-fee merely because the assignee in one application had prayed for recognition of the assignment of the decree under O. 21, R. 16 and for a personal decree under O. 34, R. 6, when in appeal, the personal decree itself is attacked. AIR (V 32) 1945 Mad 425 : 58 MLW 318 : (1945) 2 MLJ 87 : (1945) MWN 417 (DB).

——**O. 34, R. 6 — Application dismissed — Appeal — Court-fee.**

An order dismissing an application for a personal decree under O. 34, R. 6 has a force of a decree and is appealable under S. 96, and not under O. 43, R. 1 (q). Court-fee payable on appeal is ad valorem. AIR (V 32) 1945 Nag 289 : ILR (1945) Nag 643 : 1945 NLJ 409 (DB).

——**O. 34, R. 6 — Order refusing application — Appeal — Art. 1, Sch. 1, Court-fees Act (VII of 1870).**

An application under O. 34, R. 6, is definitely in the nature of a claim for the recovery from the person or other property of the mortgagor of the balance left over after the proceeds of the sale of the property have been appropriated. The refusal to recover the amount from the person and other property of the mortgagor amounts to a final adjudication of the matter in controversy between the parties and, therefore, amounts to a decree as defined by S. 2 (2), Civil P. C., and hence an appeal from such an adjudication must bear full ad valorem court-fee under Art. 1 of Sch. 1, Court-fees Act. AIR (V 28) 1941 Pesh 56 : 1941 Pesh LJ 56 : 195 Ind Cas 239 (DB).

——O. 34, R. 6 — A decree passed under O. 34, R. 6, is a decree within meaning of Art. 1, Sch. 1 of the Court-fees Act (VII of 1870). Consequently, ad valorem court-fees are payable on an appeal preferred from such a decree. (1936) 164 Ind Cas 423 : 39 CWN 315 : 62 Cal 568.

——**O. 34, R. 6 — Order holding that an application for money-decree is not maintainable.**

An order that an application for the passing of a simple decree under O. 34, R. 6, is not maintainable amounts to a decree and is appealable as such. AIR (V 20) 1933 All 429 : (1933) ALJ 738 : 144 Ind Cas 468 (DB).

——**O. 34, R. 6 — Appeal from order — Ad valorem — Court-fee.**

Where the final decree contained no provision for payment of the balance and for the recovery of such balance from the debtor and the mortgagee was driven to make an application under O. 34, R. 6.

Held, that the application under O. 34, R. 6 was in substance an application for a personal decree of the balance ascertained as a result of the realisation by the sale. Appeal from an order passed in that application is a regular appeal and ad valorem court-fee must be paid. AIR (V 11) 1924 All 292 : 74 Ind Cas 21 (DB).

——**O. 34, R. 6 — Appeal — Refusal of application.**

An order refusing to make a decree under O. 34, R. 6 is a decree within S. 2, C. P. C., and an appeal from it must bear ad valorem court-fees calculated on the subject matter of the appeal. AIR

(V 5) 1918 All 97 (1) : 40 All 553 : 16 ALJ 438 : 47 Ind Cas 561 (DB).

——O. 34, R. 6 — Personal decree — Legality of.

Where a personal decree under the rule is allowed to be final and not appealed against, a party thereto cannot object to its validity in execution of the decree. AIR (V 4) 1917 Pat 330 : 38 Ind Cas 691.

——O. 34, R. 6 — Appeal — Decree — Court-fee.

A decree under O. 34, R. 6, C. P. Code is a decree within S. 2 (2). Ad valorem court-fee must be paid in a memorandum of appeal against it. AIR (V 3) 1916 All 357 : 14 ALJ 328 : 35 Ind Cas 158.

——O. 34, R. 6 — Appeal — Court-fee.

An ad valorem fee is payable in appeals against decrees passed under O. 34, R. 6 of the C. P. C. AIR (V 2) 1915 Oudh 122 : 18 OC 121 : 30 Ind Cas 497.

——O. 34, R. 6 — Appeal — Decree — Court-fee.

An order under O. 34, R. 6 being a decree, an appeal from such an order is an appeal from a decree. On the memorandum of such an appeal ad valorem court-fee must be paid. (1913) 18 CLJ 133 : 19 Ind Cas 971 (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — C. P. C., S. 244 — Appeal.

If a party is dissatisfied with an order under S. 90, T. P. Act, the proper course for him is to appeal against the order under S. 244, C. P. C. (1904) AWN 268 (268) : 1 All LJ 701 (DB).

4. Application for.

(a) General.
(b) Application — Nature.

(a) General.

——O. 34, R. 6 — Application under by assignee-decree-holder — Maintainability. AIR (V 38) 1951 Mad 628 : (1949) 2 MLJ 741.

——O. 34, R. 6 — Property sold free from mortgage under S. 138, C. P. Land Revenue Act and purchased by mortgagee — Mortgagee can apply for personal decree.

Where the mortgaged property is sold under S. 138, C. P. Land Revenue Act free from mortgage and is purchased by the mortgagee decree-holder himself, he gets absolute and unqualified title to it. The mortgagee decree-holder is not debarred from applying for a personal decree under O. 34, R. 6 against the mortgagor for recovery of the balance of the decretal amount. AIR (V 32) 1945 Nag 289 : ILR (1945) Nag 643 : 1945 NLJ 409 (DB).

——O. 34, R. 6 — Application, when can be made — No reservation of liberty to mortgagee — Effect.

An application for a personal decree is an application in the suit and only arises when it is found that the properties have not realised sufficient to pay off the mortgagee. The mortgagee has a right to apply for a personal decree in such circumstances and his application can only be made in the suit. The Court has no power to pass a personal decree until the eventuality referred to has happened.

Hence it is open to the mortgagee to apply for a personal decree when it is found that the sale of the mortgaged properties is not sufficient to discharge the mortgage debt to him even if there be no prayer in the plaint for that relief. The fact that no liberty to the mortgagee plaintiff to apply for a personal decree is reserved in the preliminary decree, does not preclude him from applying for a personal decree when the time to do so comes. AIR (V 31) 1944 Mad 65 : 56 MLW 649 : (1943) 2 MLJ 501 : (1943) MWN 698 : ILR (1944) Mad 572 : 211 Ind Cas 630 (DB).

——O. 34, R. 6 — An application under O. 34, R. 6, Civil P. C., by the mortgagee is necessary for an order for a personal decree for the balance due. AIR (V 24) 1937 Rang 494 : 173 Ind Cas 770 (DB).

——O. 34, R. 6 — Two decrees against the same defendant — Sale in execution of one — Prayer for rateable distribution in respect of the other decree — Latter decree satisfied in part out of sale proceeds — Application for personal decree for balance is maintainable as the sale must be deemed to be in execution of both the decrees. AIR (V 23) 1936 Oudh 143 : 1935 OWN (CC) 1081 : 11 Luck 481 : 158 Ind Cas 422 (DB).

——O. 34, R. 6 — A mortgage decree passed against a Hindu father had reserved to the mortgagee liberty to apply for a personal decree against the mortgagor, in the event of the sale proceeds being found insufficient to pay off the decretal amount. The mortgage property was, in fact, brought to sale and the auction-purchaser had deposited the sale price, but this amount could not be made available for discharge of the decree by reason of the prohibitory order issued at the instance of the mortgagor's sons:

Held, that the mortgagee was still entitled to apply to the executing Court for passing a personal decree and proceed against the property if his claim was found to be within time and the sons are unable to prove that the debt was tainted with illegality or immorality. AIR (V 20) 1933 Lah 768 : 149 Ind Cas 515 (DB).

——O. 34, R. 6 — Proper forum.

A suit for a mortgage was instituted in the Court of the Subordinate Judge of Agra which had jurisdiction over the subject-matter of the suit. Subsequently, the plaintiff brought a suit in the Court of the Munsif of Fatehabad on the basis of a charge which he alleged had come into existence and obtained a decree in that Court against certain property. He then made an application under O. 34, R. 6, to the District Munsif of Fatehabad, for a personal decree for the balance due under the mortgage bond:

Held, htat the existence of a charge on the property in Fatehabad did not give the Munsif of Fatehabad jurisdiction to entertain an application under O. 34, R. 6, because that rule only applied to a personal covenant arising from a mortgage. AIR (Vol 18) 1931 All 192: (1931) ALJ 893: 135 Ind Cas 842 (DB).

——O. 34, R. 6 — Is necessary — It is a continuation of the suit.

If a decree is passed in the form prescribed as No. 4 in Appendix D to Sch. 1 with liberty to decree-holder to apply for personal decree for the amount of the balance such reservation of liberty does not amount to personal decree for the balance and a separate personal decree has to be subsequently passed. An application for such second decree is a continuation of the original suit and if it is dismissed for default, a second application is barred by O. 9, R. 9. AIR (V 17) 1930 Nag 188 : 26 NLR 154.

——O. 34, R. 6 — Plaint containing prayer for personal decree also — Decree in Form 4 App. — Subsequent application under R. 6 — Mortgagor whether can resist same.

Held, by the Full Bench (Srivastava, J., dissenting) where the plaint contains a prayer that if the money due to the plaintiff could not be obtained from the sale proceeds of the mortgaged property, the balance should be recovered from the defendant personally and a preliminary decree is

passed for sale in Form 4, App. 9, C. P. Code, enacting that if the sale proceeds are insufficient the plaintiffs are at liberty to apply for a personal decree for the amount of the balance; this amounts to an adjudication between the parties that the plaintiff decree-holder has an actual right to such a personal decree and as the existence of that right is detrimental to the defendant judgment-debtor the latter must appeal against the preliminary decree and if he does not do so he cannot resist a subsequent application made under O. 34 on the ground that the plaintiff decree-holder is not entitled to a personal decree. Construction of decrees with reference to forms and pleadings in such cases discussed.

Per Srivastava, J., dissenting — The Court in granting the plaintiff's prayer to reserve to himself the liberty of making an application under O. 34, R. 6 does not judicially determine or adjudicate upon any question in controversy between the parties. AIR (V 17) 1930 Oudh 378 : 7 OWN 774 (FB).

——O. 34, R. 6 — It does not lie when the amount ceases to be mortgage debt.

A suit was brought for sale on the basis of a mortgage deed executed by a Hindu father, and a preliminary decree was passed on 13th January, 1920 for Rs. 573. The sons of the mortgagor were not parties to the suit. They subsequently brought a suit for a declaration that the debt was without legal necessity and was not binding on the family property. Their suit was decreed on 24th July, 1920, the Court holding that the mortgage debt was good to the extent of Rs. 429-3-0. After this decree the sons were made parties to the final decree in the mortgage suit which was passed on 7th May, 1921 for Rs. 429-3-0 only. There was no reference in this final decree to the plaintiff's right to recover the balance of the amount allowed to him under the preliminary decree. On the 15th April, 1924, the plaintiff filed an application under O. 34, R. 6 praying for a personal decree for the balance of the amount against the mortgagor.

Held, that the effect of the declaratory decree obtained by the sons was to confine the charge on the family property to Rs. 429-3-0 only and that the balance of the amount ceased to be a mortgage-debt and hence the plaintiff had under O. 34, R. 6 no right to recover the balance of the amount. AIR (V 16) 1929 All 15 : 111 Ind Cas 221 : 26 ALJ 1374 (DB).

——O. 34, R. 6 — Actual insufficiency not a condition precedent to an application under.

A second mortgagee brought a suit against the mortgagor and obtained a final decree. Before he applied for execution the prior mortgagee brought a suit on his mortgage making both the mortgagor and second mortgagee parties and sold the property in execution of his decree. The sale proceeds satisfied only the decretal debt of the prior mortgagee. The second mortgagee applied under R. 6 for a personal decree. It was contended that no action could be taken on it as the mortgagee had not brought to sale the property and found that the sale proceeds were insufficient to satisfy his decree.

Held, that the Court will not compel the mortgagee to make a fruitless attempt to sell the property which was already sold, in order to enable him to apply under R. 6 read with S. 68, T. P. Act. In order that the application for personal decree should be held to be untenable, there must be something which the mortgagee should be able to recover by such sale. 33 Cal 890; AIR 1924 Cal 209; 18 CLJ 133; 22 All 404 and 31 All 373; 1 Ind Cas 799, held Overruled. AIR (V 16) 1929 Cal 121 : 117 Ind Cas 530 : 32 CWN 1160 (DB).

——O. 34, R. 6 — Prayer in plaint — Absence in decree — Effect.

The fact that the personal remedy is asked for in the plaint and that nothing appears about it in the decree, is not enough to say that the plaintiff is for ever after barred from asking for it. AIR (V 14) 1927 Mad 779 : 53 MLJ 489 : 103 Ind Cas 528 : 1927 MWN 330 : 39 MLT 22 (DB).

——O. 34, R. 6 — Mortgage sale void — Right to apply under arises on date of declaration.

Where the sale of a certain property in execution of a mortgage decree is declared to be void the property not being liable to sale, e.g., being trust property, right to apply for a personal decree against the mortgagor accrues on the date of the order declaring the sale void and not the actual date of dispossession. AIR (V 13) 1926 Mad 941 : 24 MLW 280 : 1926 MWN 574 : 97 Ind Cas 502.

——O. 34, R. 6 — Writing — Signature — Unnecessary.

There is nothing in R. 6 which requires that an application to the Court should be in writing, much less is there anything to show that the application should be signed by anybody. All that the rule lays down is that the Court is authorised to pass a decree, where the judgment-debtor is personally bound to pay the balance. Under the circumstances the fact that an application was not signed by the decree-holders will not affect the case. AIR (V 11) 1924 All 804 : 82 Ind Cas 65 : 5 LRA Civ 565 (DB).

——O. 34, R. 6 — Application for — If mortgagor can raise objection not adjudicated in suit.

Where a mortgage decree made no mention of the plaintiff's right to proceed under O. 34, R. 6,

Held, that in an application under O. 34, R. 6, the defendant was not estopped from objecting that part of the decree amount was barred at the time of the suit inasmuch as it had not been adjudicated upon in the suit. AIR (V 5) 1918 Pat 315 : 46 Ind Cas 892 (DB).

——O. 34, R. 6 — Applicability — Security unsaleable.

Where the mortgaged property is found to be unsaleable an application for personal decree may be maintained. (1911) 14 OC 62 : 9 Ind Cas 752.

——O. 34, Rr. 6, 4, 5 (T. P. Act, Ss. 90, 88, 89) — Personal decree adjudicated in first decree — Personal liability of mortgagor, if adjudicated in suit, not to be treated as nullity.

Section 90, T. P. Act, read with Ss. 88 and 89, shows that the proper procedure to follow in mortgage suits is to postpone the consideration of the right of the mortgagee to sell the properties other than the mortgaged property until the need for it has actually arisen. But if a personal decree has been prayed for in the first instance and adjudicated upon, the adjudication is not a nullity and a refusal will operate as a bar to a subsequent application. (1909) 32 M 534 (536) : 5 MLT 246 : 4 Ind Cas 1120 (DB).

(b) Application — Nature.

——O. 34, R. 6 — An application under O. 34, R. 6 is not an application in execution but a substantive original application for a new decree in the suit, and the procedure applying to this application would be governed by S. 141, Civil P. C. AIR (V 23) 1936 Lah 388 : 38 PLR 700 : 163 Ind Cas 119.

——O. 34, R. 6 — Not in execution.

An application under O. 34, R. 6 can, in no sense, be considered to be made in proceedings taken in

execution of any decree which precedes it. It is by itself the starting point of a fresh simple money decree. As such, the provisions of O. 9 would be applicable to it. AIR (V 17) 1930 All 841 : 124 Ind Cas 729 : 1930 ALJ 1200 (DB).

——**O. 34, R. 6 — Nature of proceeding.**

A proceeding under O. 34, R. 6, C. P. Code, is not a proceeding in which any right to immovable property is directly and specifically in question, and therefore S. 52, T. P. Act has no application to such a proceeding. AIR (V 17) 1930 Oudh 93 : 7 OWN 123 (DB).

——**O. 34, R. 6 — It is an application for a decree.**

An application for a personal decree against a mortgagor where the sale proceeds of the mortgaged properties are insufficient to satisfy the decree is not an application in execution proceedings but is an application for a decree. When such application is dismissed for default a fresh application is barred under O. 9, R. 9. Proper remedy of decree-holder is to set aside the order dismissing the application for default. AIR (V 17) 1930 Rang 257.

——**O. 34, R. 6 — Not a new proceeding.**

The application under O. 34, R. 6, C. P. Code, is clearly not a new proceeding, but a continuation of the original suit, so that it does not come under the bar of S. 16 of the Provincial Insolvency Act as a new proceeding. AIR (V 8) 1921 Lah 270 : 59 Ind Cas 710 : 2 Lah 95 : 3 LLJ 126 : 61 PLR 1921 (DB).

——**O. 34, R. 6 — Application for — Applications for execution.**

An application for attachment of property in no way resembles an application under S. 90, T. P. Act (O. 34, R. 6, C. P. Code). AIR (V 2) 1915 Cal 8 : 18 CWN 492 : 24 Ind Cas 35 (DB).

——**O. 34, Rr. 6 (S. 90, T. P. Act) — Application under, not an application in execution.**

An application for a decree under S. 90, T. P. Act, is not an application in execution but one in suit for a supplemental decree and consequently will not save the bar from limitation of subsequent applications for execution of the mortgage decree.

Quaere — Where the mortgage decree contained a clause entitling the decree-holder to proceed against property of the judgment-debtor other than those included in the mortgage decree — whether an application for a decree under S. 90 was or was not necessary. (1906) 4 CLJ 141 : 33 C 867 (873) (DB).

5. Attachment before judgment.

See also O. 38, R. 5.

——O. 34, R. 6 — In a mortgage suit, the Court under O. 38, R. 5 can order the attachment before judgment although a personal decree has not been passed under O. 34, R. 6. AIR (V 29) 1942 Pesh 17 : 1942 Pesh LJ 1 : 199 Ind Cas 209.

——**O. 34, R. 6, O. 38, R. 5 — Mortgage suit — Attachment before judgment of other properties.**

In a suit to enforce a mortgage, if there is a reasonable probability of the mortgaged property not being sufficient to discharge the mortgage debt, the Court can attach before judgment properties not subject to the mortgage provided the requirements of O. 38, R. 5 are complied with. AIR (V 18) 1931 Bom 329 : 33 Bom LR 514 : 135 Ind Cas 428.

6. Award or consent decree.

——**O. 34, R. 6 — Arrangement between parties — Power of Court.**

So long as a decree has not been passed under O. 34, R. 6, it is open to the Court under O. 23, R. 3 to deal with any arrangement alleged to have been entered into between the parties in respect of the claim of the mortgagee to recover the balance due to him from the defendant, otherwise than out of the property sold or to be sold under the decree for sale, and it makes no difference for this purpose whether or not liberty is reserved to the mortgagee in the preliminary or final decree for sale, to make an application under O. 34, R. 6.

Where the arrangement alleged relates, not only to the personal liability but also to the liability of the properties directed by the final decree to be sold, other considerations may arise, as for instance, whether the two parts of the agreement are severable. AIR (V 23) 1936 Mad 34 : 42 MLW 968 : (1935) MWN 1311 : 69 MLJ 765 : 59 Mad 188 : 160 Ind Cas 270 (FB).

——**O. 34, R. 6 — No stipulation for personal decree in case property proving insufficient.**

A mortgage-decree was passed upon the basis of a compromise between the mortgagee and the defendants Nos. 2 to 7 who were the transferees from defendant No. 1, the mortgagor. The compromise provided that a decree for Rs. 12,000 odd besides costs of the suit pendente lite and future interest should be passed in favour of the plaintiff against the defendants, and the mortgaged property should be held liable therefor. The stipulated period for payment was one year.

The compromise further provided that if the defendants did not pay the decretal amount within one year, then they would not be entitled to deduct Rs. 1,000 which the plaintiff had relinquished, and it would be included in the decree with interest at the rate of 10 per cent. per mensem and the mortgaged property would be held liable therefor:

Held, that the compromise was silent on the question whether the decree-holder would be entitled to a personal decree in the event of any balance remaining due to him after the sale of the mortgaged property. But there was nothing in the terms of the compromise to indicate clearly that the mortgagee had given up his right to a personal decree, to which he was legally entitled.

In such circumstances, the terms of the compromise should not be held as prohibiting the mortgagee from applying for a personal decree under O. 34, R. 6, in the event of the debt not being satisfied out of the mortgaged property unless the language of the compromise makes it clear that the mortgagee had consented to forego this remedy. There was nothing in the compromise to show this clearly. AIR (V 23) 1936 Oudh 259 : 1936 OWN (CC) 476 : 12 Luck 207 : 162 Ind Cas 536 (DB).

——**O. 34, R. 6 — Award ordering sale on default of payment of instalment, but silent regarding personal remedy — Decree-holder, if can be deprived of his ordinary rights of personal remedy — Judgment-debtor not applying for amendment of decree nor appealing — Decree becoming final.**

The dispute in a suit on a mortgage was referred to an arbitrator who delivered his award, fixing the amount of the mortgage money to be paid and fixing the instalments in which the money should be paid, and ordering that in default of payment of any instalment the mortgaged property should be sold. But the award was silent regarding the personal remedy against the judgment-debtor in the event of the mortgaged property proving insufficient to satisfy the mortgage debt.

The decree-holder objected on the ground that the award did not contain any provisions for a personal decree against the mortgagor in the event of the mortgaged property proving insufficient to satisfy the mortgage debt. His case was that the

arbitrator intended that a personal remedy should not be refused; but by an oversight, he had omitted to make provision for it in the award. This objection was dismissed on the ground that there was no evidence that the omission was due to an oversight and a decree was passed in terms of the award. A preliminary decree was passed under O. 34, R. 4, in the ordinary form, and a final decree was also prepared. The property was sold, but a large sum remained due to the decree-holder under the terms of his decree. He then applied under O. 34, R. 6, for personal decree:

Held, that a mere silence in the terms of the award regarding the personal decree should not be taken as indicating that the decree-holder was to be deprived of the ordinary right of recovering the money from the debtor if the mortgaged property proved deficient.

Held also, that although there was no necessity to pass a preliminary or final decree for sale but since as a matter of fact such decrees were passed, it must be held that the property was sold under a decree prepared under O. 34, R. 5, and, therefore, the provisions of O. 34, R. 6, were applicable.

Held, further, that it was open to the judgment-debtor to apply for amendment of the decree as being contrary to the award, and it was open to him to appeal against the decree as being contrary to the award, but as a matter of fact, he did not take any step to challenge the correctness of the preliminary decree and hence the decree having become final against him, it was not open to him to say that the decree-holder was not entitled to apply for a personal decree under O. 34, R. 6. AIR (V 23) 1936 Oudh 61 : 1935 OWN (CC) 1103 : 1935 OLR 597 : 158 Ind Cas 493 (DB).

——**O. 34, R. 6 — Preliminary decree not mentioning personal remedy but referring to compromise which provided it — Absence of decree, whether bar to execution.**

There is nothing in O. 34, which debars a Court from determining the personal liability of the mortgagor at the time when the preliminary decree is passed in a mortgage suit. Order 34, R. 6, gives the plaintiff a right to apply for a personal decree after the sale of the mortgaged property. But this need not be done in a case where a personal decree has already been passed at the time of the passing of the mortgage decree.

Consequently, where, in a mortgage suit, a compromise decree was passed and the preliminary decree did not expressly mention about the personal remedy but referred to the petition of compromise which provided for it, the absence of a decree under O. 34, R. 6, is no bar to the execution of the decree. AIR (V 23) 1936 Pat 568 : 15 Pat 345 : 17 PLT 540 : 3 BR 48 : 165 Ind Cas 561 (DB).

——**O. 34, R. 6 — Mortgage suit — Decree based on amicable settlement.**

The mere fact that decree in a mortgage suit was based on an amicable settlement and the sale was held thereunder, does not take the case out of the purview of O. 34, R. 6. AIR (V 20) 1933 Oudh 520 : 10 OWN (CC) 1097 : 9 Luck 211 : 147 Ind Cas 949.

——**O. 34, R. 6 — Compromise — Absence of provision excluding right to personal decree.**

Where a mortgagee is entitled to a personal decree against the mortgagor and a suit for sale instituted at the proper time to enable him to seek the personal relief is compromised, unless such right is excluded either expressly or by necessary implication by the terms of the compromise, the mortgagee has a legal right to claim a personal decree for the balance due against the mortgagor. When the compromise does not contain such a provision, the mortgagee is not debarred from getting a personal decree after the sale of the mortgaged property and the sale proceeds are not sufficient to pay the amount under the decree. AIR (V 20) 1933 Oudh 214 : 10 OWN (CC) 223 : 144 Ind Cas 661 (DB).

——**O. 34, R. 6 — Amendment.**

Mortgage suit — Compromise decree — Unwarranted addition of clause for personal decree — Court has power under S. 152 to amend decree by scoring out the clause — When amendment is refused, the High Court can interfere under S. 115. AIR (V 18) 1931 Oudh 422 : 8 OWN (CC) 1121 : 134 Ind Cas 1009 (DB).

——**O. 34, R. 6 — Power to grant personal judgment exists in the case of consent decree.**

The power of the Court to give relief by granting a personal decree does not depend upon O. 34, R. 6, which is a provision giving direction to the Court as to the time and manner at and in which the relief is to be given. It is open to the Court on motion in a consent decree to give a personal judgment against the mortgagors. AIR (V 16) 1929 Cal 387 : 120 Ind Cas 110 : 33 CWN 300 (DB).

——**O. 34, R. 6 — Silence as to personal judgment — Right is not foregone.**

The mere fact that the terms of a consent decree about the grant of a personal judgment are silent is not a reason for holding that the leader was to forego his right to recover his money back from the borrower, if the security is found to be deficient. AIR (V 16) 1929 Cal 387 : 120 Ind Cas 110 : 33 CWN 300 (DB).

——**O. 34, R. 6 — Validity as to personal judgment.**

It is permissible for a Court in a mortgage suit while passing a decree to direct that the mortgagee shall recover personally any deficit which may be found due after the mortgaged property is sold and, therefore, an award decree containing such an order is valid. AIR 1923 Bom 32, Diss. from. AIR (V 16) 1929 Sind 44 : 115 Ind Cas 336.

——**O. 34, R. 6 — Application under unnecessary if provision is made in consent decree.**

Where a mortgage decree sought to be executed was a decree not in terms of the rules of O. 34, C. P. Code, but in terms of the agreement between the parties and according to that agreement, provision for recovery from person and other property of judgment-debtor of the balance has been made, if the sale proceeds be insufficient no further decree is required to be made under R. 6, O. 34. AIR (V 15) 1928 Oudh 490 : 108 Ind Cas 723 : 3 Luck 411 : 5 OWN 135 (DB).

——**O. 34, R. 6 — Silence as to personal liability — Application will lie.**

Where a suit for a sale on the basis of a mortgage is compromised, and a decree is passed on the basis of the compromise, the fact that the compromise does not expressly state the mortgagor's personal liability for the balance does not bar an application under C. P. Code, O. 34, R. 6, but not for costs which were agreed to be recoverable from the property. AIR (V 13) 1926 Oudh 27 : 88 Ind Cas 507.

——**O. 34, R. 6 — Personal remedy — Limitation.**

An application for making a conditional decree passed by consent absolute would be governed by the general Art. 181 which applies to all applications for which no period of limitation is provided elsewhere in the Limitation Act or by S. 48, C. P. Code. Even where there is a condition in the decree that until one judgment-debtor's share is found to be insufficient steps are to be taken against

the other judgment-debtor, the right to apply against both accrues at the same time. The right to apply for absolute is one thing and and the determination of the question as to which property should be sold first is another. AIR (V 10) 1923 All 29 : 70 Ind Cas 840 (DB).

——O. 34, R. 6 — Object of.

The object of O. 34, R. 6 is to benefit the mortgagor and if he waives his right by consenting to a money decree being passed he cannot subsequently object to the mortgage property being attached and sold in an execution of such decree. (1911) 1 MWN 147: 9 MLT 261: 9 Ind Cas 939 (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — Supplemental decree — Money decree in the first instance.

The supplemental decree provided for in S. 90, T. P. Act, is only necessary in cases where the original decree is a mortgage decree and not where the original decree is against the mortgagor personally. (1903) 7 CWN 744 (745) (DB).

7. Combined decree.

——O. 34, R. 6, S. 73 — Decree for sale of mortgaged property and personal decree for balance — No application under O. 34, R. 6 — Decree-holder, if entitled to rateable distribution.

A composite decree consisting of a decree for sale of mortgaged property and a personal decree for balance passed without a separate application, though improper, is valid. Such a composite mortgage decree, without an application under O. 34, R. 6, for personal decree being made, is "a decree for the payment of money" within S. 73 and the decree-holder is entitled to rateable distribution at a time when the net proceeds is of sale fall short of the decretal amount. AIR (Vol 21) 1934 Cal 764 (2): 60 CLJ 22 : 38 CWN 850: 152 Ind Cas 770 (DB).

——O. 34, R. 6 — Though a composite decree for sale and also in terms of O. 34, R. 6 may be passed at one and the same time yet neither a plaintiff is bound to ask for the second relief in the plaint of the suit nor is the Court bound, even where such a relief is prayed for, to adjudicate upon it. AIR (Vol 20) 1933 Oudh 520 : 10 OWN (CC) 1097: 9 Luck 211: 147 Ind Cas 849 (DB).

——O. 34, R. 6 — Insertion of clause relating to decree over in preliminary decree.

The guardian and manager of the property of a lunatic, with the permission of the District Judge, executed a mortgage in respect of certain of the lunatic's properties. The mortgagees sued to recover the amount by sale of the mortgaged property, the plaint also containing a prayer that in case the sale-proceeds be insufficient, a decree for the balance also should be passed. The claim was admitted by the guardian and a decree was passed in the form laid down in Form No. 4, Appendix D. The sale-proceeds being found insufficient, the plaintiffs applied for a personal decree under O. 34, R. 6:

Held, that the insertion of a clause in the preliminary decree for a decree over was correct and the defendant not having preferred an appeal against the decree on the expiry of the period of limitation within which an appeal could be filed, the decree became final against him and he was under S. 97 precluded from disputing the correctness of the preliminary decree.

Held, further, that in the circumstances a decree under, O. 34, R. 6 could be passed against the defendant on the plaintiffs' application.

If a Court passes a composite decree combining a decree for sale and a personal decree, the decree is valid, and the personal decree, though made at the time of the decree for sale, operates at a future date when the sale takes place and fails to satisfy the mortgage debt. AIR (Vol 20) 1933 Oudh 352 : 10 OWN (CC) 653 : 9 Luck 51: 144 Ind Cas 931 (FB).

——O. 34, R. 6 — Prayer for personal decree on deficiency — Preliminary decree in terms of — If not appealed against, cannot be questioned in an application under R. 6.

Per Full Bench:— Where the plaint contains a prayer that if the money due to the plaintiff could not be obtained from the sale proceeds of the mortgaged property, the balance should be recoverable from the defendant personally and a preliminary decree is passed for sale in form 4 App. 9, C. P. Code, enacting that if the sale proceeds are insufficient the plaintiffs are at liberty to apply for a personal decree for the amount of the balance, this amounts to an adjudication between the parties that the plaintiff decree-holder has an actual right to such a personal decree and as the existence of that right is detrimental to the defendant judgment-debtor the latter must appeal against the preliminary decree and if he does not do so he cannot resist a subsequent application made under R. 6, O. 34 on the ground that the plaintiff decree-holder is not entitled to a personal decree against him. AIR (Vol 17) 1930 Oudh 378 (FB).

——O. 34, R. 6 — Provision in preliminary decree about personal decree must be appealed against.

The provision that if the net proceeds of the sale are insufficient to pay the amount decreed with interest and costs, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance gives the mortgagee an actual right the existence of which is detrimental to the mortgagor.

A mortgagor is aggrieved by a preliminary decree containing such provision and if he wants to take exception to it he must appeal against the preliminary decree within the period of limitation. If he does not do so he is precluded from disputing the correctness of the preliminary decree upon that point. 6 OWN 969: AIR (Vol 17) 1930 Oudh 10 : 123 Ind Cas 215 (DB).

——O. 34, R. 6 — Effect on.

The rights under a valid mortgage decree directing recovery of balance personally from judgment-debtor cannot be deemed as abandoned by presenting an application under O. 34, R. 6. 115 Ind Cas 336 : AIR (Vol 16) 1929 Sind 44.

——O. 34, R. 6 — In decree for personal remedy on deficiency — Not invalid.

Although the personal remedy cannot be enforced under R. 6 until after the sale has failed to satisfy the debt, a provision in decree that, if the proceeds of the sale are not sufficient to pay the mortgage-debt, the mortgagors should pay the balance personally, cannot be held to be invalid. 111 Ind Cas 808: AIR (Vol 15) 1928 Lah 653 (DB).

——O. 34, R. 6 — Execution of.

Where a decree passed against a father and sons is a mortgage decree so far as the father's share is concerned and a personal decree so far as the son's shares are concerned, the decree can be executed against the sons though a decree under O. 34, R. 6 is not obtained. 64 Ind Cas 629: 2 PLT 715: AIR (Vol 8) 1921 Pat 357 (DB).

——O. 34, R. 6 — Combined decree — Legality of.

A conditional decree under O. 34, R. 6 can be passed in the mortgage suit itself without waiting for the mortgaged property to be sold to ascer-

tained if any balance would be left over. AIR (Vol 7) 1920 Mad 479: 43 Mad 421 : 38 MLJ 203: 11 LW 221: (1920) MWN 181: 27 MLT 96 : 55 Ind Cas 320 (DB).

——O. 34, R. 6 — Combined decree — Preliminary decree — Discretion as to personal liability — No mention of personal liability in final decree — Effect of.

The preliminary decree for sale of the mortgaged property contained a direction that if the whole amount was not realised by sale of the mortgaged properties, for the rest of the claim, if legally realisable, the mortgagor would be liable. In the final decree there was no provision for any personal decree.

Held, that the preliminary decree was not a composite decree allowing the decree-holder to proceed against other properties of the judgment-debtor. It merely said that he might proceed if he was legally entitled to do so thus leaving it for future decision whether the decree-holder was legally entitled to obtain such a decree. AIR (Vol 6) 1919 Cal 432: 23 CWN 924: 53 Ind Cas 904 (DB).

——O. 34, R. 6 — Combined decree — Validity of T. P. Act, S. 90 — Mortgage — Decree for sale — Personal decree for balance, if unrealised — Compromise decree, if can be passed.

Under S. 90 of the T. P. Act (O. 34, R. 6 of the C .P. Code) it is not a condition precedent to the making of a personal decree for the balance of the mortgage money, that the mortgaged properties should have been sold and the proceeds found insufficient to satisfy the debt. It is open to the Court to provide in a decree for sale, that if the proceeds of sale are not sufficient to cover the amount of the mortgage debt together with interest, the defendant shall pay the balance personally. 47 Cal 370 : 46 IA 294: 36 MLJ 215: 17 ALJ 207: 23 CWN 490: 25 MLT 278: 29 CLJ 443: 21 Bom LR 589: 10 LW 26: (1919) MWN 347: 12 Bur LT 80: 49 Ind Cas 620 : AIR (Vol 5) 1918 PC 159.

——O. 34, R. 6 — Combined decree — Execution.

The executing Court cannot enter into the question whether the defendant is personally liable when the decree awards a personal remedy in case sale proceeds of the mortgaged property do not suffice. AIR (Vol 3) 1916 Lah 349: 75 PWR 1916: 32 Ind Cas 820.

——O. 34, R. 6 — Combined decree — Mortgage decree not in accordance with S. 89, T. P. Act — Personal remedy before sale — Whether can be questioned in execution proceedings.

A mortgage decree giving a personal remedy before the sale of the mortgaged property though irregular under S. 89, T. P. Act, cannot be questioned in execution proceedings. AIR (Vol 2) 1915 Mad 449 : 27 MLJ 25: 24 Ind Cas 195 (DB).

——O. 34, R. 6 — Combined decree — Application unnecessary.

Where a decree directs payment of the decree amount within a fixed time and orders the property to be sold in default, the decree is not merely a mortgage decree but also a money decree, and no further order under, O. 34, R. 6 is necessary. AIR (Vol 2) 1915 Mad 414 : (1914) MWN 497 : 25 Ind Cas 50 (DB).

——O. 34, R. 6 — Combined decree — Execution against other properties abandoning hypotheca.

A combined decree cannot be construed as giving the decree-holder a right to abandon his claim against the hypotheca and proceed against the other property of the debtor in the first instance. AIR (Vol 1) 1914 Mad 663 : 14 MLT 530 : 26 MLJ 83: (1914) MWN 157 : 21 Ind Cas 782 (DB).

——O. 34, R. 6 — Combined decree — Effect of — Fresh decree unnecessary.

Where a Court for some reason or other passes a combined decree under O. 34, Rr. 4 and 6, C. P. C., a separate decree under R. 6 is not necessary for execution. AIR (Vol 1) 1940 Oudh 333 : 1 OLJ 742 : 18 OC 55: 27 Ind Cas 72 (DB).

——O. 34, R. 6 — Combined decree — Decree for sale of mortgaged property and personal decree against the property.

A fresh decree under O. 34, R. 6 is unnecessary if the decree passed is both a decree for sale of the mortgaged property and a present decree against other property of the judgment-debtor. AIR (Vol 1) 1914 Oudh 245 : 17 OC 153 : 25 Ind Cas 121 (DB).

——O. 34, R. 6 — Combined decree — Personal remedy — Remedy against property.

There is no absolute rule preventing a mortgagee from obtaining a decree comprising both an independent personal remedy and remedies against the mortgaged property. And in such a case the decree-holder is entitled to enforce the personal remedy before applying for enforcement of the decree against the mortgaged properties. (1910) 4 SLR 244: 10 Ind Cas 975 (DB).

——O. 34, R. 6 — Combined decree — T. P. Act, Ss. 88, 89 and 90.

The proper procedure to follow in mortgage suits is to postpone the consideration of the plaintiffs' right to sell defendants' properties, other than the mortgaged property until the need for it has actually arisen. But the Court is not incompetent to decide that question in the first instance in the suit itself and any finding come to thereon will bind the parties. (1909) 32 Mad 534: 5 MLT 246: 4 Ind Cas 1120 (DB).

——O. 34, Rr. 6, 4 (Ss. 90, 88, T. P. Act) — 'Res-judicata' — Personal decree with a decree for sale — Application for personal decree dismissed — Execution of original decree against person.

Where a combined decree under Ss. 88 and 90 of the T. P. Act has been passed, it is not necessary to apply for a personal decree after the sale of the hypothecated property. If such an application is made, any order passed on that is without jurisdiction and cannot supersede the decree as originally made and cannot operate as a bar to the decree being executed. (1906) AWN 251: 3 ALJ 606: 29 All 12 (13) (DB).

8. Construction.

——O. 34, R. 6 — Personal decree — Need for proving prior application under R. 5 (2) of O. 34.

An application for a personal decree under O. 34, R. 6, C. P. Code, is not maintainable unless a sale in pursuance of the preceding rule has as a matter of fact taken place. The expression "any such sale" in R. 6 has reference to R. 5, sub-r. (2). Case-law discussed. 7 OWN 744: AIR (Vol 17) 1930 Oudh 377 (FB).

——O. 34, R. 6 reproduces the effective portion of the old S. 90, T. P. Act and the words used in decree form No. 4 in Appx. D are intended to give effect to O. 34, R. 6. 123 Ind Cas 215: 6 OWN 969: AIR (Vol 17) 1930 Oudh 10 (DB).

——O. 34, R. 6 — Personal liability — "Do pay."

Where a mortgage decree directs that defendants "do pay" they are prima facie personally liable. (AIR (Vol 6) 1919 Mad 1117: (1918) MWN 146: 7 LW 36: 43 Ind Cas 871 (DB).

——O. 34, R. 6 — Combined decree — Application for personal decree — T. P. Act, S. 90.

A combined decree directing the mortgagors "do pay" any deficiency arising after the proceeds of sale are applied towards the mortgage amount, is irregular but not void. A 'fresh application under O. 34, R. 6, C. P. C., is unnecessary. AIR (Vol 5) 1918 Mad 607: 33 MLJ 543: (1917) MWN 845: 6 LW 675: 42 Ind Cas 282 (DB).

——O. 34, R. 6 — Combined decree — "Do pay" — Effect — Personal decree also.

If the words "do pay" are used in a mortgage decree the decree-holder can proceed against the person of the defendant even before bringing the mortgaged property to sale. AIR (Vol 1) 1914 Mad 170: (1914) MWN 152: 22 Ind Cas 293 (DB).

——O. 34, R. 6 — Personal liability — Beneficiaries.

The word "defendant" in R. 6 means the mortgagor defendant or his representatives only and not all persons benefited by the mortgage. (1910) 7 Ind Cas 784 (Cal) (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — Application for a personal decree against mortgagor — Limitation — Limitation Act, Sch. II, Art. 116.

The fact that there is no express personal covenant to pay the mortgage money is no bar to the mortgagee obtaining a personal decree under S. 90 of the Transfer of Property Act, against the mortgagor if the requirements of the section are otherwise fulfilled: a personal covenant to pay is implied in and is an essential part of every simple mortgage. 11 Bom 475, not foll.

Held also, that on an application under S. 90 it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. (1908) 1908 AWN 161: 5 ALJ 670: 30 A 388 (389) (DB).

——O. 34, R. 6 (T. P. Act, S. 90) — 'Such sale'.

The words 'such sale' referred to in S. 90, T. P. Act, mean a sale of property directed to be sold by the decree under S. 88 and the order absolute under S. 89. Hence where the property mortgaged was malikana rights in certain zemindari, but by mistake the decree directed the sale of the zemindari which was sold.

Held that the provisions of S. 90 were complied with and the decree-holder was entitled to a personal decree. (1906) 1906 AWN 205 : 28 All 674 (675): 3 ALJ 465 (DB).

——O. 34, Rr. 6, 5 (Ss. 90, 89, T. P. Act) — "Such sales," meanings of — Sale of portions of the mortgaged property — Relinquishing a substantial portion thereof.

Prima facie, "such sale" in S. 90 means the sale of the whole of the mortgaged property. Where the mortgagee released from his charge a substantial portion of the mortgaged property in the hands of purchasers on receipt of a portion of his debt which did not appear to be the true and full value of the property in their hands without the consent of the mortgagors and after the sale of the properties in the hands of the mortgagors, applied for a personal decree under S. 90.

Held that the application cannot be executed. (1906) 10 CWN 862: 33 Cal 890 (892) (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — "Legally recoverable" — Mortgage deed — When personal covenant to pay to be understood.

Per Mukerjee J.: In determining whether the balance is "legally recoverable" before a decree is passed under S. 90, it has to be ascertained, whether the intention of the parties as evidenced by the terms of the document, was that the money shall be paid only out of the hypothecated property and not from the general estate of the debtor.

Where there is in a mortgage nothing to the contrary, there is an implied promise to pay presumed in law from the fact of the acceptance of the loan. Although a mere recital of a debt may not be, by itself and apart from the context sufficient to imply a contract to pay and thus create personal obligation, a provision in the mortgage deed that the money will be repaid on a certain day, imports a covenant for repayment on that day for the breach of which an action would lie against the mortgagor, the judgment in which action would be satisfied out of his general property.

A decree-holder-mortgagor who has purchased the mortgaged premises after obtaining leave to bid at the sale is in the same position as an independent purchaser and is only bound to give credit to the mortgagees for the actual amount of his bid. (1906) 4 CLJ 246 (249, 250).

See also (1906) 10 CWN 862 : 33 Cal 890 (892) (DB).

——O. 34, Rr. 6, 7, 8 (T. P. Act, Ss. 90, 92, 93) — Prior and subsequent incumbrances — Redemption of mortgage — Execution of decree.

A puisne mortgagee of certain property sued the prior mortgagees for redemption. A decree was passed for redemption or sale. The plaintiff did not pay the amount decreed, and the property was sold, but it failed to realize the amount of the debt and costs due to the prior mortgagees.

Held, that the decree so far as it affected the puisne mortgage not being a personal decree, the prior mortgagees could not recover the balance of the amount decreed by arrest of the puisne mortgagee. S. 90 could not be construed so as to make it applicable to the present case. (1902) AWN 73: 1 ALJ 250: 26 All 507 (508) (DB).

9. Costs.

——O. 34, R. 6 — In a suit by a mortgagee against the mortgagor, costs in favour of mortgagee do not have priority over the actual mortgage debt. AIR (Vol 18) 1931 Rang 153 : 9 Rang 186: 133 Ind Cas 225.

——O. 34, R. 6 — Until it is found that the costs cannot be realised by sale of such property it cannot be realised personally under R. 6. AIR 1925 All 68; AIR 1926 All 722, Diss. from. 122 Ind Cas 783: 7 OWN 398 : AIR (Vol 17) 1930 Oudh 328 (DB).

——O. 34, R. 6 — An order directing the unsuccessful appellants to pay costs of the appeal is merely a formal compliance with the provisions of the Code and is not intended to be directed for the recovery of costs personally from the judgment-debtor. 93 Ind Cas 223: AIR (Vol 13) 1926 All 343.

——O. 34, R. 6 — Personal liability — Costs.

An unsuccessful appellant mortgagor must in any event personally pay the costs of appeal, but the mortgagee can also add it to the security. AIR (Vol 6) 1919 All 297: 41 All 473: 17 ALJ 582 : 50 Ind Cas 730 (DB).

——O. 34, R. 6 — Casts — Personal liability.

The costs under a decree for sale on foot of a mortgage are a part of the mortgage debt and are recoverable from the mortgaged property and not personally from the debtor unless the decree so directs. If the property proves insufficient, the mortgagee may apply for a personal decree. AIR (Vol 3) 1916 Pat 1: 2 Pat LJ 51: 38 Ind Cas 214 (DB).

——O. 34, R. 6 — Costs — Personal decree — Mode of execution.

A mortgage decree-holder can realize his decree for costs otherwise than by proceeding under S. 90, T. P. Act, if the Court has passed a personal decree for costs. (1912) 16 CWN 731: 15 Ind Cas 23 (DB).

——**O. 34, R. 6 — Costs — Right of mortgagee to personal decree for costs.**

Under O. 34, R. 6, the successful mortgage is entitled to a personal decree for costs when the mortgaged property has been sold and found insufficient. (1912) 12 MLT 312: (1913) MWN 139: 17 Ind Cas 244 (DB).

——**O. 34, R. 6 (S. 90, T. P. Act) — Execution for costs — Mortgage decree — Order for sale — Costs — Costs if can be recovered from the mortgagor personally — Transfer of Property Act, S. 90.**

The costs awarded by a decree directing the sale of mortgaged property form part of the mortgage-decree and the decree-holder must proceed to recover the costs by a sale of the mortgage property in the first instance, and it is only when the mortgaged property is found to be insufficient to satisfy the decree that the decree-holder can proceed against the other properties of the mortgagor in the manner provided by S. 90 of the Transfer of Property Act. (1908) 12 CWN 364: 35 Cal 431 (433): 8 CLJ 152 (DB).

——**O. 34, R. 6 (S. 90, T. P. Act) — Mortgage — Prior and subsequent mortgagees — Costs recoverable from puisne mortgagees.**

A prior mortgagee in a suit upon his mortgage prayed for an order for costs against a puisne mortgagee personally. No such order was contained in the decree passed under S. 88 of Act No. IV of 1882.

Held, that the prior mortgagee was not entitled to a decree under S. 90 of the T. P. Act against the puisne mortgagee for the amount of the costs. (1901) 1901 AWN 131: 23 A 439 (441) (DB).

10. Execution against other property.

——**O. 34, R. 6 — Final mortgage decree — No personal decree obtained — Mortgagee's application for sale of properties other than those mortgaged.**

In execution of a final mortgage decree, the mortgagee brought to sale the property which had been mortgaged in his favour but failed to obtain any personal decree by making an application under O. 34, R. 6, Civil P. C. He, however, proceeded to apply for attachment and sale of the other property of the judgment-debtor without obtaining any personal decree. Certain other properties of the judgment-debtor were attached on the basis of the applications so made and a small sum was realized by the decree-holder without any objection being raised for about six years.

Thereafter, while the proceedings relating to the mustajri of certain land were going on, the judgment-debtor raised an objection that the execution proceedings subsequent to the sale of the mortgaged properties were null and void as no personal decree had been obtained under O. 34, R. 6. The final decree, however, which had been passed, confirmed the preliminary decree and that decree stated that it was open to the plaintiff to apply for a personal decree if the mortgage charge was not satisfied by the sale of the mortgaged properties:

Held, that the principle of constructive res judicata applied to execution proceedings, and on that principle, the judgment-debtor was debarred from raising the objection.

Held, also that the mortgagee's application for the attachment of the other properties of the judgment-debtor could not be considered to be an application for the passing of a personal decree under O. 34, R. 6. There was nothing in the application of the decree-holder to bring to the notice of the Court that all the properties which had been mortgaged had already been sold and that the decree-holder wanted to proceed against other properties of the judgment-debtor. The Court had, therefore, no occasion to apply its mind to the points which would require consideration for the decision of an application under O. 34, R. 6. AIR (Vol 28) 1941 Lah 171 : 43 PLR 60 : 195 Ind Cas 288.

——O. 34, R. 6 — Where a sult on mortgage is brought against the father and sons and is decreed against father alone being dismissed against sons and then the partition takes place, the son's share cannot be taken in execution of a personal decree against the father under O. 34, R. 6, Civil P. C., obtained subsequent to such partition even if the debt incurred by the father was neither for illegal nor for immoral purpose. AIR (Vol 25) 1938 Nag 24: ILR (1938) Nag 136 : 174 Ind Cas 621 (DB).

——**O. 34, R. 6 — Waiver — Sale proclamation — Objection to decree not raised but time for raising money asked — Time granted — Execution, whether can be subsequently questioned on ground that there was no decree.**

The decree-holders proceeded to execute the decree against the mortgaged properties and also against the personal properties at one and the same time. The Court first proceeded against the mortgaged properties which were sold and the sale confirmed. It was then that the sale proclamation against the other properties of the judgment-debtor was issued. The judgment-debtor applied for time in order to enable him to raise money and waived his rights of the issue of a fresh sale proclamation. But subsequently he contested that there was no decree:

Held, that the judgment-debtor on a previous occasion never took exception to the execution on the ground that there was no decree. He waived his right to a fresh sale proclamation and on that understanding, took time from the Court. He could not subsequently turn round and question the execution on the ground that there was no decree. AIR (Vol 23) 1936 Pat 568: 15 Pat 345: 17 PLT 540: 3 BR 48: 165 Ind Cas 561 (DB).

——O. 34, R. 6 — Before the person and other property of the judgment-debtor can be proceeded against, the decree-holders must obtain a decree under R. 6. AIR (Vol 23) 1936 Pesh 71: 161 Ind Cas 633.

——**O. 34, R. 6 — Family properties.**

To apply for relief against the family properties of the sons of the mortgagor is an incidental right possessed by the decree-holder as incidental to the personal decree that may be given against their father mortgagor. (1934) 1934 MWN 1273.

——**O. 34, R. 6 — Attachment under O. 38, R. 5 before sale and deficiency can be ordered.**

Where mortgage decree for sale of property mortgaged provides also that if the sale proceeds are insufficient to satisfy the decree, the decree-holder shall be at liberty to proceed against the person of his judgment-debtor. Court can order attachment of his other property under O. 38, R. 5, even before the sale takes place and the proceeds are found insufficient. 118 Ind Cas 446 : AIR (Vol 16) 1929 Lah 402.

——**O. 34, R. 6 — Personal remedy is not open till a decree under R. 6 is passed.**

Under the present Code in the case of a mortgage preliminary decree is passed under R. 4 of O.

34. If the mortgagor-defendant does not pay into Court the amount mentioned in the preliminary decree within the time fixed in the decree a final decree for sale has to be passed under R. 5 and if the proceeds of the sale of the mortgaged property are not sufficient to cover the decree amount, a personal decree for the balance has to be passed under R. 6. It is the decree that is passed under R. 6 that is executable against the mortgagors personally. In the absence of a decree under R. 6 the mortgagee is not entitled to proceed against the property of the mortgagors other than those covered by the mortgage. 93 Ind Cas 99 : 1926 MWN 143 : AIR (Vol 13) 1926 Mad 415: 50 MLJ 39 (DB).

——O. 34, R. 6 — Law before and after T. P. Act.

In respect of execution against property other than that on which a charge is declared, the decree passed before T. P. Act stands on the same footing as a simple mortgage of that property executed prior to the passing of the Transfer of Property Act. Under the Transfer of Property Act if it had been passed after that Act came into force, it could be enforced against property other than that charged subject to the one condition created by that Act that the charged property had been exhausted. But where the decree was passed before that Act came into force, that is before that one condition was imposed, it could be executed as an ordinary decree for the payment of money without the fulfilment of that condition. 89 Ind Cas 931: AIR (Vol 13) 1926 Nag 168.

——O. 34, R. 6 — Position of secured creditor of Hindu widow.

The secured creditor of a Hindu widow, on the security proving insufficient to satisfy his decree thereon is entitled to proceed against the other properties. 85 Ind Cas 963 : 6 LRA Civ 87: AIR (Vol 12) 1925 All 352.

——O. 34, R. 6 — Maintenance deed — Execution application under R. 6 unnecessary.

Where maintenance is awarded to a Hindu widow by a decree which charged specific properties for its payment, the decree may be executed against other properties in the event of the exhaustion of the charged ones, provided that the other properties sought to be proceeded against belonged to the widow's husband. No application under O. 34, R. 6, Code of Civil Procedure, is requisite. 74 Ind Cas 867: 2 Pat 796 : AIR (Vol 11) 1924 Pat 262 (DB).

——O. 34, R. 6 — Inability to sell mortgage property.

A mortgage decree was obtained in respect of three properties one of which was situated in British territory and the other two in a Native State. The decree-holder executed the decree and sold the property situated in British territory, but the price fetched by the sale of this property was not sufficient to satisfy the entire decretal amount. At his instance the decree was transferred to the Native State for execution but the Superintendent of that State refused to execute the decree as it was of a Court in British India. The decree-holder therefore made an application for a personal decree under O. 34, R. 6, of the Code of Civil Procedure.

Held, that decree-holder was entitled to a personal decree under O. 34, R. 6 and simply because the decree as it stood enabled the decree-holder to proceed against the mortgagee personally, it was not necessary to dismiss the application for a decree under O. 34, R. 6. 61 Ind Cas 635: 6 PLJ 106 : 2 PLT 736 : AIR (Vol 8) 1921 Pat 49 (DB).

——O. 34, R. 6 — Personal liability.

A decree-holder does not acquire any right over the other property of the judgment-debtor excepting the mortgaged one when in the decree on the mortgaged suit the direction of selling the property was held to cover only the dues after the default of payment of certain number of instalments was incurred. AIR (Vol 7) 1920 Bom 95: 22 Bom LR 953: 58 Ind Cas 377 (DB).

——O. 34, R. 6 — Notice — Decree remaining unsatisfied partly — Notice to judgment-debtor, whether necessary.

Where the Court has to decide whether the execution of the decree should proceed without a supplemental decree under O. 34, R. 6 of C. P. C. the order without notice to judgment-debtor, directing the execution to issue cannot be supported. AIR (Vol 7) 1920 Cal 533: 31 CLJ 382: 56 Ind Cas 801 (DB).

——O. 34, R. 6 — Right to personal decree-mortgaged properties not found saleable — S. 46, Chota Nagpur Tenancy Act — Mortgagee, if entitled to proceed against other properties.

Under the terms of a compromise decree in mortgage suit the amount was to be recovered from the mortgaged properties and if that should prove insufficient the balance would be recovered from the other properties of the mortgagor. The mortgaged properties were not saleable by reason of S. 46 of the Chota Nag. Ten. Act.

Held, that the mortgagee decree-holder was entitled to proceed against the other properties of mortgagor judgment-debtor in event of the mortgage being found invalid. At any time up to the sale the mortgagee can abandon his claim against the mortgaged property and ask for a personal decree and bring to sale the other properties of the mortgagor without first bringing to sale the mortgaged properties. 29 All 260; 14 Ind Cas 591, Not foll. AIR (Vol 6) 1919 Pat 365: (1919) Pat HCC 390 : 53 Ind Cas 922 (DB).

——O. 34, R. 6 — Right to personal decree — When entitled to proceed against properties other than mortgaged property.

A holder of a mortgage decree cannot proceed against other properties than the mortgaged property unless the judgment-debtor has no saleable interest in that property. A mortgage decree directing payment by a certain date and ordering in default sale of the mortgaged property is a personal decree, so that the person and other property of the judgment-debtor can be proceeded against without obtaining a decree under O. 34, R. 6 of the C. P. C. AIR (Vol 2) 1915 Mad 452: 38 Mad 677 : 15 MLT 232 : 23 Ind Cas 515 (DB).

——O. 34, R. 6 — Personal liability — Restriction on — Whether valid.

A Court cannot direct in a mortgage decree that no property other than the mortgaged property shall be proceeded against. The question whether other property can be proceeded against should be left to be determined in an application if any made under O. 34, R. 6 of the C. P. C. 23 Ind Cas 389 : AIR (Vol 1) 1914 Cal 214.

——O. 34, R. 6 — Personal liability — Extent of.

A relief claimed, under O. 34, R. 6, C. P. C., against a defendant includes a relief against any property in his possession. AIR (Vol 1) 1914 Oudh 333 : 1 OLJ 742 : 18 OC 55 : 27 Ind Cas 72 (DB).

——O. 34, R. 6 — Right to personal decree — Hypotheca to be sold — Execution against other properties of mortgagor, when permissible.

A mortgage decree-holder cannot be allowed to execute his decree against other properties of the mortgagor before exhausting the mortgaged

properties and without obtaining an order under S. 90, T. P. Act. (1913) 17 CWN 1039 : 20 Ind Cas 829.

——O. 34, R. 6 (T. P. Act, S. 90) — Mortgage decree for sale — Half of mortgaged property exempted from sale on suit by third party — Remainder insufficient to satisfy mortgage debt.

A mortgagee held a decree for sale and order absolute. Before the sale a third party had established his title to one half of the mortgaged property. The decree-holder brought to sale the remaining half of the property covered by this decree, but the amount realized proved insufficient to satisfy the mortgage debt.

Held, that under such circumstances, there was no bar to the decree-holder obtaining a decree over against the unhypothecated property of the mortgagor under S. 90, T. P. Act. (1903) 1903 AWN 179 : 26 All 25 (27).

——O. 34, R. 6 (S. 90 T. P. Act) — Mortgage — Decree on — Pro tanto satisfaction of the decree from the sale proceeds of the mortgage property — Personal decree — Right of mortgagee to proceed on other properties of the mortgagor.

In equity it would be impossible to give effect to the contention that because the mortgage lien has been satisfied pro tanto, the decree-holder is not entitled to proceed against the other properties of the mortgagor for the balance of the decree. This is the necessary result of a personal decree, under S. 90. (1900) 28 C 12 (16, 17) : 4 CWN 735 (DB).

11. Ex parte decree.

——O. 34, R. 6 — Setting aside ex parte decree — Inherent power.

Where an ex parte decree under O. 34, R. 6 was passed by oversight against a person who was not a mortgagor.

Held, that the Court had inherent judisdiction to set aside the decree. 2 PLT 251 : (AIR Vol 8) 1921 Pat 491 : 60 Ind Cas 368.

——O. 34, R. 6 — Personal decree — Ex parte — Liability of.

Personal decree under S. 90 of the T. P. Act obtained without informing Court of previous refusal to grant such decree cannot be set aside as fraudulent. AIR (Vol 2) 1915 All 397: 38 All 7: 13 ALJ 901 : 30 Ind Cas 792 (DB).

12. Limitation.

(a) General.
(b) Starting point.

(a) General.

——O. 34, R. 6 — Application for personal decree — Limitation.

The period of limitation for an application by the plaintiff for a personal decree under O. 34, R. 6 is three years from the date of the confirmation of the sale. AIR (Vol 33) 1946 Cal 65: 49 CWN 638.

——O. 34, R. 6 — Mortgage-debt subsisting but personal remedy in respect of principal barred by limitation — Covenant to pay interest independent of covenant to pay principal — Mortgagee can get personal decree for interest for period of six years preceding suit for sale — Limitation Act (1908), Art. 116.

If the stipulation for payment of interest in a mortgage-deed does not constitute an independent agreement, and is no more than a part of the contract for the payment of the principal, the mortgagee cannot get a personal decree for the recovery of the interest, even for the period of six years preceding the suit, in a case where his suit for the enforcement of the personal remedy in respect of the principal is barred by time at the time of the institution of the suit.

There being one contract from which the liability for the principal and the interest arises, the cause of action arising from the breach of contract is not divisible or severable and the time of the recovery of both principal and interest must be deemed to begin to run from the date when the breach takes place. If the covenant for payment of interest is an independent and separate agreement, the breach of such covenant will give rise to a separate cause of action, independently altogether of the cause of action arising on a breach of the covenant for the payment of the principal.

A suit instituted within six years of such breach will obviously be within time, in view of the language of Art. 116, Lim. Act, and cannot be held to be barred by limitation, merely because an action for compensation for breach of another independent covenant has become time-barred. The mortgagee is entitled to a personal decree for recovery of such interest even though he has no subsisting right to get a personal decree for the recovery of the principal.

This is, however, subject to the proviso that the mortgagee is not entitled to any relief in respect of interest falling due after the mortgage debt itself has become irrecoverable, because, in that event, his suit for sale itself will be liable to dismissal as barred by time and no occasion will arise for him to apply for a personal decree under O. 34, R 6, Civil P. C. AIR (Vol 33) 1946 Lah 97: 47 PLR 358: ILR (1945) Lah 355: 224 Ind Cas 135.

——O. 34, R. 6 — Equitable mortgage — Personal remedy.

A promissory note was given for the mortgage-debt on the same day when an equitable mortgage was created. Three years later, a fresh promissory note was executed by the mortgagor for the balance due on the loan. Subsequently, the mortgagee instituted a suit on the mortgage. In execution of the decree, he got the property sold. But the sale proceeds being insufficient, he filed an application for a personal remedy :

Held, that no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgage-debt. There was one cause of action only which accrued upon the date of the mortgage transaction and the suit having been filed more than three years after the mortgage transaction, the personal remedy was barred, the right to this remedy being part of the original transaction. AIR (Vol 25) 1938 Rang 134: 1938 Rang LR 6: 177 Ind Cas 63 (DB).

——O. 34, R. 6 — Where a suit was filed after six years from the date on which the mortgage debt was agreed to be paid, it was clearly time-barred. (1937) 20 NLJ 42.

——O. 34, R. 6 — Sale by A to B on February 5, 1924 — Kobala reciting payment of full consideration — Suit by A on April 25, 1925 for declaration that the sale deed was fraudulent and that no consideration passed — Suit dismissed also holding that part of consideration passed — Suit by A on August 28, 1928 for enforcement of statutory charge for unpaid purchase-money — Decree for sale of property for unpaid purchase-money — Only portion of amount realised — Application under O. 34, R. 6 for balance — Suit, held governed by Art. 111 and not Art. 116 and hence application barred. AIR (Vol 24) 1937 Pat 44: 15 Pat 753: 3 BR 191: 18 PLT 176: 166 Ind Cas 599 (DB).

——O. 34, R. 6 — An application for personal decree under O. 34, R. 6, Civil P. C. is governed by Art. 116 and not by Art. 66, Lim. Act. AIR (Vol 20) 1933 Cal 268: 36 CWN 117: 143 Ind Cas 472 (DB).

——O. 34, R. 6 — The personal remedy can be enforced on the basis of a registered deed within six years under Art. 116, Lim. Act; AIR 1926 PC 56 held to be no direct authority for contrary view. AIR (Vol 17) 1930 All 69: 123 Ind Cas 321: 1929 ALJ 1294 (FB).

——O. 34, R. 6 — Principal barred — Recovery of interest personally is possible.

Even where the mortgagee's claim for the principal amount is barred, the mortgagee is not debarred from recovering from the mortgagors personally the interest which accrued during the six years immediately preceding the institution of the suit. AIR (Vol 17) 1930 Lah 737.

——O. 34, R. 6 — Mortgage suit — Confession of judgment — Personal remedy — Bar of limitation cannot be raised.

Where a suit was brought in 1924 to recover money secured under a mortgage of 1915 from the mortgaged property as well as from mortgagor personally and defendants confessed judgment.

Held, they could not after the sale proceeds were found insufficient and mortgagee applied for personal remedy be allowed to raise the issue of limitation. AIR (Vol 15) 1928 Lah 653: 111 Ind Cas 808 (DB).

——O. 34, R. 6 — Principal barred — Recovery of interest personally is possible.

Even where the mortgagees claim for the principal amount is barred, the mortgagee is not debarred from recovering from the mortgagors personally the interest which accrued due during the six years immediately preceding the institution of the suit. AIR (Vol 15) 1928 Lah 653: 111 Ind Cas 808 (DB).

——O. 34, R. 6 — Where a person executes two deeds of simple mortgage in respect of one and the same property in favour of the same person at different times and promises to repay the amount under the later deed along with that due under the earlier deed, the cause of action for the money due under later deed is merged into the cause of action under the earlier deed and if more than 6 years elapse after the accrual of the cause of action on the earlier deed a claim under O. 34, R. 6, C. P. Code, becomes barred by limitation. AIR (Vol 13) 1926 Oudh 336: 13 OLJ 147: 95 Ind Cas 486.

——O. 34, R. 6 — Limitation — Personal decree.

A personal decree under O. 34, R. 6 can be passed within 6 years of the date provided in the mortgage bond for payment. AIR (Vol 6) 1919 All 226: 17 ALJ 647: 1 UP LR (HC) 73: 50 Ind Cas 640 (DB).

——O. 34, R. 6 — Limitation — Decision — Res judicata.

No application under S. 90, T. P. Act can be made, after the parties have obtained a Court's decision as to whether a claim for personal decree is within time. In granting a supplementary decree the Court has to consider not whether the application under S. 90 is barred but whether the personal remedy was barred. The application under S. 90 of the T. P. Act is barred if brought 3 years after the sale is confirmed. AIR (Vol 3) 1916 Nag 1: 13 NLR 76: 39 Ind Cas 854 (DB).

——O. 34, R. 6 — Limitation — Limitation Act, Art. 181.

An application under O. 34, R. 6, C. P. C. is governed by Art. 181 of the Limitation Act. A Court cannot pass a decree under this rule without an application by the plff. and on such application being made, the Court has first to decide whether there is a personal covenant to pay and then whether the claim to enforce such covenant is within time. 42 Cal 294, Diss. AIR (Vol 3) 1916 Nag 1: 13 NLR 76: 39 Ind Cas 854 (DB).

——O. 34, R. 6 — Limitation — Personal covenant — Decree on.

Where there is a covenant to pay a mortgage debt on a particular date the mortgagee is entitled to a personal decree, even though the covenant for payment is followed by a direction that in default of payment the debt may be recovered from the hypothecated property. An application for a personal decree may be made even after 6 years from the date of bond provided the suit has been filed within six years from the date of the bond. AIR (Vol 3) 1916 Mad 13: 2 LW 66: 27 Ind Cas 770 (DB).

——O. 34, R. 6 — Limitation.

Art. 181 of the Limitation Act does not apply to an application either under R. 6 or to R. 2 of O. 34, C. P. C. AIR (Vol 2) 1915 Cal 725: 42 Cal 294: 30 Ind Cas 719 (DB).

——O. 34, R. 6 — Limitation — Limitation Act, Arts. 181 and 182 — Application for personal decree.

An application to make a personal decree against the mortgagor is not an application for execution of the decree. Art. 181 applies to such application and not Art. 182. (1913) MWN 867: 21 Ind Cas 530 (DB).

——O. 34, R. 6 — Limitation — Lim. Act, Art 181.

An application under O. 34, R. 6 must be treated as an application in execution proceedings to which Art. 181 of the Limitation Act would apply. (1911) 10 Ind Cas 21 (Oudh).

——O. 34, R. 6 — Limitation — Mortgage — Personal remedy — Plaint not in accordance with law.

The plaintiff sued to recover the amount due under a mortgage deed, a decree was passed in his favour against the mortgaged property but the amount realised by the sale of the property being insufficient to satisfy the decree, the plaintiff applied under S. 90 of the T. P. Act for a further decree against the other property of the mortgagor.

The Subordinate Judge found that the claim was time-barred. An appeal was then preferred to the District Court on the ground, that within six years a sum of Rs. 200 was paid by the mortgagors as interest on the mortgage debt and therefore the plaintiff's present claim was not barred and the plaintiff should have been allowed an opportunity of proving the payment of interest. The plaint merely stated that Rs. 200 were received and did not give any date or the account on which they were paid.

Held, the claim was barred by limitation. (1910) 34 Bom 540: 12 Bom LR 531: 7 Ind Cas 455 (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — Limitation — Art. 178 not applicable.

In making a supplemental decree under S. 90, T. P. Act the Court has to consider if any question of limitation arises, whether the personal remedy was barred at the date of the institution of the suit and not whether it would be barred at the date of the application under S. 90, Art. 178 of Sch. II of the Limitation Act does not apply to an application under S. 90, T. P. Act. 22 C 924, foll. The mortgage suit having in this case been brought within the period of limitation provided by Art. 119 of Sch. II of the Limitation Act:

Held, that the application under S. 90, T. P. Act was not barred though made more than three years after the date of the decree for sale. (1907) 6 CLJ 119 (121, 122) : 34 Cal 672 : 11 CWN 674 (DB).

(b) Starting point.

——O. 34, R. 6 — Limitation — Personal decree — Execution — Starting point of limitation.

See AIR (Vol 37) 1950 Pat 491.

——O. 34, R. 6 — Where, in execution of a final decree for sale on a mortgage, the property was sold for a smaller amount than the debt and the order of confirmation of sale was affirmed in appeal and

the mortgagee applied for personal decree under O. 34, R. 6, Civil P. C.:

Held, that Art. 181, Limitation Act, governed the application and limitation ran from date on which it was finally decided by Appellate Court that sale should stand. AIR (Vol 24) 1937 All 285: (1937) ALJ 135: 1937 AWR (HC) 103: ILR (1937) All 481: 168 Ind Cas 673 (DB).

——O. 34, R. 6 — Remedy given of foreclosure — Limitation.

Where the mortgage-deed does not contain a condition of foreclosure, the contract to repay the borrowed money and the contract that certain property should be charged as security for that re-payment can be regarded as separate contracts and it is open to the plaintiff to sue on the contract to repay. Where the only remedy expressly given is that of foreclosure, that is by necessary implication no covenant of personal liability. In such a case the period of limitation would run from the date of execution and a suit for the recovery of the money will have to be brought within three years. (1936) 163 Ind Cas 961: 18 NLJ 291.

——O. 34, R. 6 — Time for application for personal decree runs from Appellate Court's order — Limitation Act (IX of 1908), Sch. I, Art. 181.

The decree-holder in a mortgage suit cannot apply for a personal decree under O. 34, R. 6, until the sale has become absolute. Where there has been an appeal from the order dismissing the judgment-debtor's application for setting aside the sale, the starting point of limitation for the right to apply under O. 34, R. 6, is the date of the Appellate Court's order and not the date of confirmation of the sale in the lower Court. AIR (Vol 22) 1935 Mad 640: (1935) MWN 594: 42 MLW 518: 166 Ind Cas 828 (DB).

——O. 34, R. 6 — Under terms of a mortgage deed, the principal sum was to be paid in eight years and stipulated interest every month. It was also provided that if interest for one full year remained unpaid, the mortgagee was at liberty to recover principal and interest and compound interest without waiting for the expiry of the stipulated period. Interest not being paid there was a default at the end of the year. The mortgagee brought a suit for the recovery of the amount due within six years from the date of the expiry of the stipulated period and obtained a decree. The property was brought to sale but the sale proceeds being insufficient, the mortgagee applied for a simple money decree for the balance under O. 34, R. 6, Civil P. C.:

Held, that the time began to run on the date after the expiry of the stipulated period and not after the expiry of one year within which the mortgagor made continued default in payment of interest; that Art. 116, Limitation Act, read with Art. 80, governed the case, and the suit was in time. AIR (Vol 21) 1934 All 397: (1934) ALJ 261: 56 All 954: 3 AWR (HC) 431: 148 Ind Cas 951 (FB).

——O. 34, R. 6 — Limitation Act (IX of 1908), Sch. I, Art. 181 — Application for personal decree — Limitation — Accrual of cause of action.

An application for a personal decree under O. 34 R. 6, is governed by Art. 181, Lim. Act, and the right to apply accrues, not from the actual date of sale, but when the sale is confirmed under O. 21, R. 92, after hearing objections. But once the right accrues, time begins to run and the uncertainty caused by an appeal or other proceedings taken, is not itself sufficient to suspend the operation of the Statute or to entitle the plaintiff to get a deduction. AIR (Vol 18) 1931 Cal 166: 52 CLJ 531 and 56 CLJ 517: 35 CWN 231: 58 Cal 74: 130 Ind Cas 815 (DB).

——O. 34, R. 6 — Limitation to be decided after insufficiency.

The proper stage for deciding whether the personal remedy of the plaintiff mortgagee is barred, is after the net proceeds of the sale have been found to be insufficient to pay the decretal amount so so long as this has not been ascertained no question for the passing of the personal decree really arises. AIR (Vol 17) 1930 All 69: 123 Ind Cas 321: 1929 ALJ 1294 (FB).

——O. 34, R. 6 — Original suit for relief on personal covenant in time — No bar at all for an application under R. 6.

In pursuance of a morgage decree, mortgaged property was sold, but the net proceeds of the sale were found to be insufficient to pay the amount due under the decree. Steps were taken to get a decree prepared under O. 34, R. 6, for the balance of the amount decreed to be recoverable from the judgment-debtor otherwise than out of the property sold. The suit on mortgage was within time for the relief on personal covenant.

Held, that the decree, which was being sought to be passed must be treated to be a supplementary decree in the suit which was originally brought by the mortgagee, and no question of limitation arose. AIR (Vol 16) 1929 Oudh 59: 5 OWN 1094: 114 Ind Cas 769: 4 Luck 237 (DB).

——O. 34, R. 6 — Mortgage sale set aside — Mortgage can apply under starting point date of refund.

Where after sale of mortgaged property in execution of mortgage decree, the sale is set aside and mortgagee is required to refund the proceeds to the purchaser he can apply under R. 6, as the proceeds in such a case are nil and therefore insufficient, and the time for making such application is three years from the date on which the mortgagee refunded the purchase money to the purchaser. AIR (Vol 14) 1927 All 395: 25 ALJ 485: 100 Ind Cas 775: 49 All 506 (DB) .

——O. 34, R. 6 — After passing a preliminary decree in a mortgage suit the Court appointed a Receiver to sell the mortgaged properties. The proceedings of the Receiver were slow and the deed of conveyances were not executed till long after the settlement of the terms of the sale in favour of the mortgagee-decree holder.

Held, application for balance was not barred by Art. 181. Time did not begin to run till the deed of conveyance had been executed. AIR (Vol 10) 1923 All 203: 79 Ind Cas 85: 21 ALJ 37: 4 LRA Civ 73 (DB).

——O. 34, R. 6 — Time for suit on a personal covenant to repay the debt in a mortgage runs from the expiry of the term fixed for redemption. But where the mortagee enjoys the usufruct in lieu of interest, time runs from the last year when he enjoys such usufruct. AIR (Vol 8) 1921 Bom 437: 63 Ind Cas 234: 45 Bom 1206: 23 Bom LR 529 (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — Mortgage bond payable by instalments — Suit instituted more than six years after default.

Where a mortgage bond was payable by instalments in default of any of which the creditor could enforce the whole bond and the instalments were not paid, but no suit was brought within six years of default of payment of instalments. Held that the creditor was not entitled to a decree under section 90 of the T. P. Act if the proceeds of sale proved insufficient.

Held, that the bond in question was a bond payable by instalments within the meaning of Art. 75 of the Limitation Act XV of 1877. (1906) 1906 AWN 193 (193): 3 ALJ 463 (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — Limitation Act, Sch. II, Art. 178 — Limitation — Decree improperly

directing sale of non-hypothecated property — Amendment of decree — Terminus a quo for limitation in respect of an application under S. 90 of the Transfer of Property Act.

The decree granted to a successful plaintiff in a suit for sale upon a mortgage by mistake directed the sale of certain property of the judgment-debtor which was not covered by the mortgage in suit. Under this decree the mortgaged property was brought to sale and subsequently an application was made for the sale of the non-hypothecated property included in the decree. No objection on the score of the incorrectness of the decree, was taken at the time by the judgment-debtor; but two applications were made by the judgment-debtor for postponement of the sale and were granted. At a later date the judgment-debtor applied under section 206 of the Code of Civil Procedure for amendment of the decree by striking out of it the non-hypothecated property. This application was granted, and the decree limited to the hypothecated property, which had already been sold. The decree-holder thereupon applied for a decree under S. 90 of the Transfer of Property Act.

Held, that the period of limitation for such an application must, under the circumstances, be deemed to start from the time when the decree was amended. 1902 AWN 50 (51).

13. Omission to claim.

——O. 34, R. 6 — Res judicata.

It is no doubt the practice in mortgage suits to consider even at the preliminary stage the question whether the personal remedy against the mortgagor is barred or not, but the omission to consider it or the omission to provide for it in the preliminary decree will not operate as res judicata, because the proper stage for dealing with the question of personal liability arises only after the mortgaged property has been sold and the proceeds are found insufficient to satisfy the plaintiff's claim. Hence the omission to reserve the personal liability of the defendants in the preliminary decree does not preclude the plaintiff from claiming any relief against them under O. 34, R. 6. AIR (Vol 26) 1939 Mad 162: 48 MLW 758: (1938) MWN 1185: (1938) 2 MLJ 999: ILR (1939) Mad 223: 180 Ind Cas 236 (DB).

——O. 34, R. 6, S. 11, Expl. V — Plaintiff claiming personal decree — Defendant not denying — Court mentioning nothing regarding it in decree — Subsequent application.

Where the right of the plaintiff to obtain a personal decree had been decided, the parties will be bound by such decision. But if there has been no decision on the point even though the plaintiff had claimed for such a relief in the plaint, the plaintiff is not barred from claiming it under Expl. V, R. 11. Expl. V, would not apply unless the relief claimed was such as it was obligatory on a Court to grant. AIR (Vol 22) 1935 All 411: (1935) ALJ 279: 57 All 797: 1935 AWR (HC) 344: 157 Ind Cas 533 (DB).

——O. 34, R. 6 — Mortgage decree not fully satisfied — No suit for balance — Alienation of property by defendant — Suit for declaration that alienation is not binding on decree-holder — Court's discretion in granting relief.

A declaratory relief is always in the discretion of a Court. No suitor is entitled as of right to obtain a declaration that a certain alienation made by the defendant is invalid. It is possible that the plaintiff may not succeed in obtaining a decree under O. 34, R. 6, for the unsatisfied portion of his mortgage money. If he does not obtain such a decree, he will never have any interest in the validity of the sale-deed executed by the first defendant in favour of the second defendant. In the circumstances of such a case, the Court is not justified in exercising its discretion in granting the declaration that the alienation is not binding as claimed by the plaintiff. It is possible that if he does so obtain the decree and attaches the property covered by the sale-deed, the defendants may not object to the sale thereof for satisfaction of the plaintiff's claim, or if they do so object, their objection may be disallowed. No useful purpose will be served by granting a declaration at this stage. If the plaintiff later on obtains a decree under O. 34, R. 6 and attaches the property to which the sale-deed in favour of the second defendant relates, and an objection is taken under O. 21, R. 58, and if the same is allowed by the Court executing the decree, the plaintiff will have a good cause of action for a declaratory suit. AIR (Vol 21) 1934 All 1064: 4 AWR (HC) 818: 152 Ind Cas 360 (DB).

——O. 34, R. 6 — If a Court passes a composite decree combining a decree for sale and a personal decree, the decree is valid, and the personal decree though made at the time of the decree for sale operates at a future date when the sale takes place and fails to satisfy the mortgage debt. AIR (Vol 20) 1933 Oudh 529: 10 OWN (HC) 1087: 9 Luck 162: 147 Ind Cas 961 (DB).

——O. 34, R. 6 — Omission to claim personal decree — Mortgagee cannot sue therefore afterwards.

Where the cause of action is the failure to repay the principal and interest due under the bond and the relief claimable is both against the property hypothecated and against the executants of the bond on their covenant to repay, if the mortgagees omitted to sue for a personal decree against the mortgagors on the covenant, they could not afterwards sue for that which was omitted.

It is not usual or necessary to ask for a personal decree where the property is held liable for the whole of the principal debt and interest except in so far as the proceeds may be insufficient but it is quite open to the court to pass a decree against the mortgagors on their covenant to repay the whole if a part of the claim should be held not to be chargeable on the property. AIR (Vol 9) 1922 Pat 450: 66 Ind Cas 945: 1 Pat 506: 3 PLT 709 (DB).

——O. 34, R. 6 — Right to personal decree — Omission to proceed against portion of mortgaged property — Effect.

The mortgagee relinguishing a portion of the hypotheca is not entitled to a personal decree in as much as he has not exhausted his remedy in respect of all the items of the mortgaged property. Per Seshagiri Aiyar, J.— The personal remedy should be enforced only when there is a deficiency after sale of all the mortgaged property available for sale. AIR (Vol 7) 1920 Mad 221: 38 MLJ 93: 26 MLT 192: 9 LW 538: 51 Ind Cas 81 (DB).

——O. 34, R. 6 — Right to personal decree — Omission to sell hypotheca.

A Court had discretion to give or refuse the relief under O. 34, R. 6 to a person who is entitled to put the property to sale under a decree but who deliberately neglects to do so. The object of the rule requiring the mortgagee to completely sell the hypotheca before obtaining a personal decree is that the personal liability of the mortgagor should not be improperly increased.

It is not however the law that a personal decree cannot be obtained in any case where the whole of the property directed to be sold has not been sold

whatever the cause may be. If a portion of the hypotheca has since the date of the decree become destroyed or become not available for sale by the action of other claimants and not through the acts or default of the mortgagee, the latter can obtain a personal decree against the mortgagor. AIR (Vol 6) 1919 Cal 951: 45 Cal 702: 48 Ind Cas 322 (DB).

——O. 34, R. 6 — Right to personal decree — Omission of small portion of property in plaint — Effect of.

Where in a plaint in a mortgage suit a small portion of the mortgaged property was inadvertently omitted, the omission did not bar the mortgagee from applying under O. 34. R. 6. C. P. C. AIR (Vol. 4) 1917 Pat 555: 2 Pat LJ 538: 42 Ind Cas 56 (DB).

——O. 34, R. 6 — Right to personal decree — Laches.

If a person entitled to bring the property to sale under a decree neglects and allows a third person having no such right to sell a portion of the property, he cannot be allowed to come in afterwards under O. 34, R. 6. (1913) 20 Ind Cas 320 (All).

14. Personal decrees.

(a) General.
(b) Covenant.
(c) Right to.
(d) When passed.

(a) General.

——O. 34. R. 6 — Where property, the subject of a suit for sale on a mortgage, has ceased to be available for sale, owing to no fault of the mortgagee, the latter is entitled to a personal decree, the whole right to which the mortgagee has had all along, but which right has merely been suspended owing to the fact that his remedy against the mortgaged property was not yet shown to have been exhausted or to be otherwise unavailable. AIR (Vol 27) 1940 Pat 616: 6 CLT 37: 7 BR 231: 191 Ind Cas 599.

——O. 34, R. 6 — Equitable grounds.

Where a specific provision has been made by law prescribing the conditions in which a decree can be passed, the Court can act only within the limits laid down by such law. It is not justified in enlarging its powers by an appeal to equitable considerations.

Where, before the execution of a mortgage decree the son of the mortgagor judgment-debtor obtains a decree in his suit impugning the mortgage and the decree and the mortgagee decree-holder subsequently applies for a simple money decree under O. 34, R. 6, no simple money decree even on equitable grounds can be passed. AIR (Vol 25) 1938 All 98: (1937) ALJ 1181: 1937 AWR (HC) 1116: ILR (1938) All 148: 173 Ind Cas 729 (DB).

——O. 34, R. 6 — Properties not available.

The conditions under which a personal decree may be asked for, under O. 34, R. 6, are equally satisfied if the properties directed by the mortgage decree to be sold are no longer available. It will be most unreasonable to hold that the mortgagee decree-holders, before they can apply under O. 34, R. 6, must go through the farce of selling the mortgaged properties, though the properties have ceased to be available to them by reason of being sold in execution of a mortgage decree obtained by a prior mortgagee.

They can apply under R. 6, without doing so. The failure on the part of the mortgagee decree-holders to exercise the right of redeeming the prior mortgage, a right which they are not bound to exercise does not debar them from asking for a personal decree. AIR (Vol 25) 1938 Pat 525: 17 Pat 538: 5 BR 196: 179 Ind Cas 109 (DB).

——O. 34, R. 6, O. 9 R. 13, Ss. 47, 2, Cl. (2) — Two mortgage decrees — Property sold — Money realised applied towards satisfaction of second mortgage — Balance towards part satisfaction of first mortgage — Application for personal decree for balance.

The judgment-debtor executed two mortgages. The mortgagees under both these mortgages assigned their mortgagee rights to the decree-holder who brought separate suits on the basis of each of the two mortgages, and on March 29, 1930, preliminary decrees for sale were passed in both the suits. Both the decrees were made final on November 8, 1930. The decree-holder made separate applications for execution of both the decrees and they were sent to the Collector for sale of the mortgaged property. The sale was carried out and on August 12, 1932, the Collector reported to the Civil Court that a sum of Rs. 4,173-9-3 had been realised.

On August 23, 1932, the Subordinate Judge passed an order treating the decree passed on the second mortgage as fully satisfied, and after appropriating the balance of the money realised by sale towards the decree based on the first mortgage, recorded that a balance of Rs. 1,504-7-8 remained due in respect of the decree on the first mortgage. On March 25, 1933, the decree-holder made an application under O. 34, R. 6 Civil P. C., for a personal decree for the aforementioned balance which was opposed by the written statement filed by the judgment-debtor. In the meantime the Subordinate Judge who had passed the order dated August 23, 1932, had been transferred. His successor who dealt with the application under O. 34, R. 6, held that the money realised by the sale should be first appropriated in payment of the decree passed on the prior mortgage and the balance, if any, towards the second decree. As the order dated August 23, 1932, had been passed in the absence of the judgment-debtor, the Subordinate Judge was of opinion that it was open to him to correct the order of his predecessor. He accordingly found that the decree on the first mortgage had been satisfied except for a small sum of Rs. 7-9-3, and passed a personal decree under O. 34, R. 6, in respect of this amount. As regards the decree on the second mortgage, he held that the entire amount due under that decree remained unsatisfied:

Held, that the effect of the order dated August 23, 1932, was to discharge the decree passed on the basis of the second mortgage as fully satisfied. And this discharge amounted to a decree under the provisions of S. 47 read was S. 2, Cl. (2) of the Civil P. C.

Held, also that the fact of the order being passed ex parte or in the absence of the parties did not in any way detract from its being a decree. This being the position, the judgment-debtor had a right to appeal against the decree. If he did not exercise his right of appeal, he could take steps to have the order set aside by a proper application for review. He might possibly also have applied under the provisions of O. 9, R. 13 of the Civil P. C. to have the ex parte order set aside. The written statement could not be treated as an application under O. 9, R. 13, Civil P. C..

Held, further, that any modification or alteration of the order dated August 23, 1932, more than three years after the order was passed, far from furthering the ends of justice, would work serious injustice to the interest of the decree-holder and that on the basis of the order of August 23, 1932, decree-holder was entitled to a personal decree for the balance. AIR (Vol. 23) 1936 Oudh 50 : 1935 OWN (CC) 1091 : 11 Luck 519 : 158 Ind Cas 705 (DB).

——O. 34, R. 6 — Property not capable of being put up for sale being ancestral — Subsequent ap-

plication by decree-holder for personal decree within limitation.

In a mortgage bond, the mortgagor had under taken personal liability also and in suit on it the prayer was that a personal decree should be passed in case the property was insufficient to discharge the debt. A decree was passed but when the property was sought to be sold, it was held that it could not be sold on the ground that it was ancestral. Subsequently, an application was made for a personal decree within limitation period:

Held, that it could be granted. AIR (Vol. 22) 1935 Lah 536.

——O. 34, R. 6 — Sale of right of redemption — Pre-emption suit — Personal liability of pre-emptors.

On the sale of the right of redemption and the successful termination of a pre-emption suit as regards the sale, in the abence of a contract to that effect, the pre-emptors are not personally liable for the mortgage money. AIR (Vol 20) 1933 Lah 329 : 34 PLR 171 : 144 Ind Cas 738 (DB).

——O. 34, R, 6 — Personal decree against guardian — Minor's property, if can be proceeded against.

Order 34, R. 6, Civil P. C. enables a supplementary personal decree to be passed if it is found that the mortgage security is insufficient to discharge the debt, and if no such personal decree, which is in effect a decree for money, has been passed against a minor, such a decree passed against his guardian in his individual capacity cannot have any effect in rendering the minor's property liable. AIR (Vol 20) 1933 Mad 175 : 145 Ind Cas 694.

——O. 34, R. 6 — Sale of portion of mortgaged property — Other portion not available for sale — Absence of default on mortgagee's part.

Order 34, R. 6, does not lay down that the sale must be of the entire mortgaged property. Where a portion of the property has been sold & the other portion is not available for sale, and this situation has arisen owing to the action of other claimants and not through any act or default of the mortgagee, the plaintiff mortgagee is entitled to a personal decree under O. 34, R. 6.

Quaere.— Whether a mortgagee can obtain a personal decree by means of an application in the mortgage suit on grounds independent of O. 34, R. 6

(The necessity of amending O. 34, R. 6, Civil P. C., pointed out). AIR (Vol 20) 1933 Oudh 1 : 8 Luck 217 : 9 OWN (CC) 1128 : 141 Ind Cas 183 (FB).

——O. 34, R. 6 — Insolvent discharged — Secured creditor obtaining decree on his mortgage and after sale of property, applying for personal decree for balance — Application resisted by debtor on the ground that order of discharge had completely absolved him from all debts:

Held, mortgagor was entitled to a personal decree for balance. AIR (Vol 19) 1932 All 336 : 54 All 428 : (1932) ALJ 237 : 138 Ind Cas 361 (DB).

——O. 34, R. 6 — A sold certain property to B, receiving a portion of the price in cash and leaving the balance to be paid to C, whom A had mortgaged other properties to secure a loan. B did not pay C. C sued and obtained decree against A. Thereupon A sued B for recovery of sum for which C had obtained a decree. An ordinary decree under O. 34, R. 4 in form No. 8, Appendix D of Sch. I, Civil P. C., giving A liberty to apply for a personal decree was passed. A sold the properties and for the balance applied for a personal decree under O. 34, R. 6. B contended that O. 34, R. 6, Civil P. C. was inapplicable:

Held, that A was not entitled to apply for a personal decree under O. 34, R. 6, Civil P. C., merely as a charge-holder.

Under S. 55 (4) (b), T. P. Act, there was a personal liability on B to pay the purchase-money to A and A was, therefore, entitled to apply for a personal decree under O. 34, R. 6. AIR (Vol 18) 1931 All 99 : (1930) ALJ 1524 : 52 All 901 : 130 Ind Cas 198 (DB).

——O. 34, R. 6 — Miscellaneous — Use of decree under.

Secured creditor can obtain decree under O. 34, R. 6 and utilize this decree as a proof of the balance. AIR (Vol 17) 1930 Oudh 20 : 121 Ind Cas 903 : 6 OWN 982 (DB).

——O. 34, R. 6 — Stage for.

It is well-settled in Indian Law that when a mortgagee brings a suit to enforce his mortgage, the Court will not allow him to enforce it by a personal judgment against the borrower until he has exhausted his remedies against the security. The usual practice is not to grant a personal decree until sale has been carred out and the deficiency ascertained. It is a form of relief which in the ordinary way will not be given to a mortgagee unless and until this stage has been reached. The power of the Court to give that form of relief does not depend upon R. 6, O. 34, which is a provision giving discretion to the Court as to the time and manner at and in which the relief is to be given.

An ordinary decree absolute for sale is, strictly speaking, a decree that may only be executed by sale. But when a declaration is made that a certain sum of money is due upon a security, it is usual to talk of executing the decree by sale and then afterwards by getting a personal judgment and enforcing that. (1932) 137 Ind Cas 672 (1) : 35 MLW 559 : 54 CLJ 400 : 62 MLJ 170 : 36 CWN 109.

(Affirming AIR (Vol 16) 1929 Cal 387 : 120 Ind Cas 110).

——O. 34, R. 6 — Security not being available for sale.

Where the whole of the mortgaged property has ceased to be available for sale owing to no fault of the mortgagee, the mortgagee is entitled to a personal decree against mortgagor on the ground that the mortgagee has had all along a right to a personal decree but it had been merely suspended owing to the fact that his remedy against the mortgaged property was not yet shown to have been exhausted or be otherwise unavailable though it cannot be said that such a decree is one within O. 34, or based by analogy with O. 34, R. 6, on any legal fiction that there has been a sale. AIR (Vol 15) 1928 All 71 : 108 Ind Cas 459 : 50 All 321 : 25 ALJ 1042 (DB).

——O. 34, R. 6 — Decree under — It is decree for money.

A mortgage decree until it reaches the stage shown by S. 90 of the Transfer of Property Act (O. 34, R. 6, C. P. Code) cannot be said to be decree for money. AIR (Vol 14) 1927 Lah 445 : 103 Ind Cas 437 : 9 LLJ 301 : 28 PLR 380 : 8 Lah 721 (DB).

——O. 34, R. 6 — Sale under R. 5 condition precedent.

Before the plaintiff can invoke the aid of the provisions of R. 6 he must establish that the mortgaged properties have been sold as contemplated by sub-rule (2), R. 5. However the rules surely cannot mean that if a portion of the property, however small ,which was included in the mortgage decree as a portion of what was to be sold, is destroyed or has ceased to be available for sale

after the date of the decree, through no fault of the mortgagee, there can be no decree for personal liability against the mortgagor. AIR (Vol 11) : 1924 Cal 209 : 74 Ind Cas 1021 : 50 Cal 718 (DB).

——O. 34, R. 6 — Personal liability — Presumption — Decree — Form of.

The personal liability of the mortgagor to pay the mortgage money is ordinarily presumed to exist in the absence of a contract to the contrary. A mortgage decree should conform to the form prescribed in Appendix D. The right to proceed against the person must be specifically reserved by the decree itself. AIR (Vol 5) 1918 Mad 530 : 6 LW 692 : 42 Ind Cas 288 (DB).

——O. 34, R. 6 — Personal liability — Vendee — Sale — Free from encumbrance.

Where money is left with the vendee of encumbered immoveable property for the purposes of discharging the encumbrance there is no trust created in favour of the mortgagee because his rights to proceed against the property are in no way affected by the sale. AIR (Vol 3) 1916 All 232: 38 All 209 : 14 ALJ 151 : 33 Ind Cas 351 (DB).

——O. 34, R. 6 — Personal liability — Manager of a joint family — Decree against assets — Form of.

On a mortgage executed by the father and uncle in a joint Hindu family the mortgagee prayed for a decree against the deft. personally and the land mortgaged. There was no necessity for the mortgage.

Held, that the mortgagee was not entitled to a decree personally against defts. who were liable only to the extent of assets of the mortgagors in their hands. In the absence of any necessity, the decretal amount could not be made an express charge on the land. AIR (Vol 2) 1915 Lah 374 : 157 PLR 1915 : 147 PWR 1915 : 30 Ind Cas 528 (DB).

——O. 34, R. 6 — Right to personal decree — Insolvency of mortgagor.

Where in an action by a secured creditor, the deft. is declared an insolvent, the creditor can still proceed against the security under S. 16 (5) of the Prov. Insol. Act, but if the security does not pay the amount due to him, he cannot obtain a decree for the balance under O. 34, R. 6, C. P. C. (1912) 34 All 106 : 8 ALJ 1241 : 12 Ind Cas 587 (DB).

(b) Covenant.

—— O. 34, R. 6 — No personal covenant — Mortgage executed by senior members of joint Hindu family — Covenant to re-pay principal and interest within three years — Mortgage found to be not for legal necessity or family benefit.

A mortgage was executed by the senior members of a joint Hindu family. The mortgagors covenanted in the mortgage bond to re-pay the principal and interest within three years from the date of its execution, and it was stipulated that in default of such payment within the time specified, the mortgagee would be entitled to sue for foreclosure and the mortgage bond would be regarded as a deed of sale, the consideration whereof would be the unpaid portion of the money advanced under the mortgage. The mortgage was found to be executed without legal necessity and was not for the benefit of the joint Hindu family. The mortgagee brought a suit for foreclosure and claimed a personal decree against the mortgagors and their heirs:

Held, that there was no personal covenant on the part of the mortgagor to pay the mortgage debt and the mortgagee could not therefore, get a personal decree. AIR (Vol 26) 1939 All 260: (1939) ALJ 362 : 1939 AWR (H C) 164 : ILR (1939) All 313 : 181 Ind Cas 902 (DB).

——O. 34, R. 6 — Dakhli rehan mortgage — Personal liability in case of failure to give possession.

A dakhali rehan mortgage deed began by stating that the mortgagors had taken a loan which they expressly promised to pay by a certain date. It was next stipulated that in the event of non-payment, the creditors will be put in possession of certain property as dekhali rehandars until payment. There was a further stipulation that if the creditors, through any act done by the mortgagors or in any manner failed to get possession over the said land, they should be at liberty to realize the principal amount with interest "from our person and properties or from the rehan property in any manner they like":

Held, that the mortgage was of an anomalous kind, and therefore the rights and liabilities of the parties to it must be determined by their contract as evidenced in the mortgage deed. Since there was a personal liability, the assignee of the mortgagee was entitled to a decree against the mortgagor personally under O. 34, R. 6 AIR (Vol 24) 1937 Pat 261 : 3 BR 532 : 169 Ind Cas 75 (DB).

——O. 34, R. 6 — A covenant contained in a mortgage deed giving the mortgagee a right to recover the mortgage money by sale of the mortgaged property is certainly binding on any person claiming title from a mortgagor and stands on an entirely different footing from the right to a personal decree. AIR (Vol 11) 1924 All 877: 84 Ind Cas 26 : 5 LRA Rev. 225.

——O. 34, R. 6 — Personal liability —Compromise decree — Making other properties liable — Effect of.

A formal order under O. 34, R. 6 of the C. P. Code is a necessary preliminary to proceed against properties not covered by a mortgage even where the original decree is a compromise decree declaring that the judgment-debtor's other properties are to be liable in the event of the mortgaged properties not realizing sufficient to cover the decretal amount. AIR (Vol 5) 1918 Pat 262: 3 Pat. L J 649 : 48 Ind Cas 608 (DB).

——O. 34, R. 6 (T. P. Act S. 90) — Decree for sale on a mortgage — Right given by the decree to proceed against other property, in default — Assignment of the decree — Registration of the assignment not affected — Registration Act, S. 13 — Election to treat it as a decree for money.

A decree on a mortgage entitled its holder to recover its amount from the property of the judgment-debtor other than that mortgaged, in case the whole of that amount could not be recovered from the latter property. The decree was assigned by the decree-holder under an unregistered instrument. The assignment was held to be inoperative so far as the decree was one on a mortgage. The assignee thereupon, waiving the first part of the decree, applied for execution of the decree treating it as a decree for money.

Held, that the right of election given by the decree could not convert a mortgage decree into a money decree for the purposes of registration. The decree in the present case directed that its amount should be recovered from the mortgaged property first and that other property should be proceeded against only in the event of the former property failing to satisfy the decree fully. There were two rights given by the decree the second depended upon the exercise of the first, which was that arising out of a mortgage decree. The two could not be separated, and if for the exer-

cise of that right, registration was necessary, it was equally so for the exercise of the other right. (1909) 11 Bom. L R 356 (359) : 2 Ind Cas 511 (DB).

——O. 34, R. 6 — Compromise decree — Mortgage decree — Reduction of security — Application to sell property not mortgaged.

The plff. sued for Rs. 795 on a mortgage of 16 bighas of land. The parties compromised and a mortgage decree was passed for Rs. 450 to be realised from the sale of 2 bighas 16 cottahs of the land only. The parties did not contract themselves out of S. 90 of the T. P.Act. The plff. being unable to realise the amount of the decree by the sale of the limited security applied for a decree under S. 90.

Held, that he was entitled to get one. (1909) 3 Ind Cas 443. (Cal).

——O. 34, R. 6 — Personal covenant — Covenant for payment of balance — If a decree can be passed under S. 90.

Where a person mortgages his property without entering into any personal covenant for the re-payment of balance which may become due and without indicating the mode of such re-payment, he must be held to be personally liable and a decree should be passed under S. 90 of the Transfer of Property Act. (1909) 13 CWN 138 : 9 CLJ 5 : 1 Ind Cas 442 (DB).

——O. 34, R. 6 (Ss. 90, 65 (e) T. P. Act) — Implied covenants binding upon the mortgagor.

A puisne mortgagee of property, upon which there existed several prior incumbrances, obtained a decree for sale after redemption of the prior incumbrances. The prior incumbrances were redeemed, and the mortgaged property was put up to sale; but the sum realised was not even sufficient to cover the amounts due upon the prior incumbrances, not to mention the amount due upon the mortgage in suit.

Held, that having regard to S. 65(e), T. P. Act the puisne mortgagee decree-holder was entitled to a decree under S. 90, T. P. Act in respect of the deficit due upon the prior incumbrances as well as in respect of the deficit upon his own mortgage. (1903) 1903 AWN 202 : 26 A. 93 (95) (DB).

(c) Right to.

——O. 34, R. 6 — Applicability — Mortgagor having no title to mortgaged properties — Right of mortgagee to apply for personal decree — T. P. Act, S. 68.

The opening words of R. 6 of O. 34, C. P. Code, are not a condition precedent to an application under that rule, and a mortgagee is, therefore, entitled to apply for a personal decree under that rule where as a result of adjudication in a Court of law in a suit to which the mortgagor and mortgagee were both parties, the mortgagor was found to have no title to the mortgaged properties.

As the cause of action for the mortgage suit on account of non-payment of the loan remains undischarged the plaintiff mortgagee can ask the Court to proceed to try the cause of action and give relief to the plaintiff on the terms of S. 68 of the T. P. Act and to pass a personal decree for the sum claimed in the suit. Neither O. 34, R. 6 nor O. 34, R. 14, C. P. Code, would present any difficulty, the mortgaged properties being unavailable. (1949) 53 CWN 631 (DB).

——O. 34, R. 6 — The mortgagee is not entitled to apply for a personal decree under O. 34, R. 6 until the mortgaged property has been actually sold and the sale proceeds found insufficient to meet the mortgagee's claim and the original decree should merely reserve the right to apply for a personal decree. AIR (Vol 23) 1936 Nag 34 : 31 NLR 124 Sup : 160 Ind Cas 196.

——O. 34, R. 6, S. 97 — Where, in a suit on mortgage, the preliminary decree passed in favour of the plaintiff itself contains a provision that "if the net proceeds of the sale are insufficient to pay such amount (the amount of the decree) and such subsequent interest (on the decretal amount) and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance", the application for a personal decree cannot be barred by time.

A provision like this in a decree for sale constitutes an adjudication which is detrimental to the defendant and which must be regarded as awarding to the plaintiff a personal decree in the event of the proceeds of the sale being insufficient but merely leaving it open to him to apply for a personal decree in such event and if a party aggrieved by a preliminary decree does not appeal from it, he is under S. 97 precluded from disputing its correctness afterwards. AIR (Vol 22) 1935 Oudh 11 : 11 OWN (C C) 1196 : 10 Luck 233: 151 Ind Cas 1055.

——O. 34, R. 6 — Where the dealings between the parties were in a running account, the mere fact that a shop had been offered as collateral security does not relieve the debtors of their personal liability and the creditor is legally entitled to claim a personal decree against the debtor in the event of the sale-proceeds of the charged property being found insufficient to meet his dues. AIR (Vol 21) 1934 Lah 765 : 16 Lah 137 : 37 PLR 482 & 537 : 153 Ind Cas 1064 (DB).

——O. 34, R. 6 — Decree on prior and puisne mortgages — Entire property sold by prior mortgagee — Puisne mortgagee's right to get personal decree.

Where a second mortgagee obtained a decree on his mortgage, but in execution of a decree obtained by the first mortgagee the entire mortgaged property was sold and nothing remained to be sold in execution of the second mortgagee's decree:

Held, that the second mortgagee was entitled to apply for a personal decree against the mortgagor. The question whether a mortgagee is entitled to apply for a personal decree without bringing the property to sale depends on the question whether the act of the mortgagee is unreasonable and each case has to be decided on its own merits. AIR (Vol 21) 1934 Mad 726: 67 MLJ 468: 40 MLW 507 : (1934) MWN 1181 : 152 Ind Cas 416.

——O. 34, R. 6 — Puisne mortgagee, if entitled to apply for personal decree without applying for sale.

Where, subsequent to a preliminary and a final decree for sale of the mortgaged property, the property is not available for sale in execution of the decree owing to circumstances for which the decree-holder is not responsible, there is no bar in his way to obtain a personal decree for the whole of the mortgage amount due to him.

Where, after A had obtained a final decree the property was sold by B in execution of a decree on a prior mortgage and the sale proceeds were insufficient even to satisfy the prior mortgage;

Held, that A was entitled to a personal decree under O. 34, R. 6, Civil P. C. even though the property had not been put up for sale under A's decree. AIR (Vol 20) 1933 Lah 792: 144 Ind Cas 698 (DB).

——O. 34, R. 6 — Right to personal decree — Sale, whether condition precedent.

It is not necessary to put such a construction on S. 90 of the T. P. Act (IV of 1882) as would esta-

blish as a condition precedent to the power of decreeing personal payment of the balance that the mortgaged property must first be sold and found insufficient to satisfy the debt, but the words of the section are satisfied in cases where the Court passes a decree that on the happening of the event when the net proceeds of the sale are found to be insufficient, the balance should be paid. AIR (Vol 19) 1932 Cal 775: 36 CWN 709: 56 C LJ 187: 59 Cal 1314: 140 Ind Cas 788 (DB).

——O. 34, R. 6 — Principle underlying.

There were several mortgages prior to that of the applicant for personal decree. A decree was passed in 1905. The applicant took no steps until 1919 as he waited for previous mortgagees to take steps.

Held, that after decree every party was an actor and could take steps to enforce decree where the amount was ascertained and decreed and if the prior mortgagees were slow in exercising their rights so as to imperil the rights of the later mortgagee (the applicant) ought to have taken action earlier. It is no doubt true that he could not have got a personal decree until all the mortgaged properties have been exhausted, but that would not mean that the applicant for a personal decree could first wait till just short of 12 years before selling and then take another period, just short of 12 years for a personal decree, since his right to a personal decree accrued along with his other rights when the final decree was made. If he wished to exercise the right to a personal decree in time he must also take timely steps for those proceedings which were necessarily preliminary. AIR (V 14) 1927 PC 73: 52 MLJ 565: 101 Ind Cas 24: 54 Cal 500: 54 IA 129: 31 CWN 589: 1927 MWN 336: 4 OWN 474: 29 Bom LR 850: 38 MLT 90: 45 CLJ 507: 26 MLW 180.

——O. 34, R. 6 — Right to personal decree — Decree for sale not executed.

If a mortgagee obtains a decree for sale but fails to execute it, he cannot apply under O. 34, R. 6 to obtain a decree over as the property under that rule should be put to sale in execution of the decree before an application under its provisions can be made. AIR (Vol 7) 1920 All 155: 42 All 519: 18 ALJ 628: 2 UPLR (All.) 160: 56 Ind Cas 139 (DB).

——O. 34, R. 6 — Right to personal decree — Suit for personal decree, if lies.

After an application for personal decree is disallowed under O. 34, R. 6. no separate suit to enforce the personal remedy provided by S. 68 of the Transfer Property Act is maintainable, R. 6 covers cases where mortgaged property cannot be sold at all for any reason other than the wrongful act of the mortgagor. AIR (Vol 7) 1920 Oudh 251: 23 OC 145: 57 Ind Cas 967 (DB).

——O. 34, R. 6 — Right to personal decree — Personal remedy, when enforceable.

A personal decree can be obtained only after the mortgaged property is brought to sale under the final decree, but not before a final decree is passed. AIR (Vol 6) 1919 Cal 258: 46 Cal 245: 50 Ind Cas 924.

——O. 34, R. 6 — Right to personal decree — Decree declaring right of prior and puisne mortgagees to apply for sale.

Where in a suit for sale brought by a puisne mortgagee against the mortgagor and the prior mortgagee, a decree is passed by which both the prior and the puisne mortgagee are declared entitled to apply for the sale of the mortgaged properties, both can apply for a personal decree. AIR (Vol 5) 1918 Mad 669: 33 MLJ 382: 22 MLT 257: (1918) MWN 4: 42 Ind Cas 953 (DB).

——O. 34, R. 6 — Right to personal decree — Puisne mortgagee.

A puisne mortgagee who has partly satisfied himself from surplus of proceeds of a sale in execution of a prior mortgage decree could subsequently sue the mortgagor for the balance under O. 34, R. 6 and obtain decree against his person as well as his other property. 22 All 404: 33 Cal 890. Diss. AIR (Vol 3) 1916 Oudh 79: 2 OLJ 614: 34 Ind Cas 48 (DB).

——O. 34, R. 6 — Right to personal decree.

O. 34, R. 6, C. P. C. only applies where the mortgage-deed has already been sued upon and decree granted as against the land and the proceeds of the sale of the land prove insufficient to discharge the mortgage-debt. It has always been recognised that a mortgagee has the right to proceed concurrently with all the remedies open to him to enable him to realise his debt and therefore he is perfectly entitled to sue on the personal covenant contained in a mortgage deed. AIR (Vol 3) 1916 Pat 350: 35 Ind Cas 43.

——O. 34, R. 6 — Right to personal decree.

A mortgagor cannot be proceeded against personally till the whole of the mortgage security has been sold and another decree for the balance has been obtained. (1913) 16 OC 238: 21 Ind Cas 283 (DB).

—— O. 34, R. 6 — Right to personal decree.

A personal decree against the mortgagor can be granted only when the mortgaged property has been sold and the proceeds are found to be insufficient to cover the mortgage-debt and not in a case where the mortgagor is found to have no rights in the property even before sale. 9 Ind Cas 752, Diss. (1912) 9 ALJ 569: 14 Ind Cas 591.

——O. 34, R. 6 — Right to personal decree — Second decree.

A personal decree can be obtained only once against the mortgagor.

The proceeds realised by the sale of mortgaged property in execution of a decree for sale should be insufficient. The balance should be legally recoverable from the mortgagor otherwise than from the property sold. A personal decree has not previously been made. These conditions must be satisfied before a decree under S. 90 T. P. Act can be passed. (1912) 16 CLJ 318: 17 Ind Cas 263 (DB).

——O. 34, R. 6 — Right to personal decree.

A decree under O. 34, R. 6, C. P. C. can be made only when it is found that the sale of the hypothecated properties is insufficient to satisfy the judgment-debt. Till that stage is reached, no question of personal liability arises. At the preliminary stage of the suit no personal decree can be made in favour of the plff. in addition to the decree for sale of the hypothecated properties. (1912) 15 CLJ 684: 15 Ind Cas 911 (DB).

——O. 34, R. 6 — Right to personal decree.

A personal decree may be obtained against the mortgagor on abandonment of all claim against the property. (1911) 14 OC 217: 9 Ind Cas 403.

——O. 34, R. 6 — Right to personal decree.

Where the proceeds of a sale under S. 88 are not sufficient to liquidate the decretal debt, the question whether the balance is or is not legally recoverable from the judgment-debtor must be gone into by the Court, even though the judgment-creditor has not asserted and proved the said right in the suit. (1909) 11 Bom LR 1127: 4 Ind Cas 256 (DB).

(d) When passed.

——O. 34, R. 6, O. 7, R. 6 — Ground of exemption from law of limitation stated in application under O. 34, R. 6 but not in plaint — Law is sufficiently complied with.

Order 7, R. 6, Civil P. C., makes it incumbent upon a person seeking exemption from the law of limitation to state the ground or grounds for exemption; but this does not mean that he must state the ground before the occasion arises for seeking exemption. If the mortgaged properties are sufficient to discharge the debt due to the mortgagee, it will not be necessary to show a ground for exemption from the law of limitation with regard to a personal decree. Of course the suit itself must be in time, but if it is brought in time, the plaintiff can plead the ground for exemption when it is necessary to apply for a personal decree.

Hence when the plaintiff mortgagee sets out in his application under O. 34, R. 6, the ground in which he claimed exemption from limitation in respect of a personal decree it is sufficient compliance with the law even if the ground of exemption was not stated in the plaint. AIR (Vol 31) 1944 Mad 65 : 56 MLW 649 : (1943) 2 MLJ 501 : (1943) MWN 698 : ILR (1944) Mad 572 : 211 Ind Cas 630 (DB).

——O. 34, R. 6 — Normally a personal decree should not be passed at all until the mortgaged property has been exhausted, but if such a decree is passed it is not invalid. AIR (Vol 29) 1942 Pesh 85: 204 Ind Cas 509 (DB).

——O. 34, Rr. 6, 5 — Part of mortgaged property not available for sale due to mortgagee's fault — Personal decree not to be passed.

Before the plaintiff can invoke the aid of the provisions of R. 6 of O. 34, Civil P. C., he must establish that the mortgaged properties have been sold as contemplated by Sub-R. (2) of R. 5. And where a portion of the mortgaged property has been sold and the other portion is no longer available for sale, through the fault of the mortgagee himself, the mortgagee is not entitled to a personal decree under O. 34, R. 6. AIR (Vol 24) 1937 Oudh 252 : 1937 OWN (CC) 100 : 13 Luck 129 : 166 Ind Cas 673 (DB).

——O. 34, R. 6, O. 22, R. 3 — After ascertainment of the deficiency arising on the sale of the mortgaged properties, the Court, under O. 34, R. 6, tries the question whether the balance is legally recoverable otherwise than out of the property sold, and passes a decree. Whether called a 'supplemental' decree or by any other name, this is the only decree on such claim in the plaint. AIR (Vol 23) 1936 Mad 34 : (1935) MWN 1311 : 69 MLJ 765 : 42 MLW 968 : 59 Mad 188 : 160 Ind Cas 270 (FB).

——O. 34, R. 6 — Order under O. 34, R. 6 — Property ordered to be sold first should be sold first.

Before a property can be disposed of in execution of the decree, it would be necessary under O. 34, R. 6, that the items ordered to be sold in execution of the decree should be sold first and then if any balance is left unpaid, it would be necessary for the opposite party to obtain an order under O. 34, R. 6, for recovery of the balance from the deposit or otherwise. AIR (Vol 21) 1934 Cal 426: 59 CLJ 18: 151 Ind Cas 317 (DB).

——O. 34, R. 6 — Transfer of Property Act (IV of 1882), Ss. 58, 68 — Mortgage-deed — Personal covenant to pay — Presumption.

In all mortgages, a personal covenant to repay the mortgage money must be presumed unless there is something in the nature and terms of the mortgage-deed to negative it.

The nature of the deed may either raise a presumption for or a presumption against the interpretation of the terms which might otherwise be ambiguous in favour of or against a present covenant to pay, but a personal covenant to pay may be express or may be implied in all mortgages whatsoever of any form, the only difference being that in certain forms of mortgages particularly in a usufructuary one, the Court might, in the absence of an express covenant, demand a much more clearly implied covenant than it might require in other cases. AIR (Vol 19) 1932 Lah 164 : 13 Lah 259 : 33 PLR 536 : 135 Ind Cas 33 (DB).

——O. 34, R. 6 — Personal decree — When passed.

In a suit by prior mortgagee brought against the mortgagor and the subsequent mortgagee to enforce his mortgage, no personal decree can be passed against the subsequent mortgagee. 31 PLR 506 : AIR (Vol 17) 1930 Lah 791 (DB).

——O. 34, R. 6 — After exhausting security.

When a mortgagee brings a suit to enforce his mortgage, the Court will not allow him to enforce it by a personal judgment against the borrower until he has exhausted his remedies against the security. 120 Ind Cas 110: 33 CWN 300: AIR (Vol 16) 1929 Cal 387 (DB).

——O. 34, R. 6 — Conditions.

When the mortgage-decree has been executed and the mortgaged property has been sold and the sale proceeds are found to be insufficient to pay the amount due to the plaintiff then if the balance is legally recoverable from the defendants personally otherwise than out of the property sold, the Court has power to pass a decree for such an amount under R. 6. 93 Ind Cas 223: AIR (Vol 13) 1926 All 343.

——O. 34, R. 6 — Personal covenant by mortgagor — Form of decree.

A decree in a mortgage suit, when the mortgage-deed contains a personal covenant, should direct that "If there is any deficit the mortgagee should be at liberty to apply for a personal decree for the balance against the mortgagor". A direction that on default of payment of the decretal amount the plaintiff is to be at liberty to recover the same by applying for sale of the mortgaged property and to recover the deficit, if any, from the defendants personally, is not proper. 75 Ind Cas 188: 24 Bom LR 843: AIR (Vol 10) 1923 Bom 32 (DB).

——O. 34, R. 6 — Forum — Supplementary decree.

The Court to which a decree for the sale of immoveable property is transferred for execution cannot pass the supplementary decree. The Court in which the mortgage suit was originally instituted alone can pass it. AIR (Vol 5) 1918 Mad 699: (1918) MWN 4: 33 MLJ 382: 22 MLT 257: 42 Ind Cas 953 (DB).

——O. 34, R. 6 — Notice — Judgment-debtor.

Before making a decree under the rule, it is right to issue notice to the judgment-debtor to show cause, except possibly in cases where the judgment and preliminary decree have expressly made him personally liable. AIR (Vol 3) 1916 Low Bur 20: 8 LBR 450: 9 Bur LT 245: 35 Ind Cas 283.

——O. 34, R. 6 — Final decree — Passing of — Essential.

A decree-holder holding two decrees on separate mortgages and executing the second decree ought to get an order absolute under S. 89 if he wants a decree under S. 90 and the sale of the property in the first decree makes no difference. (1909) 31 All 373: 6 ALJ 451: 1 Ind Cas 799 (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — Unconditional promise to pay implies personal liability.

If a person promises to pay a certain sum of money with interest and hypothecates certain property as security without any express covenant that he would be personally liable or without stating any mode of payment, he is personally liable, and a decree under S. 90 of the Transfer of Property Act, should be passed in such a case against the mortgage if the sale-proceeds of the mortgaged property do not satisfy the entire debt and the right to have such a decree is not time-barred. (1909) 13 CWN 138 (141): 1 Ind Cas 442: 9 CLJ 5 (DB).

——O. 34, R. 6 — (S. 90, T. P. Act) — Mortgage — Mortgaged property totally incapable of being sold — Decree under S. 90 not obtainable.

Where property mortgaged was property which the mortgagee could by no possibility bring to sale, being an occupancy holding of which the mortgagor was not the tenant in execution of decree under his mortgage, it was held, that no decree under S. 90 of the Transfer of Property Act, 1882, could be granted. (1907) 1907 AWN 69: 4 ALJ 157: 29 A 260 (261).

——O. 34, R. 6 (S. 90, T. P. Act) — Mortgage decree — Sale of the property after the usual period of six months — Personal liability for the unpaid balance — Mortgage decree should only reserve liberty to apply — Attachment of property — Son born to mortgagor after the sale of the mortgaged property but before the sale of the other property under the personal decree — Son entitled to have exempted his share in the property from sale.

On the 8th March 1902, a decree on a mortgage was passed in favour of D directing that the mortgaged property should be sold on failure to pay the money within six months, and that if the sale-proceeds were insufficient to pay off the amount the balance was to be recovered from G personally. In June 1903 the mortgage property was sold in execution of the decree. On the 19th idem D, purporting to proceed under the personal decree for the balance, got attached a house belonging to G which was not compromised in the mortgage.

On the 4th August 1903, the sale was set aside on G's application. G then applied on the 17th August 1903 to have the attachment of the house raised. The Court directed the attachment to be maintained, but ordered that the property should not be sold until the proceeds were found insufficient. In September 1904 G's son V was born. On the 26th November 1904 the mortgaged property was again sold and on the 5th January 1905, D applied for sale of the house whereupon V applied to have the attachment removed from his one half share in the house.

Held (1) that the decree in so far as it directed personal payment by G was passed in disregard of the provisions of S. 90 of the Transfer of Property Act. It was clear from the words of the section that direction should have been made in a supplemental decree to be passed when the net proceeds should be found insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for a decree under S. 90; the personal decree was contingent on the ascertainment of the balance and only becomes operative and capable of execution when that balance was ascertained. It was therefore open to V to establish any circumstance which affected the validity of the attachment as against his interest in the house. (2) That therefore the house to the extent of V's interest therein should be released from attachment. (1907) 9 Bom LR 199: 31 B 244 (248, 249) (DB).

——O. 34, Rr. 6, 5 (Ss. 90, 89, T. P. Act) — Sale of part of mortgage property with judgment-debtor's consent in England — Effect of suit in Chancery Court — Limitation.

Certain shares in railway belonging to the defendants were ordered to be sold under S. 89, T. P. Act. At the request of the defendants they were sent to England for sale through a broker. The defendants gave a power-of-attorney in favour of a Railway Bank and also gave the stock certificate. The Railway Company declined to act on the power-of-attorney or the transfer in Bank. The Bank instituted a suit in the Court of Chancery in England and obtained a decree for sale and sold the stock. The proceeds of sale having proved insufficient, the Bank put in the present application for a decree under S. 90.

Held the sale which took place in England must be treated to be a sale had in connection with the decree passed in this country, but carried out by the parties independently of the Court in this country at the express instance of the defendant's judgment-debtors and that they could not be heard to say that the sale was not in pursuance of the order for sale passed under S. 89.

Held further, that unless the railway stock was sold, the defendants could successfully object to the application under S. 90. The stock having been sold, the decree under S. 90 should be passed. (1906) 3 ALJ 445: 28 A 660 (664): (1906) AWN 167 (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — Condition precedent for an order under.

The sale of property ordered to be sold under S. 89, T. P. Act, constitutes the only condition precedent for an order under S. 90 whether the order under S. 89 was passed rightly or wrongly. (1905) 2 ALJ 413 : 28 A 19 : 1905 AWN 165 (DB).

——O. 34, R. 6 (S. 90, T. P. Act) — Decree under — When can be passed — Succession certificate, necessity of.

A decree under S. 90, T. P. Act, cannot be passed in every suit for a sale upon a mortgage; but only where the defendant by his contract or otherwise is personally liable for the payment partly or wholly, of the debt. A succession certificate is necessary in such a case. (1904) 6 Bom LR 582 (585): 28 Bom 630 (DB).

15. Scope.

——O. 34, R. 6 — Applicability — Mortgage decree in 1941 in respect of a mortgage of 1931 — Application for personal decree in respect of unsatisfied balance — Maintainability.

A suit on a mortgage of 1931, which contained a personal covenant, was filed and a decree was obtained in 1941 and in pursurance of the decree the hypotheca was sold. Cl. 5 of the mortgage decree provided that in respect of the unsatisfied balance the mortgagee should be at liberty where such remedy is open to him under the terms of the mortgage as is not barred by time to apply for a personal decree against the mortgagors for the balance. There was an unsatisfied balance. An application was made under O. 34, R. 6, C. P. Code, for a personal decree against the mortgagors and their brother who, though a defendant in the suit, was not a party to the mortgage.

Held, by the time the suit on the mortgage was instituted, any remedy by virtue of recourse to the personal covenant was barred. Since the remedy under personal covenant was barred, the mortgagee had nothing by reference to the mortgage deed which could avail him to recover any balance. Further, there cannot be recourse against the brother who was not a party to the mortgage deed and so who was not under any ob-

ligation regarding the personal covenant in it. AIR (Vol 36) 1949 Mad 1: (1948) 2 MLJ 283: 61 LW 539: 1948 MWN 554 (FB).

——O. 34, R. 6 — Mortgage suit does not come to an end until the mortgaged property has been duly sold and the sale proceeds dealt with, or if there is a right to a personal decree under O. 34, R. 6, until that personal decree has been passed. AIR (Vol 28) 1941 Rang 316: 1941 Rang LR 774: 198 Ind Cas 404 (DB).

——O. 34, R. 6 — The words 'otherwise deal with his security, in S. 28 (6), Prov. Insol. Act, do cover the application of the decree-holder under O. 34, R. 6, and a secured creditor is entitled by this sub-section to obtain a decree under O. 34, R. 6, and to default with the security by the method allowed by that rule. AIR (Vol 26) 1939 All 401: (1939) ALJ 238: 1939 AWR (HC) 265: ILR (1939) All 492: 184 Ind Cas 868 (DB).

——O. 34, R. 6 — The Sub-R. (1) of R. 14 of O. 34 refers to a simple money suit because it is only in such a case that there should be any question of bringing another suit for sale in enforcement of a mortgage. It does not apply to a simple money decree under O. 34, R. 6, because in such a case the suit has already been brought for sale on the mortgage and no question of instituting a suit for sale on the mortgage could arise. AIR (Vol 25) 1938 All 341: (1938) ALJ 379: 1938 AWR (HC) 245: ILR (1938) All 466: 175 Ind Cas 938 (DB).

——O. 34, R. 6 — Plaintiff agreeing to take mortgaged property at valuation in lieu of Court sale — No sale.

Where the parties agree that the mortgaged properties should be taken over by the plaintiff at a valuation in lieu of a Court-sale a personal decree can be passed without sale of the mortgaged property. AIR (Vol 25) 1938 Rang 353: 179 Ind Cas 875 (DB).

——O. 34, R. 6, Ss. 152, 115 — Preliminary decrees, amendment of — Defendants asking Court to amend decree not to grant personal remedy — Preliminary decree becoming final — Order of amendment, if can be sustained.

In a mortgage suit, the defendants are not entitled after the property had been sold and the decree-holder had become entitled to apply for a personal decree for the amount of the balance under O. 34, R. 6 of the Code to ask the Court to exercise its discretion in amending the preliminary decree, so as to direct that if the decretal amount be not satisfied out of the sale proceeds, the decree-holder shall have no power to realise the balance from the other property of the judgment-debtor. The Court's order granting amendment in the case of a preliminary decree which has long since become final, is wrong and cannot be sustained. AIR (V 23) 1936 Oudh 81: 1935 OWN (CC) 1322: 159 Ind Cas 269 (DB).

——O. 34, R. 6 — Property not capable of being sold.

Order 34, R. 6 contemplates that the mortgaged property is as a matter of fact put up for sale and that on the sale having taken place, it is found that the whole of the decretal amount cannot be satisfied out of its proceeds. Where the property cannot be sold at all, no question of the net proceeds of the sale being insufficient arises and O. 34, R. 6 has no application. AIR (Vol 22) 1935 Lah 536.

——O. 34, R. 6 — Mortgaged property ceasing to be available for benefit of third parties not through fault of mortgagee.

When the mortgaged property ceases to be available for the benefit of a mortgagee owing to the claim of third parties and not through any fault of the mortgagee himself, a personal decree can be passed under O. 34, R. 6. AIR (Vol 21) 1934 Lah 174: 35 PLR 17: 15 Lah 607: 147 Ind Cas 1018.

——O. 34, R. 6 — Order 34, R. 6 makes no specific reference to Form No. 8, Sch. I, Appendix and is not limited by the form which is provided merely for use and adaptation according to the circumstances of the case. AIR (Vol 20) 1933 Cal 251: 60 Cal 19: 143 Ind Cas 679 (DB).

——O. 34, R. 6 — Executability before property is sold and personal remedy exhausted.

Although a mortgage decree, so far as it orders the sale of a certain property is not joint and several, but so far as the liability for payment of money is concerned it may be a joint and several decree against the mortgagors inter se.

Decrees passed under O. 34, R. 6 are not decrees for enforcement of mortgage or sale, but R. 20 specifically mentions a decree for enforcement of a mortgage and a charge. When a personal decree is passed under O. 34, R. 6, there is no decree for enforcement of mortgage or charge.

The effect of O. 21, R. 20 is that if the mortgagor has a decree against the mortgagee, such a decree can be set-off against the mortgage-decree even before the mortgaged property is exhausted and a personal decree under O. 34, R. 6 is passed. AIR (Vol 20) 1933 Pat 210 (2): 14 PLT 189: 143 Ind Cas 542 (DB).

——O. 34, R. 6 — Transfer of Property Act (IV of 1882), S. 68 (b) — Third party establishing his right to mortgaged property before sale — Application for personal decree.

Order 34, R. 6, applies only to case where there has been a sale and where the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff. Therefore, a mortgagee who has obtained a decree for sale is not entitled to apply under R. 6 where, before the sale is held, a third party obtains a declaratory decree that the mortgaged property belongs to him and not to the mortgagor.

In an application under O. 34, R. 6, the question whether the mortgagee had a remedy under S. 68 (b), T. P. Act, cannot be gone into. AIR (Vol 19) 1932 All 475: (1932) ALJ 311: 138 Ind Cas 372 (DB).

——O. 34, R. 6 — Sale, whether condition precedent.

Where a decree for sale becomes inoperative on the mortgagor being declared not to have been the owner of the mortgage property, O. 34, R. 6 can have no application. AIR (Vol 19) 1932 All 358: (1932) ALJ 317: 16 RD 373: 136 Ind Cas 829 (DB).

——O. 34, R. 6 — It is well-settled in Indian Law that when a mortgagee brings a suit to enforce his mortgage, the Court will not allow him to enforce it by a personal judgment against the borrower until he has exhausted his remedies against the security. The usual practice is not to grant a personal decree until sale has been carried out and the deficiency ascertained. It is a form of relief which, in the ordinary way, will not be given to a mortgagee unless and until this stage has been reached. The power of the Court to give that form of relief does not depend upon R. 6, O. 34, which is a provision giving discretion to the Court as to the time and manner at and in which the relief is to be given.

An ordinary decree absolute for sale is, strictly speaking, a decree that may only be executed by sale. But when a declaration is made that a certain sum of money is due upon a security it is usual to talk of executing the decree by sale and then afterwards by getting a personal judgment

and enforcing that. (1932) 137 Ind Cas 672 (1): 35 MLW 559: 54 CLJ 400: 62 MLJ 170: 36 CWN 109 (PC).

——O. 34, R. 6 — R. 6 of O. 34 does not only apply to a sale on a mortgage but can also be applied to a sale on a charge. AIR (Vol 17) 1930 Oudh 10: 123 Ind Cas 215: 6 OWN 969 (DB).

——**O. 34, R. 6 — Wrongful sale deprives the right.** When a mortgagee demands payment of the mortgage money he should be in a position to give back the mortgaged property and allow the mortgagor to redeem and where there has been a wrongful sale it is not open to the mortgagee, who has put it out of his power to allow the mortgagor to redeem to sue the mortgagor for recovering the balance of the mortgage-money. AIR (Vol 13, 1926 Mad 841: 94 Ind Cas 860: 23 MLW 476 (DB).

——O. 34, R. 6 — The proposition that no money-decree is possible which does not carry with it a right to arrest the judgment-debtor is not correct. AIR (Vol 9) 1922 Nag 98: 65 Ind Cas 53: 5 NLJ 49: 18 NLR 145 (DB).

——**O. 34, R. 6 — Construction of decree — Mortgage — Suit for sale — No direction for sale — Decree giving only a charge.**

In a suit brought to enforce a mortgage and for sale the decree merely declared the amount due to be a charge on the mortgaged properties.

Held, that the decree must be construed to be a mortgage decree directing the sale of the mortgaged properties and that O. 34, R. 6 was applicable thereto. AIR (Vol 3) 1916 Mad 786: 2 LW 689: 30 Ind Cas 280 (DB).

——**O. 34, R. 6 — Personal liability.**

A decree directing the decree-holder to recover the balance of decretal amount from other properties of the judgment-debtor if not recoverable from the hypotheca is not a money decree. (1909) 11 Bom LR 356: 2 Ind Cas 511 (DB).

——**O. 34, Rr. 6, 15 (Ss. 90, 100 T. P. Act) — Suit to enorce vendor's lien by sale — Determination in that suit of vendee's personal liability — Application for decree under S. 90 — Res judicata.**

In a suit for enforcement of a vendor's lien by sale of the property, the Court further decided that the defendants cannot either personally or by their other properties, be held liable for any part of the amount claimed. The property sold to them can alone be liable. Subsequently the plaintiffs applied for a personal decree under S. 90, T. P. Act.

Held, that it was within the competence of the Court to determine the personal liability or otherwise of the defendants and that the matter so determined was res judicata in respect of their subsequent application, and it was none the less res judicata, because the finding as to the personal liability of the defendants was not embodied in the decree. 7 A. 606 referred to. An institution of a separate suit for a decree under S. 90 is improper. (1906) 1906 AWN 44: 3 ALJ 171: 28 A. 365 (371, 372) (DB).

(Reversing (1905) 2 ALJ 379 on other grounds.)

——**O. 34, R. 6 (S. 90 T. P. Act) — Charge-holder — Unpaid vendor — Personal decree — C. P. C., S. 13, application of.**

Per Banerji J.: The holder of a charge is, like a mortgagee suing for sale, entitled to ask for and obtain a decree under S. 90, T. P. Act, provided the balance due to him is legally recoverable from the defendant personally.

Per Richards J. (dissentiente) :— S. 100, T. P. Act, does not enable the owner of a charge as distinguished from a mortgagee to obtain a personal decree under S. 90 against the owner of the property charged, even where there is a balance recoverable from the defendant otherwise than out of the property sold. S. 13, C. P. C. (S. 11 of 1908 Code) does not apply to an application under S. 90. (1905) 1905 AWN 144 (146, 147) : 2 ALJ 379.

(Reversed in L. P. A. in 28 A. 365 on other grounds.)

——**O. 34, R. 6 (S. 90 T. P. Act) — Abuse of process of Court — Fraud — Purchase benami for decree-holder — Estoppel.**

Where, upon an application for sale, the decree-holder obtains leave to purchase the property upon the under-taking to pay the full decretal amount for it, and the property is purchased benami for him, at a less sum, and the judgment-debtor does not object at the time.

Held, upon the decree-holder applying for a personal decree for the balance, that the judgment-debtor having the remedy to get the sale set aside in due course of law, cannot object to the decree-holder executing his decree for the balance, although the purchase by the decree-holder was abuse of the process of the Court. (1904) 1 ALJ 486 (487, 488) (DB).

O. 34, R. 7.

See also Civil P. C., O. 34, Rr. 2, 4 and 10.

1. **Account.**
2. **Applicability and scope.**
3. **Burden of proof.**
4. **Costs.**
5. **Form of decree.**
6. **Interest.**
7. **Mesne profits.**
8. **Mixed mortgage.**
9. **Mortgage of undivided share.**
10. **Mortgage executed by a minor.**
11. **Nature of proceedings.**
12. **Payment.**
13. **Power of the Court.**
14. **Rent.**
14A. **Retransfer of property to mortgagor.**
15. **Successive suits.**
16. **Time.**
17. **Transferee.**
18. **Usufructuary mortgage.**

1. Account.

——**O. 34, R. 7 — Redemption — Second mortgagee trying to redeem prior one — Suit by prior mortgagee without impleading subsequent mortgagee — Prior mortgagee purchasing property in execution of his decree — Subsequent mortgagee suing for redemption — Prior mortgagee, if bound to account for rents and profits from date of possession.**

Where the first mortgagee without impleading the second mortgagee, brought a suit on his mortgage and purchased the property in execution of the decree obtained by him, and in the suit by the second mortgagee for redemption of the first mortgage the former contended that the latter was liable to account for the rents and profits of the property but the latter denied this liability on the ground of his being in possession not as mortgagee but as auction purchaser:

Held, that the first mortgagee was bound to account. In spite of the sale in execution of first mortgagee's decree, the second mortgagee held the equity of redemption. AIR (Vol 26) 1939 Cal 15: ILR (1938) 2 Cal 643: 183 Ind Cas 612.

——O. 34, R. 7 — In a mortgage suit governed by the Deccan Agri. Relief Act, accounts under S. 13 of the Act can be taken only up to the date of the suit. Accounts subsequent to the date of the suit should be taken in terms of O. 34, R. 7, Civil P. C. AIR (Vol 22) 1935 Bom 122: 37 Bom LR 76: 154 Ind Cas 770 (DB).

——O. 34, Rr. 7 and 11 — Section 13 of Deccan Agri. Relief Act only provides for an account in the terms of that section to the date of the suit and not to the date of the decree. The account between the date of the suit and that of the preliminary decree can be taken under ordinary law under O. 34, R. 7, Civil P. C., and the award of interest is governed by R. 11. AIR (Vol 22) 1935 Bom 97: 36 Bom LR 1242: 154 Ind Cas 780 (DB).

——O. 34, R. 7 — Directions by the Court with regard to the mode in which account is to be taken will not, at least in redemption suits, amount to preliminary decree. AIR (Vol 21) 1934 Pat 97 (2): 14 PLT 735: 149 Ind Cas 311.

——O. 34, R. 7 — Deposit under — Nature of.

A distinction must be drawn between a deposit of the mortgage money under S. 83 of the Transfer of Property Act without any decree of the Court, and a deposit of the amount declared due under O. 34, R. 7. In the case of a deposit under S. 83 there has been no adjudication by the Court of the amount of mortgage money due. The account has still to be taken. If the mortgagee refuses to accept the money, whether properly or improperly, the mortgagor comes into Court under O. 34, R. 7, asking to have an account taken and the amount due declared. When he does this, he may reasonably, be expected to include in his claim anything which will be due to him up to the date fixed for redemption. His account still falls within the account contemplated in O. 34, R. 7 and not under the final decree. 2 OWN 826: 91 Ind Cas 258: AIR (Vol 13) 1926 Oudh 113.

——O. 34, R. 7 — Decree for accounts — Preliminary decree for redemption — Procedure.

To pass first a decree for taking accounts and then a preliminary decree for redemption in a suit for redemption is irregularity. The Court can pass an interlocutory order for accounts but not a decree for accounts. In the present case where two decrees were passed like this and the High Court decided that they should be treated as if they constituted one decree only viz., as a preliminary decree for redemption, a later Bench of the High Court regarded the appeals from the two decrees as an appeal from a preliminary decree for redemption. 92 Ind Cas 63: 47 All 803: 23 ALJ 691: AIR (Vol 12) 1925 All 707 (DB).

——O. 34, Rr. 7 and 8 — Accounts — Final decree.

If a Court in a preliminary decree instead of directing an account to be taken inserts the amount to be paid by the mortgagor, it is not final and may vary from time to time. Proper additional charges paid by the mortgagee after the preliminary decree can be added to the amount. The mortgagee cannot leave the property in jeopardy till the final decision is passed. AIR (Vol 5) 1918 Cal 1039 : 44 Cal 448: 22 CWN 374: 35 Ind Cas 95 (DB).

2. Applicability and scope.

——O. 34, Rr. 7 (2) and 9 — Applicability — Mortgage-money not deposited within time allowed by an order allowing redemption of a mortgage made under S. 16 of the U. P. Agriculturists' Relief Act.

The provisions of O. 34, Rr. 7 (2) and 9, C. P. Code, do not apply to a case in which an order allowing redemption of a mortgage has been made under S. 16 of the U. P. Agriculturists' Relief Act and the mortgage money has not been deposited within the time fixed by the Court. 1950 AWR 565: 1950 ALJ 424: AIR (Vol 37) 1950 All 675 (FB).

——O. 34, R. 7 — Redemption — Suit for — Property misdescribed — Suit should not be dismissed.

For a mere misdescription of the property in the plaint in a suit for redemption of specific property, the Court should not visit the plaintiff with the extreme penalty of dismissal. AIR (Vol 25) 1938 Mad 562: (1938) MWN 78: 47 MLW 686: 182 Ind Cas 916 (DB).

——O. 34, R. 7 — What constitutes.

Where in an alleged redemption suit the plaintiff did not admit the validity of the redemption effected by some of mortgagors and he described in his plaint the proceedings taken by those mortgagors as collusive, and asked for a decree for redemption of the entire property,

Held, that this suit cannot be treated as a suit for recovery of his share of the property mortgaged as one brought against his co-mortgagors who had already redeemed the property, but that his suit was purely a suit for redemption of the entire mortgaged property. 94 Ind Cas 784: 2 Luck 221: 3 OWN 467: 13 OLJ 622: AIR (Vol 13) 1926 Oudh 346 (DB).

——O. 34, R. 7 — The rule has no application where one mortgagor redeems the whole property and a co-mortgagor brings a suit against the redeeming mortgagor, for his share in the property. on payment of proportionate amount. 69 Ind Cas 653: AIR (Vol 10) 1923 Lah 129 (DB).

3. Burden of proof.

——O. 34, R. 7 — Redemption, suit for — Plaintiff not proving specific mortgage set up by him — Suit is liable to be dismissed.

Per Bajpai and Dar, JJ. — In a suit to redeem a mortgage, the burden lies on the plaintiffs to establish the specific mortgage which they set up and if they fail to discharge this burden, their suit is liable to be dismissed. AIR (Vol 30) 1943 All 393 : 1943 AWR (HC) 291: (1943) ALJ 548: ILR (1944) All 76 : 212 Ind Cas 238 (FB).

——O. 34, R. 7 — Redemption suit — Proof of the specific mortgage alleged.

A plaintiff seeking to redeem must prove the specific mortgage set up in his plaint clearly and indefeasibly, but the question of proof necessary for the plaintiff to succeed must in each case depend upon and may be affected by the pleadings and the defence raised by the defendant. (1903) 5 Bom LR 333 (333) (DB).

——O. 34, R. 7 — Mortgage of another date found — No decree.

Where a plaintiff fails to prove the specific mortgage set up by him, no decree could be passed in his favour on the basis of any other mortgage which the Court might find to have been proved in the suit. (1903) 13 MLJ 274 (275) (DB).

——O. 34, R. 7 — Redemption suit — Plaints — Variation of date of mortgage in the pleadings.

Where the plaintiff, in his plaint in redemption suit, states approximately the date of a mortgage, it is open to him on the pleadings to show that the lands were mortgaged, if not in the year stated in the plaint, at any rate, at some time about that period. (1902) 27 B 271: 5 Bom LR 85 (87) (DB).

4. Costs.

——O. 34, R. 7 — Charge on the property unless otherwise mentioned in decree.

It is certainly competent to the Court in the exercise of its discretion to award the costs personally against the mortgagor, but where the terms of the decree are ambiguous, it ought to be construed that they are a charge on the property and the mortgagor seeking redemption must deposit that amount also. AIR (Vol 13) 1926 All 424: 48 All 425: 24 ALJ 424: 94 Ind Cas 872 (DB).

——O. 34, R. 7 — Appeal — Decree as to — Construction — Rules governing.

In a redemption suit, the trial Court declared the plaintiff entitled to possession of the property on payment of Rs. 1816-10-6. The decree of the

appellate Court said that it was increasing the amount of money payable to the mortgagees by a sum of Rs. 175. Then it said that a total sum of Rs. 1,991-10-6 was payable by the plaintiff to the defendants on or before the 2nd of March 1921. After having said so much the Court went on to say that certain costs were payable by the plaintiff to the defendant. After making these statements the decree went on to say "If the plaintiff paid the sum aforesaid within 2nd March" 1921 etc. etc.

Held, (Per Mukerji, J.) that it was open to the appellate Court either to pass a personal decree against the successful party to make the costs payable out of the mortgage property. In every case it was a matter of interpretation what was intended by the appellate Court. In the present case it was not the intention of the Court to make the costs as stated in the decree, a charge on the property.

Held, (Per Daniels, J.) — Even if it be possible to read the words "the aforesaid sum" as referring only to the sum of Rs. 1,991 that construction of the decree should be adopted which was in accordance with the law as laid down under O. 34, R. 7 and with the universal practice of the Courts in such cases which directs that the costs of the suit should form part of the sum payable in order to effect redemption. The costs in this case should therefore be held to have been intended to be made a charge on the property and the mortgagor was not entitled to recover possession without depositing the full amount of costs over and above the Rs. 1,991. AIR (Vol 12) 1925 All 492: 6 LRA Civ 225: 87 Ind Cas 585 (DB).

——O. 34, R. 7 — Redemption suit — When mortgagee to lose costs.

In a redemption suit the usual course is to give the mortgagee his costs unless he has been guilty of such conduct as would disentitle him to costs. Where the mortgagee succeeded in establishing his claim to Rs. 1,400 more than was conceded by the mortgagor-plaintiff to be due.

Held, that the mortgagee was entitled to his costs, even though the original amount he claimed was untenable. (1904) 1904 AWN 273 (274): 27 All 313: 1 All LJ 715.

——O. 34, R. 7 — Redemption suit alleging mortgagee discharged — Sum found due to the mortgagee.

Where in a suit for redemption, a mortgagor alleges entire discharge of the mortgage and it was found otherwise.

The Privy Council ordered that the costs of the suit were to be borne by the plaintiff-mortgagor. (1903) 30 IA 66: 25 A 287 (295): 7 CWN 514 (PC).

——O. 34, R. 7 — Of mortgagee in redemption suit though the question is only as to which of two rival claimants can redeem.

The costs of a mortgagee in a redemption suit should be paid though the question is only as to which of two rival claimants can redeem, for he has a right to watch the litigation in the redemption suit. (1900) 24 M 377 (386): 28 IA 46: 5 CWN 217 (PC).

5. Form of decree.

——O. 34, R. 7 — Only mortgagee and not mortgagor can apply for decree for sale.

Under O. 34, R. 7, Civil P. C., it is only the mortgagee and not the mortgagor who is entitled to apply for a decree for sale. AIR (Vol 29) 1942 Pesh 96: 204 Ind Cas 242.

——O. 34, Rr. 7 and 8 (in force in 1919) — Right to redeem is extinguished by final decree only and not by preliminary decree.

The actual extinction of the right to redeem is to be effected only by the final decree, the preliminary decree merely stating the consequences in case a certain payment as fixed by the Court is not made within the time allowed. Hence, unless a decree has been passed under Sub-R. (2) of R. 8, the mortgage debt is not discharged nor is the right of redemption actually lost or extinguished. AIR (Vol 28) 1941 Mad 217: (1940) MWN 404: 51 MLW 666 (DB).

——O. 34, R. 7 (2) — Suit for recovery of possession after declaration of invalidity of mortgage — Decree for possession on condition of payment — Power to extend time— Decree, whether one for redemption.

Where, in a suit by the reversioners for recovery of possession of certain properties free from all incumbrances created by the widow, the Court found that a portion of a mortgage debt was binding on the plaintiffs, and passed a decree for recovery of possession on the plaintiffs paying a certain amount and granting six months' time to the plaintiffs to pay the money that was found payable to the mortgagees:

Held, that the decree was in substance a decree for redemption, though the suit as framed was not one for redemption, and the Court had power under Order 34, Rule 7 (2), Civil P. C., to extend the time for payment of the money under the decree.

It would be too strict an interpretation of R. 7, of O. 34, Civil P. C., to hold that the power to extend the time vested in the Court cannot be exercised even if the decree is virtually one for redemption of a mortgage, unless the suit also is strictly in the form of a redemption suit. AIR (Vol 20) 1933 Mad 762: 38 MLW 575: 65 MLJ 592: (1933) MWN 1124: 57 Mad 398: 145 Ind Cas 927 (DB).

——O, 34, R. 7 — Execution against person.

A decree passed in the terms of an award, resulting on a reference of the difference between the parties, without the intervention of the Court, can be executed personally against the mortgagor, where the award and therefore the decree, only provides specifically for satisfaction of the mortgage amount not of the mortgage property. AIR (Vol 17) 1930 Bom 208: 32 Bom LR 439 (DB).

——O. 34, R. 7 — Decree in favour of both — If warranted by circumstances is good.

The equity of redemption was sold to A by a mother acting as guardian of her son B. A then sued for redemption, and the Court found that B was major at the time when the sale-deed was passed. B then instituted another suit to set aside the sale effected by his mother acting as his guardian, and his suit ended in a compromise decree under which both A and B became partially entitled to the equity of redemption. A's suit was then decreed in favour of both A and B.

Held that as under the circumstances it could not be said that A had no right to sue when he brought his suit and further as the Court is bound to take notice of events that happen since the institution of the suit and to mould its decree according to circumstances as they stand at the time of passing the decree, the decree passed in favour of both A and B was unobjectionable. AIR (Vol 16) 1929 Bom 337: 31 Bom LR 476 (DB).

——O. 34, R. 7 — Decree for surplus — Court fees.

Where interest is decreed during the pendency of a suit, no Court-fee is charged, and as the surplus is the result of accounting directed by the Court under Rule 7, O. 34, it cannot be separately charged for the purposes of Court-fees. AIR (Vol 16) 1929

Nag 1: 24 NLR 197: 11 NLJ 232: 113 Ind Cas 34 (DB).

——O. 34, R. 7 — Decree for possession — It is not under R. 7 — Final decree unnecessary.

In a suit for redemption a decree for possession of the land in suit on payment of a certain sum within six months from the date of the decree was passed. Plaintiff paid the decretal sum into Court more than six months after the date of the decree and applied for possession of the land.

Held, that the decree not having been drawn up in the form of a preliminary decree as provided by Rule 7 of Order 34 the rule did not apply and that the decree was capable of execution. AIR (Vol 11) 1924 Lah 635: 76 Ind Cas 144.

——O. 34, R. 7 — Contents.

There is a certain amount of inconsistency between Rr. 7 and 8 of Order 34, C. P. Code. A preliminary decree in redemption suit ought not to direct more than this, that if the plaintiff makes a default, then the mortgagee should have a right to ask for final decree either for foreclosure or sale as is provided for by Rule 8 of the C. P. Code. AIR (Vol 9) 1922 Bom 127: 64 Ind Cas 1004: 46 Bom 348: 23 Bom LR 1176 (DB).

——O. 34, Rr. 7 and 8 — Form of decree — Redemption suit — Sub-mortgagee party.

In a suit for redemption against the mortgagee and sub-mortgagees the decree ought to provide (1) that plaintiff shall pay the amount due into Court; (2) that the sum shall be applied to discharge the sub-mortgagee; and (3) that the balance, if any, be handed over to the mortgagee. AIR (Vol 4) 1917 Oudh 141: 4 OLJ 475: 42 Ind Cas 66.

——O. 34, Rr. 7 and 8 — Final decrcee — Duty to pass.

Every preliminary decree in a mortgage suit must be followed by a final decree and when a preliminary decree is followed by redemption, a final decree for redemption should always be drawn up. AIR (Vol 2) 1915 Nag 8: 10 NLR 150: 26 Ind Cas 701.

——O. 34, R. 7 — In a mortgage suit a decree was passed for redemption conditionally upon payment of the amount due within six months and declaring that in default of such payment the property was to be sold.

Held that the Court did not pass a preliminary decree and consequently Rule 7 was not applicable. 146 PWR 1913: 235 PLR 1913: 19 Ind Cas 856.

——O. 34, R. 7 (S. 92, T. P. Act) — Redemption, decree for — Time — Mortgage by conditional sale — Time for redemption, if of the essence of such decree — No time fixed — Limitation for execution.

It is of the essence of a decree for redemption in the case of a mortgage by conditional sale that a time should be fixed and that an order should be passed for foreclosure in case of default. Where no such time is fixed, it is an ordinary decree to the execution of which the period of limitation specified in Art. 179, S. 11, of the Limitation Act would apply. (1909) 10 CLJ 115 (117, 118): 1 Ind Cas 71 (DB).

——O. 34, R. 7 (S. 92, T. P. Act) — Redemption decree — Prior mortgagee's execution and purchase without making puisne mortgagee party — Redemption by puisne mortgagee — Amount due.

The first mortgagee obtained a decree for sale and purchased the property in execution for less than the mortgage amount. The puisne mortgagee, who was no party to the suit, sued to redeem.

Held, that the amount to be paid was not the sum for which the property was sold, but the amount due on the mortgage up to the date on which he obtained possession after purchase. (1902) 1902 AWN 7: 24 A 185 (187) (DB).

——O. 34, R. 7 (S. 92 T. P. Act) — Redemption decree — Delivery of title deeds on payment of money — Title deeds lost — Right to demand security from the judgment-debtor.

In execution decree for redemption, the mortgagee-judgment-debtor, who had been directed to deliver the title-deeds to the mortgagor-decree-holder on receipt of the decree amount, but who having lost them was unable to return the same, cannot, in the absence of any express provision in the decree to the effect, be compelled to give security for the value of the property.—(1901) 12 M. L. J. 63 (64) (DB).

6. Interest

——O. 34, R. 7——A mortgagee is entitled to treat interest due under the mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary. (1932) 135 Ind Cas 497 : 32 P L R 735.

——O. 34, R. 7 — Rule is mandatory.

Mortgagors on redemption of the mortgaged property should be directed to pay the mortgagees interest up to the date fixed for redemption by the Court. R. 7, O 34 is mandatory on this point. 107 Ind Cas 393 : A. I. R. (Vol 15) 1928 Lah 96. (DB).

——O. 34, R. 7 — Failure to redeem — Damages — Interest at contract rate up to redemption.

Where the parties did not contemplate redemption of the mortgage, if it remained unredeemed on the expiry of four years from the date as agreed.

Held, the mortgagee in possession thereafter is entitled to damages and the fair measure of damages is prima facie the rate of interest determined by the parties in their original contract. Before the mortgage can be redeemed the mortgagor must pay him interest in accordance with the terms of the contract up to the date of redemption. 76 Ind Cas 916 : 6 L. L. J. 457 : A. I. R. (Vol 10) 1923 Lah. 404 (DB).

——O. 34, R. 7 — Tender, how far necessary to stop interest on mortgage money.

Where a mortgagor is willing to redeem, but the mortgagee's executors are not legally entitled to give discharge, not having taken diligent steps to prove the will, no tender of the money is required to stop interest on the mortgage money in favour of the mortgagor. (1902) 4 Bom. L. R. 453 : 26 B. 643. (648).

7. Mesne profits.

——O. 34, Rr. 7, 10 — General account regarding amount payable to mortgagee is complete and final — Subsequent claim for mesne profits up to date of redemption decree is barred — But claim for mesne profits from date of such decree to date of recovery of possession is maintainable.

In a redemption suit, the account to be taken is of the amount due on the date fixed for redemption and not merely up to the date of the suit. Order 34, Rr. 7 and 10 enact so in express terms. They provide that an account shall be taken first of the amount due to the mortgagee up to the preliminary decree, and secondly, of the charges and expenses properly incurred by him from the date of that decree to the date fixed for redemption. The language of O. 34, R. 10, is significant, for what it contemplates is the final adjustment of the amount payable to the mortgagee, that is to say, a general account has to be taken, which is to be complete and final.

Consequently, a subsequent claim for mesne profits up to the date of redemption decree is barred by res judicata.

Then as regards the profits due for the second period, the position is different. After payment to the mortgagee of the money payable to him under the decree, he is bound to surrender the property and if he fails to do so, his possession is wrongful. A suit for subsequent mesne profits is maintainable, for, in respect of such suit, no question of res judicata can arise. A I R (Vol 25) 1938 Mad 405 : (1938) M W N 356 : 182 Ind Cas 287 (DB).

——O. 34, Rr. 7, 8, 10, O. 2, R. 2 (before amendment of 1929) — Suit for redemption — Plaintiff getting preliminary decree — Deposit of decretal amount— Final decree — Possession not given to plaintiff by defendant — Suit for mesne profits, if barred.

Under O. 34, R. 7, Civil P. C. (Act V of 1908), (before its amendment in 1929), in a suit for redemption, if the plaintiff succeeds, the Court passes a decree ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage and for his cost of the suit, if any, awarded to him on the day specified in the decree which ordinarily is six months from the date of the preliminary decree. This amount is fixed and the plaintiff is directed to pay the same. If the plaintiff pays this amount on or before the date fixed, then the plaintiff applies under O. 34, R. 8, for the preparation of a final decree. The Court, when preparing the final decree, has got to readjust the amount finally under O. 34, R. 10, and if any legitimate sums are due to either party, the Court makes proper orders and directs the defendants to re-transfer the mortgaged property to the plaintiff, and if necessary. orders the defendant to put the plaintiff in possession thereof.

There is no provision for taking into consideration any mesne profits that might become due to the plaintiff by the failure of the defendant-mortgagee to deliver possession. If, therefore, the defendant remains in possession of the property even after a decree of the Court directing him to deliver possession of the property to the plaintiff, then the defendant is a trespasser and a fresh cause of action accrues to the plaintiff and a suit for mesne profits will not be barred by O. 2, R. 2, Civil PC. (A I R (Vol 14) 1927 All 716 : 49 All 597 : 109 Ind Cas 736 Overruled.) A I R (Vol 22) 1935 All 96 : (1935) A L J 115 : 4 A W R (H C) 1261 : 152 Ind Cas 921 (DB).

——O. 34, R. 7 — Decree partly final and partly preliminary — Application is competent to ascertain mesne profits.

Ordinarily in a redemption suit there should be a preliminary decree, followed by a final decree. But where a decree is partly final and partly preliminary, that is final in so far as it was a decree for possession and preliminary in so far it left the question of mesne profits undecided, an application under O. 34 for ascertainment of mesne profits is maintainable. AIR (Vol 13) 1926 Mad 305: 92 Ind Cas 314.

——O. 34, R. 7 — Mesne profits between date fixed and actual delivery of possession — Separate suit to recover does lie.

A mortgagor suing for redemption must bring into account all moneys due to either party in connection with the mortgage up to the day fixed under R. 7. But he is neither obliged, nor is he entitled to have any items of later date, e.g., mesne profits of the period between this date and the actual delivery of possession brought into account, for which therefore a separate suit is maintainable. Mesne profits accruing after the date of payment made according to a decree passed under O. 34, R. 7 can be the subject of a separate suit. A I R (Vol 13) 1926 Oudh 113 : 2 O W N 826 : 91 Ind Cas 258.

——O. 34, R. 7 (Ss. 92, 93 T P Act) — Mortgage — Redemption — Subsequent suit for profits received by mortgagee, barred.

In a suit for redemption there ought to be a complete and final settlement of all accounts between the mortgagee and the mortgagor, right up to the time of actual redemption or sale, as the case may be. A mortgagor, therefore, who has obtained a decree for redemption and paid in what was found by the decree to be due from him cannot subsequently sue for profits realized by the mortgagee in possession which might and ought to have been taken into account at the time of passing the decree. (1907) 1907 A. W. N. 281 : 30 A. 36 (37) : 4 All L J 763.

8. Mixed mortgage

——O. 34, R. 7 — Relief.

Where a mortgage is not purely usufructuary but of mixed or anomalous character referred to in S. 98, T. P. Act the provisions of Rr. 7 and 8, O. 34 C. P. Code are no bar to the passing of a decree debarring the mortgagor from redeeming the land. A I R (Vol 15) 1928 Lah 355 : 10 L L J 198 : 110 Ind Cas 81 (DB).

9. Mortgage of undivided share.

——O. 34, R. 7 — Redemption — Mortgage of undivided share — Suit for redemption without partition, if maintainable.

A tenant-in-common can mortgage his undivided interest in a property. Where an undivided half is mortgaged by a person who owns that undivided half, it is not open to the mortgagee to resist redemption and he is bound to deliver, on tender of the mortgage amount the title-deeds relating to the mortgaged property and such possession as he took from the mortgagor in respect of the undivided half though the mortgagee is himself the mortgagee of the other undivided half. It cannot, therefore, be maintained that a suit for redemption of such mortgage cannot lie without partition. A I R (Vol 25) 1938 Mad 562 : (1938) M W N 78 : 47 M L W 686 : 182 Ind Cas 916 (DB).

10. Mortgage executed by a minor.

——O. 34, R. 7 — Redemption — Suit for — Suit against one of mortgagees not maintainable — Mortgagor, if can claim decree for redemption of remaining property by re-payment of whole of mortgage money to remaining mortgagees.

Where the mortgagor instituted a suit for redemption against all the mortgagees but the suit was not maintainable against one of them:

Held, that the mortgagor could not claim a decree for redemption of the remaining property by payment of the whole of the mortgage money to the remaining mortgagees. A I R (Vol 26) 1939 All 600 : (1939) A L J 590 : 1939 A W R (H C) 559 : 184 Ind Cas 862 (DB).

——O. 34, R. 7 — Mortgage executed by minor — Suit to set aside mortgage — Decree directing plaintiff to pay up mortgage amount and declaring mortgage void and directing it to be cancelled and delivered — Whether redemption decree — Mortgagee's right to apply for sale on default of payment.

Where, in a suit to have a mortgage declared invalid and asking for its cancellation on the ground that the executant was a minor on the date when

he executed the mortgage, a decree was passed upholding the plea of minority but directing that the plaintiffs should pay to the mortgagees the mortgage amount with interest before a certain date as the money had been obtained by fraud and used for the benefit of the minor and that on such payment the mortgagee Bank should deliver to the plaintiffs the mortgage deed duly cancelled with the title deeds and payment was not made on the prescribed date.

Held, that the decree was in the nature of a redemption decree and the mortgagee was entitled to claim the benefit of O. 34, R. 7. Civil P. C., and to ask for an order for the sale of the properties comprised in the mortgage. A I R (Vol 22) 1935 Mad 478 : 41 M L W 458 : 68 M L J 546 : (1935) M W N 486 : 156 Ind Cas 594 (DB).

11. Nature of proceedings.

——O. 34, R. 7 — Amount should be ascertained

Under O. 34 R. 7, the court can either order that an account shall be taken of what will be due to the defendant for the principal and interest due on the mortgage and for his costs of the suit, or to declare the amount due at the date of such order; but in either case the Court should proceed to ascertain the amount which would be found due on the date which is to be fixed for payment and specify the consequences of the payment or non-payment thereof. If it merely directs that an account should be taken of what would be due to the mortgagee for principal and interest due on the mortgage, its order would be nothing more than an interlocutory order to be followed by the making up of such an account, till which the preparation of the preliminary decree should be postponed. The preliminary decree and the subsequent formal order would both be set aside in such case. A I R (Vol 11) 1924 Oudh 140 : 10 O. L. J. 374 : 77 Ind Cas 346.

——O. 34, Rr. 7 and 8 — Nature of proceedings — After preliminary decree.

Proceedings after preliminary decree for redemption till the final decree is passed are proceedings in suit. AIR (Vol 2) 1915 All 88: 37 All 226: 13 A L J 307 : 27 Ind Cas 771 (DB).

12. Payment.

——O. 34, R. 7 — Can be given effect if there is satisfaction under O. 23, R. 3.

Under the terms of O. 34, R. 7, cl. (c) the mortgagor decree-holder is bound to pay the amount into Court. If the payment is in fact made out of Court to the defendant, who accepts it in satisfaction of his decretal money, the Court can give effect to such agreement or satisfaction under the terms of O. 23, R. 3, but where the defendant has not appropriated the amount towards the payment of the redemption money, but in satisfaction of other debts, there cannot be said to be an agreement or satisfaction and the Court is not bound to take evidence for the purpose of deciding whether or not there had, in fact, been an adjustment. A I R (Vol 14) 1927 Oudh 275 : 1 L C 63 : 102 Ind Cas 428.

13. Power of the Court.

——O. 34, R. 7 — Preliminary decree — Not necessary in every case.

It is not absolutely necessary that in every mortgage suit there should be a preliminary decree before a final decree is passed. If the terms of the compromise arrived at in a mortgage suit are that a decree should be forthwith passed, a decree which is capable of execution, it is perfectly competent to a Court to give effect to the compromise and pass such a decree. AIR (Vol 13) 1926 Mad 644: 97 Ind Cas 613: 1926 MWN 285.

——O. 34, R. 7 — Appeal — Date of payment need not be changed.

An appellate Court modifying a redemption decree need not, in every case, necessarily change due date of payment of redmeption money. AIR (Vol 13) 1926 Nag 207: 89 Ind Cas 937.

——O. 34, R. 7 — Appeal from preliminary decree — Decree is only amended preliminary decree.

A preliminary decree for redemption was passed by the appellate Court which directed that the decree of the trial Court should be amended in two particulars. (1) the amount was to be altered from Rs. 1,272-8-0 to Rs. 949; and (2) the date of payment from 17th February 1909 to Jeth 1316 F.

Held, the Court of appeal only modified two terms of the preliminary decree and did not pass a decree which was something different from a preliminary decree for redemption. AIR (Vol 12) 1925 Oudh 649: 90 Ind Cas 418: 28 OC 261.

14. Rent.

——O. 34, R. 7 — Can be recovered in redemption suit.

Although a mortgagor can in the mortgagee suit ask for an account to be taken, and at that time debit the mortgagee with the rent paid to the zamindar by him, but agreed to be paid by the mortgagee, it is also open to the mortgagor to say that he would prefer to realize this sum by a separate suit based on S. 69, Contract Act, rather than by complicating the mortgage account. AIR (Vol 14) 1927 All 713: 103 Ind Cas 289: 25 ALJ 791.

14A. Retransfer of property to mortgagor.

——O. 34, R. 7 (T. P. A., S. 92 old) — "Free of all incumbrances created by the defendant" — Lease by mortgagee, effect of, on redemption.

When a mortgage is redeemed, mortgagee is bound to retransfer the property free from the mortgage and all other incumbrances created by him. Where, therefore, he has transferred a portion of the mortgaged land under lease the lease comes to an end when the mortgage is redeemed. The relation of the landlord and tenant does not exist between the mortgagor and the mortgagee's lessee and a suit to eject the mortgagee's lessee lies in a Civil Court. (1906) 1906 AWN 241: 3 ALJ 517.

15. Successive suits.

——O. 34, R. 7 — Redemption, suit for — Decree fixing amount to be paid within stated date — Amount not paid — Suit by mortgagor's successor for redemption — Whether barred by res judicata.

Where the mortgagors brought for redemption of properties covered by usufructuary mortgages and the suits were decreed fixing the sum to be paid by them within a stated date, but no payment was made accordingly and the successor of the mortgagors subsequently filed a suit claiming a declaration of his right to redemption:

Held, the suit was not barred by res judicata as no final decree had been passed in the previous suit and the right of redemption was not extinguished. The mortgagors had a subsisting right to redeem after having the state of account as between them and the mortgagees worked out by the Court. AIR (Vol 23) 1936 Pat 420 : 2 BR 656 : 17 PLT 564 : 15 Pat 607 : 163 Ind Cas 908 (DB).

——O. 34, R. 7 — Mortgage — Redemption — Further charge — Suit for redemption of first mortgage without paying amount due under further charge.

The father of defendant No. 1 executed a mortgage to A, B and C in 1885 for a sum of Rs. 452. In 1886, he executed another document in favour of A and B creating a further charge for a sum of Rs. 95 with a certain rate of interest. The plaintiff, a subsequent mortgagee of the equity of

redemption, sued for redemption of the mortgage of 1885:

Held, that the second deed was a mashrut-ul-rehn and the plaintiff could not redeem the first mortgage alone without paying the amount due under the second document. (1931) 132 Ind Cas 376 (Lah).

——O. 34, R. 7 — Construction of.

In the previous suit a decree was passed directing the mortgagee to take the mortgage money which had been deposited in Court by the mortgagor and to deliver the property to the mortgagor. The mortgagor applied for delivery of the property. Afterwards he gifted the property to the plaintiff. The application for the delivery of the property was subsequently dismissed. The plaintiff brought another suit to redeem the property.

Held, that the decree in the previous suit was not one under C. P. Code, O. 34, R. 7, but was a combined decree under O. 34, R. 8 and, as under it the mortgagee was permitted to withdraw the money that had been already deposited in Court, it had the effect of extinguishing the mortgage and a second suit for redemption was barred. AIR (Vol 12) 1925 All 484: 6 LRA Civ 241: 85 Ind Cas 480.

——O. 34, R. 7 — Redemption, second suit for.

Where it was provided in the previous decree that on plaintiff's failure to pay the money and the Court-fees within the prescribed period the decree could not be executed, but the decree was not drawn up in the manner prescribed by O. 34, R. 7 of the C. P. Code, and did not contain any clause that, if payment was not made on or before the date fixed by the Court, the plaintiff should be debarred from all right to redeem or that the mortgaged property should be sold, and where no final decree was passed under R. 8.

Held, another suit for redemption was not barred by O. 34, R. 7. AIR (Vol 12) 1925 Lah 31 : 5 Lah 371 : 84 Ind Cas 67 (DB).

——O. 34, R. 7 — Failure to act up to decree — Effect of.

In as much as the payment by the mortgagor is not barred either by the relapse of the period prescribed in the redemption decree or by Art. 181 of the Limitation Act he can save the mortgage property from sale at any time before the sale is confirmed. Where after a decree for redemption is passed under O. 34, R. 7, the mortgagor neither pays the amount of the mortgage within the time fixed by the decree nor the mortgagee applies for sale on the expiry of such period and then the mortgagee is dispossessed forcibly the parties are entitled to be restored to the same position in which they were on passing of the redemption decree in the suit brought by mortgagee for possession. It is open to them to work out the decree in terms of its directions if that is not legally barred. After the expiry of the period fixed by decree without payment of the decretal amount, the mortgagee has a right to apply under R. 8(4) of Order 34 for a decree for sale of the mortgage property but that does not take away mortgagor's right of redemption which he has got even after sale under R. 89, O. 21. AIR (Vol 12) 1925 Oudh 255: 28 OC 46: 80 Ind Cas 706.

——O. 34, Rr. 7, 8 (T. P. A., Ss. 92, 93) — Usufructuary mortgage — Redemption — Form of decree in a suit for redemption.

An order declaring that the plaintiff's right to redeem shall be extinguished upon non-payment within the time limited by a decree for redemption of the amount found to be due is not a proper order when the mortgage sought to be redeemed is a usufructuary mortgage. Nevertheless where such an order has been made and the decretal money has not been paid within the time limited and the decree has been allowed to become final, the plaintiff cannot thereafter bring a second suit for redemption. (1906) 29 A 481 (484) : 1907 AWN 137 : 4 ALJ 447 (DB).

——O. 34, Rr. 7, 8 (T. P. A., Ss. 92, 93) — Second suit for redemption not maintainable — Civil Procedure Code (XIV of 1882), Ss. 13 and 244.

Where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage.

Per Sir Arnold White C. J. :—(1) if the right to redeem is only extinguished by an order under S. 93, it subsists till then. But although it subsists, the remedy is barred by S. 13 of the Code of Civil Procedure.

Per Davis, J. :—As the full Bench in 25 M. 244 has held that the decree obtained by the mortgagee is the only decree in the case and that an application for order absolute is one in execution, the second suit would be barred by S. 13.

Per Bhashyam Aiyangar, J. :—(1) An application for extension of time to redeem can be made by the mortgagor, though the mortgagee has not applied for an order absolute. (2) Notwithstanding that S. 93, Transfer of Property Act, deals only with a mortgagee's application for an order for sale, it would on principle seem that there could be no objection to the mortgagor applying for execution of the decree passed under S. 92, and getting an order for sale of the mortgaged property, the sale of which has been ordered under the last paragraph of S. 92, in case payment is not made on or before the day fixed in the decree for redemption.

(3) A second suit for redemption will be barred by Ss. 13 and 244 of the Code of Civil Procedure. (4) Even if the order absolute for sale is the final decree the previous suit will be still pending, and S. 12 of the Civil Procedure Code will bar the trial of the second suit. (5) In the view that the decree under Ss. 86, 88 and 92 are the final judgments or decisions in the suit, they will be appealable as 'decrees' according to the first part of the definition of 'decree' in the Civil Procedure Code, and applications made under Ss. 87, 88 and 93 will be governed by Art. 179 of the second schedule of the Limitation Act, and orders thereon can be passed by the Court executing the decree and will be apbpealable as orders passed under S. 244(c), Civil Procedure Code, subject under the notification of the Government of India to the payment of the fixed Court-fee prescribed by No. II of Sch. 2 of the Court-Fees Act.

(6) A person who got a decree establishing his right and entitling him to consequential relief, cannot sue again for the same, but can only work out his right and get the relief by executing the decree. (7) S. 28 of the Limitation Act applies only to suits and not to execution of decrees. 7 M. 423, 8 M. 478, 21 M. 18 overruled. (1901) 25 M 300 (307, 311, 315) : 12 MLJ 128 (FB).

16. Time.

——O. 34, R. 7 — Extension of time — Failure to pay — Rights not enforced — Decree on subsequent payment, good.

If after the passing of a preliminary decree in a mortgage suit, the mortgagor fails to pay the decretal amount within the time fixed therefor by the Court, and the mortgagee also fails to enforce his rights under the decree, then the Court is clearly right in making the decree absolute on the mortgagor paying the decretal amount even after the expiry of the original period fixed. AIR (Vol 14) 1927 Bom 175 : 29 Bom LR 228 : 100 Ind Cas 1039 (DB).

——**O. 34, R. 7 — Payment to prior mortgagee — Time not fixed — Not more than six months.**

The preliminary decree in a mortgage suit contained a provision that the decree-holder would not be entitled to bring the property to sale unless he paid the amount of a prior mortgage. No time limit was fixed for the payment of this amount:

Held that limitation for an application for final decree would run from the expiry of six months from the preliminary decree. Although no period was fixed in the preliminary decree for the payment of the amount of the prior mortgage, that period could not be anything more than that prescribed in O. 34, R. 7 for the payment of the amount under a decree for redemption. AIR (Vol 8) 1921 All 56 : 19 ALJ 83 : 43 All 320 : 60 Ind Cas 817 (DB).

——**O. 34, Rr. 7 and 8 — Extension of time — Payment after date fixed for redemption — Validity.**

A mortgagor decree-holder who fails to pay the redemption money within the date fixed for payment but pays it before the decree is made absolute, is entitled to redeem. (AIR (Vol 2) 1915 All 302 : 29 Ind Cas 438.

——**O. 34, Rr. 7, 8 (Ss. 92, 93, T. P. Act) — Application for enlargement of time — Application to be made to the Court of first instance and not to an appellate Court.**

Under S. 93, Transfer of Property Act an appliation for extension of the time for payment of money in a decree under S. 92 of that Act by the appellate Court must be made to the Court of first instance and not to the appellate Court. (1909) 6 ALJ 251 : 31 A 328 (330) : 2 Ind Cas 220 (DB).

17. Transferee.

——**O. 34, R. 7 — Transfer of decree by mortgagee — Validity — Mortgagee, whether 'decree-holder'.**

In a redemption suit, the mortgagee is a decree-holder under the definition of "decree-holder" in S. 2 (3), Civil P. C. He can, therefore, transfer his decree and on the transfer being recognised, the transferee has the same right to apply for the passing of final decree. AIR (Vol 18) 1931 Mad 592 : 34 MLW 556 : 54 Mad 708 : 131 Ind Cas 487 (DB).

18. Usufructuary mortgage.

——**O. 34, Rr. 7 and 8 — Usufructuary mortgage — Preliminary decree for redemption — Default by mortgagor in paying amount declared under decree within time fixed — Mortgagor still can redeem and apply for final decree.**

In the case of a usufructuary mortgage even after the period for payment of the amount declared due fixed in the preliminary decree has expired the plaintiff-mortgagor can apply for a final decree at any time before the right to redeem becomes barred. No question of limitation arises in such a case as the plaintiff-mortgagor has a right to apply for the final decree until his right to redeem the mortgaged property is barred.

A preliminary decree in a suit for redemption of a usufructuary mortgage may, under R. 7(1)(c)(i), fix a time for payment of the amount declared due under the decree. But default in making the payment of the amount declared under the decree within the time fixed does not operate to debar the plaintiff-mortgagor from all right to redeem the mortgaged property.

Rule 7(1)(c)(ii) does not apply to a usufructuary mortgage and therefore, on default of payment by the plaintiff-mortgagor to pay the amount declared under the preliminary decree, the usufructuary mortgagee cannot apply for a final decree. In the case of a usufructuary mortgage, it is only the plaintiff-mortgagor who can apply to the Court to pass a final decree and on payment of the amount declared due under the preliminary decree, to order the mortgagee to put him in possession of the mortgaged properties.

Rule 7(2) does not apply to a usufructuary mortgage and therefore, it is not necessary for the mortgagor to apply for extension of time fixed in the preliminary decree:

[The plaintiff-mortgagor in this case of a usufructuary mortgage was allowed to apply for a final decree and redeem the mortgaged property on payment of the amount declared due under the preliminary decree even nearly seven years after the preliminary decree was finally affirmed on dismissal of appeal by the High Court.] AIR (Vol 33) 1946 Pat 99 : 24 Pat 575 (DB).

——**O. 34, Rr. 7, 8, S. 148 — Usufructuary mortgage — Redemption — Preliminary decree — Condition that plaintiff should deposit amount within a period and on default, suit should be dismissed — Default in payment — Extension of time.**

The plaintiffs brought a suit for redemption of a usufructuary mortgage in favour of the defendant. The Court passed the following order:

"The suit is decreed conditional on the plaintiffs depositing Rs. 199-15-0 to the credit of the defendant in this Court within six months; prepare a preliminary decree for redemption under O. 34, R. 7, Civil P. C. On compliance, the plaintiffs shall get possession and costs of the suit; on failure their suit shall stand dismissed with costs". The plaintiffs failed to pay within the period fixed and their application for extension of time was granted. Subsequently on deposit of the money, a final decree was passed directing delivery of possession, although the mortgagee objected on the ground that the Court had no power to extend the time. In appeal the Court held that the Appellate Court was not competent to question the order of the first Court granting extension:

Held, that the first Appellate Court was wrong in holding that the mortgagee could not impugn order of the first Court granting an extension of time when he appealed from the first decree and that that Court ought to have decided the question raised by the mortgagee on the merits:

Held also, that the mortgage being usufructuary, the consequence of failure to deposit should have been stated to be the sale of the property and not that the suit should stand dismissed, and the Court did not intend to pass a final decree concluding the suit, but all it meant was that, on failure of the mortgagor to deposit the mortgage money within the time allowed for redemption, it would be open to the mortgagee to apply for dismissal of the suit, and that the order of dismissal, if passed, would be embodied in a final decree which would conclude the suit, and hence it was open to the Court of first instance to grant an extension of time to the mortgagor under O. 34, R. 8, proviso or S. 148, Civil P. C. AIR (Vol 20) 1933 All 157 : 145 Ind Cas 591.

——**O. 34, R. 7 — Redemption — Accretion.**

Where during the continuation of a usufructuary mortgage, the mortgagee takes from a tenant a "mortgage by way of conditional sale" and after the expiry of his own mortgage forecloses the other mortgage, the original mortgagor is entitled to treat the latter as an accretion and claim redemption of the whole on payment of the money. (1909) 10 CLJ 83 : 3 Ind Cas 395 (DB).

——**O. 34, R. 8.**

See also O. 34, Rr. 3 and 5.

1. **Accounts.**
2. **Appeal.**
3. **Applicability and Scope.**
4. **Decree for redemption.**

5. Extension of time.
6. Final decree for foreclosure or sale.
7. Interpretation.
8. Limitation.
9. Redemption after due date.

1. Accounts.

——O. 34, Rr. 8 and 10 — Accounts — Mortgagor and mortgage — Relationship, if continues.

The relationship of mortgagor and mortgagee continues to subsist even after the preliminary decree in a redemption suit is passed and the mortgagee continues liable to account for the rents and profits by him. For certain purposes the suit remains pending and in passing a final decree the Court can take into consideration subsequent events. AIR (Vol 5) 1918 Mad 587: 42 Ind Cas 230 (DB).

——O. 34, R. 8 — Accounts — Redemption.

In a decree for redemption the accounts should be taken up to the date when possession is given. (1912) 16 Ind Cas 184 (Mad) (DB).

——O. 34, R. 8 — Accounts — Redemption.

It is the Court's duty in a redemption suit, to settle accounts, though not claimed by the plaintiff in his suit for redemption. (1910) 13 OC 32: 5 Ind Cas 444.

2. Appeal.

——O. 34, R. 8 — Appeal — Date of payment.

Where the appeal from a decree in a mortgage suit is admitted and heard on the merits, and where ultimately the decree appealed from is confirmed, it has the effect of extending the time fixed under the decree thus confirmed in appeal, in such a case the time would run from the date of the decree confirming it, but where the appeal is dismissed under O. 41, R. 11 the decretal amount must be paid within the time allowed by the original decree. 96 Ind Cas 1023: 47 Bom 956 : 25 Bom LR 990: AIR (Vol 11) 1924 Bom 98.

——O. 34, R. 8 — Extension of time — Order granting time — Appeal.

An order in a mortgage suit extending the time fixed for paying of prior mortgages on the property is within O. 34, R. 8. Such an order is a decree within S. 47 and is, therefore, appealable. (1913) 35 All 116: 11 ALJ 62: 18 Ind Cas 14 (DB).

——O. 34, R. 8 — Extension of time — Appeal — Effect of.

Time allowed to a mortgagor cannot be enlarged merely because an appeal is preferred against the decree by the mortgagor or mortgagee, which is afterwards dismissed or withdrawn. (1913) 17 CWN 457: 17 CLJ 120: 18 Ind Cas 14 (DB).

3. Applicability and Scope.

——O. 34, R. 8 — Scope of.

The provisions of R. 8 (4) are imperative. 100 Ind Cas 324: AIR (Vol 14) 1927 All 305.

——O. 34, R. 8 — Extension of time — Redemption suit.

Order 34, R. 8, C. P. C., applies to redemption suits only and under that rule the Court cannot extend time for payment fixed by a decree where the decree is not the decree for redemption.

Where a puisne mortgagee who has not been made a party to a suit by a prior mortgagee sues on his mortgage and is ordered to pay a certain sum to the auction-purchaser in the prior mortgagee's suit, O. 34, R. 8 does not apply and the time limited for payment cannot be extended. AIR (Vol 8) 1921 All 304: 18 ALJ 771: 57 Ind Cas 1006 (DB).

——O. 34, R. 8 — Scope of. See (1949) 1 MLJ 116: AIR (Vol 6) 1919 Mad 613.

——O. 34, R. 8 — Final decree — Application for — T. P. Act, S. 92.

No application for a final decree can be made under O. 34, Rr. 7 and 8 of the Code of Civil Procedure in a case where a decree was passed under S. 92 of the T. P. Act. 22 Ind Cas 283: AIR (Vol 1) 1914 Mad 392 (DB).

4. Decree for redemption.

——O. 34, R. 8 (1) — Rule applicable to redemption suit of usufructuary mortgage.

In a suit for redemption of a usufructuary mortgage filed by the mortgagor, the mortgagor can even after the time fixed for payment by the preliminary decree has expired, take advantage of O. 34, R. 8 (1) by exercising the right of making the payment of the amount due from him as fixed under R. 7 (1) at any time before a final decree debarring him from all right to redeem the mortgaged property has been passed. And as no application to be filed by the mortgagor is contemplated by the provisions of R. 8 (1), the question of limitation in such a case does not arise. AIR (Vol 33) 1946 Mad 38 : 1945 MWN 578: (1945) 2 MLJ 239.

——O. 34, R. 8 — Redemption suit, continuation of.

During the three years fixed by Art. 181 of the Limitation Act for applying for a final decree, the suit for redemption continues, and during that period rights of the mortgagor and the mortgagee are governed by the preliminary decree. 100 Ind Cas 324 : AIR (Vol 14) 1927 All 305.

——O. 34, R. 8 — Unauthorised person.

Redemption of a mortgage by an unauthorised person does not validly discharge the mortgage. 79 Ind Cas 687: 10 PWR 1923: AIR (Vol 11) 1924 Lah 738 (DB).

——O. 34, R. 8 — Form of decree — Re-transfer the mortgaged property.

After a decree for redemption the executing Court should see that all the rights acquired by the mortgagee under the mortgage are re-transferred to the mortgagor that the latter is placed in his original position. 57 Ind Cas 763: AIR (Vol 7) 1920 Lah 239.

——O. 34, R. 8 — Mesne profits — Right to — period prior to passing of final decree.

A mortgagee is not obliged to vacate possession of the mortgagee property until he has received the full mortgage money and a mortgagor cannot therefore sue the mortgagee for mesne profits for a period prior to the passing of a final decree in his favour in redemption suit filed by him. AIR (Vol 7) 1920 Oudh 24: 7 OLJ 24: 2 UPLR (JC) 33: 55 Ind Cas 503.

——O. 34, R. 8 (T. P. Act, S. 93) — Deposit accepted by Court after time but before order absolute — No formal extension of time — Redemption and sale, suit for, by subsequent mortgagee — Purchaser in execution of prior mortgage decree in possession, position of.

Defendant purchased a certain property in execution of decree on a suit by a first mortgagee in which the plaintiff, a third mortgagee, was no party. He (the defendant) redeemed the second mortgagee and was in possession of the property. The plaintiff sued to enforce his mortgage as also to redeem prior incumbrances:

Held, that S. 93 of the Transfer of Property Act did not, in its literal terms, apply to a case where there was no prior mortgage still in existence, but the principles there laid down ought to be followed in dealing with such a case. The plaintiff who did not deposit the redemption money

within the time allowed by Court can redeem afterwards, before a final order is made under Cl. (2) of S. 93 of the Transfer of Property Act, that is before the decree is made absolute. The position of the defendant, who is in possession of the property under an obligation to retransfer it if the redemption money is paid on a fixed date, is analogous to that of a mortgagee by conditional sale, if a deposit of the redemption money is accepted by the Court before the final order under Cl. 2, S. 93, of the T. P. Act, but after the date fixed for payment, it becomes an effectual deposit, although no formal extending the time was passed. (1908) 8 CLJ 547 : 36 C 122 (127) : 1 Ind Cas 780 (DB).

5. Extension of time.

——O. 34, R. 8 — Default.

The refusal of the treasury officer to take money paid as decretal amount, though tendered in time cannot amount to a default on the part of the judgment-debtors. AIR (Vol 16) 1929 All 881 (DB).

——O. 34, R. 8 — The provision for postponement of the date of payment is not limited to mortgages other than a mortgage by conditional sale but applies to such mortgage also. 111 Ind Cas 242: 50 All 882: 26 ALJ 1209: AIR (Vol 15) 1928 All 480 (DB).

——O. 34, R. 8 — Date of payment after extension is the starting point.

Where a preliminary decree for redemption is passed, but the mortgagor fails to deposit the decretal amount on or before the fixed date, it is open to the mortgagee to apply for a final decree debarring the mortgagor from all rights to redeem it. If the mortgagee does not so apply and the Court extends the time for payment by the mortgagor, the mortgagee is entitled to pay into Court within the extended time and apply for a final decree and limitation for that application will begin to run from the date as fixed payment under extension.

Per Shah J. Where the time is extended and the payment is made within that extended time the mortgagor must be taken to have paid into Court the amount declared due on the day fixed within the meaning of this rule; and it is possible that the Legislature intended that where the payment was made by the mortgagor the application for making the decree final was necessarily implied, and that, therefore, the words as to application to be found in sub-rule (2) were not considered necessary in sub-rule (1). 50 Bom 730 : 28 Bom LR 1325 : 98 Ind Cas 943 : AIR (Vol 14) 1927 Bom 32 (DB).

——O. 34, R. 8 — Even if the decree is a compromise one.

A Court has power to extend time for depositing the money in a redemption suit, in favour of the plaintiffs, even though the time is fixed in accordance with a decree passed in accordance with a compromise by parties. 101 Ind Cas 734: 13 OLJ 828: AIR (Vol 14) 1927 Oudh 586.

——O. 34, R. 8 — Postponement — No loss to mortgagee.

The fact that the mortgagee loses nothing by a late deposit of money by the mortgagor, is a good cause for postponement of the day fixed for payment under O. 24, R. 8. 39 Mad 882, Not Foll. 13 OLJ 828 : 101 Ind Cas 734 : AIR (Vol 14) 1927 Oudh 586.

——O. 34, R. 8 — Extension of time — Suit for partition — Alienee impleaded as defendant — Decree directing possession to be delivered on plaintiff paying his share of the amount — Power to enlarge time.

In a suit for partition the alienee of a portion of the joint family properties was made a defendant. The alienation was impeached as not binding on the family to the extent of Rs. 800 and the Court directed plaintiffs to obtain possession of the properties from the alienee after paying a sum of Rs. 400 within a day fixed. Plaintiff defaulted and applied for extension of time.

Held, that the decree was one for redemption in effect in the absence of a final decree to the effect, that in case the money is not paid within the time fixed the suit for possession shall stand dismissed, and it is open to the Court to extend the time for paying the amount under the proviso to O. 34, R. 8. 37 MLJ 695 : 11 LW 25: 54 Ind Cas 451 : AIR (Vol 7) 1920 Mad 99 (DB).

——O. 34, R. 8 — Extension of time — Payment after expiry of period fixed but before final decree.

Order 34, R. 8, C. P. C., provides for an extension of time for good cause shown. Where a mortgagor wishes to pay in the redemption money after the time specified but before the final decree he has to apply for an extension of time. The Court may, however, treat the application to pay in the money as tantamount to an application for extension of time. The Court is not absolved from the necessity for passing a final decree. There is no provision for the execution of the preliminary decree before it has been made final. (1919) 3 UBR 183 : 54 Ind Cas 507: AIR (Vol 7) 1920 Upp Bur 43.

——O. 34, R. 8 — Extension of time — Postponing payment.

If no loss is caused to the mortgagee by late deposit of the mortgage money, delayed payment under O. 34, R. 8, C. P. C., may be accepted. AIR (Vol 6) 1919 Oudh 381: 6 OLJ 94: 50 Ind Cas 201.

——O. 34, R. 8 — Extension of time — Mortgage, decree — Time fixed for payment — Appeal — Whether time extended.

Where an Appellate Court decree confirms the decree of the first Court and is silent regarding the time fixed for payment by the Court of first instance, a further period cannot be given for payment from the date of the appellate decree. But a party, who is not bound to perform any act under the decree of the first Court and who appeals to get a larger benefit than what the decree grants him is entitled to reckon the period in his favour from the date of the appellate decree, provided he was not disobeyed any direction of the Court. AIR (Vol 5) 1918 Mad 919: 32 MLJ 455: 41 Ind Cas 268 (FB).

——O. 34, R. 8 — The power to extend time for payment of mortgage money rests in the Court making the final decree in a redemption suit under O. 34, R. 8, i. e., the Courts of first instance though the preliminary decree was comfirmed on appeal. AIR (Vol 4) 1917 All 239 : 39 All 396 : 15 ALJ 288 : 39 Ind Cas 630 (DB).

——O. 34, R. 8 — Extension of time — Forum.

The word 'Court' in O. 34, R. 8, does not always mean the Court which passed the decree and a Court of first instance to which a suit has been remitted after a preliminary decree by the Appellate Court, has the exclusive jurisdiction to deal with an application for an extension of time under O. 34, R. 8 proviso. AIR (Vol 3) 1916 Mad 694: 39 Mad 876 : 2 LW 1074 : 29 MLJ 708 : 18 MLT 486 : 31 Ind Cas 240 (DB).

——O. 34, R. 8 — Extension of time Redemption decree — Deposit — Time not limited.

A mortgagor who obtains a decree for redemption under the T. P. Act and before the enactment of the C. P. C., of 1908 is entitled to deposit the money due before the passing of a decree absolute, without obtaining an extension of the time limited by the decree although the said Code was in force at the time he applied for the deposit. If the whole amount due under a decree is paid into Court the decree becomes satisfied without any formal order of Court recording satisfaction provided it is paid by the judgment-debtor or his authorised agent or pleader. AIR (Vol 3) 1916 Oudh 138 : 3 OLJ 189 : 19 OC 30 : 34 Ind Cas 349.

——O. 34, R. 8 — Extension of time — Compromise-decree.

The power to enlarge time can be exercised only in cases to which the rule strictly applies i. e., to cases in which a suit for redemption has been brought and in which both preliminary and final decrees have been passed. A suit for possession by a puisne mortgagee against the prior mortgage was compromised, by which possession was to be allowed on condition of the plaintiff paying a certain sum by a particular date and on default of payment on the date, possession of prior mortgagee was to continue on the date the plaintiff applied for extension of time. Held, that neither O. 34, R. 8 nor S. 148, C. P. C., applied and no extension could be allowed. AIR (Vol 2) 1915 Oudh 226: 18 OC 58: 28 Ind Cas 862.

——O. 34, R. 8 — Extension of time — Redemption after time fixed — Difference between — New Code and Old Code.

Under O. 34, R. 7 a plaintiff mortgagor cannot redeem after the expiration of the time fixed by the Court without obtaining an extension of time. Under the T. P. Act, however, he had a right to redeem before an order absolute for sale had been passed and such a right being a vested right is saved to the mortgagor by the General Clauses Act, S. 6 if the decree was passed before the new Code came into force. (1911) 14 OC 10: 9 Ind Cas 337 (DB).

——O. 34, R. 8 (S. 93, T. P. Act) — Extension of time after expiry of period.

Where in a suit for redemption of an usufructuary mortgage under S. 93 of the Transfer of Property Act, the Court passed a decree conditional upon the plaintiff's depositing the money within a fixed period and that period expired.

Held that the time might, as a matter of course, be extended by the Court upon an application made preferably in writing even after the expiry of the time. The right of redemption of the mortgagor could only be extinguished without a suit by the mortgagee, only by obtaining an order as provided in O. 34, R. 8 of the C. P. C. (1909) 6 ALJ 537 (538) : 5 MLT 390: 2 Ind Cas 466.

——O. 34, R. 8 — Extension of time — Expiry of time fixed for redemption — Acceptance by Court of money — Effect of.

Where the plaintiff in a redemption suit fails to pay before the expiry of the period fixed but the Court accepts it before the order absolute under S. 93 is made it is a valid deposit as the relationship of mortgagor and mortgagee subsists till the order absolute is made. (1909) 36 Cal 122: 8 CLJ 547 : 1 Ind Cas 780 (DB).

——O. 34, R. 8 — Extension of time.

A mortgagor who fails to redeem his mortgage within the time fixed by decree passed by consent of parties and whose application for extension of time is refused by Court cannot recover the mortgaged property when the mortgagee comes to Court for an order absolute. An order absolute is necessary even when the decree for redemption is a consent decree. (1909) 5 MLT 76: 2 Ind Cas 616.

——O. 34, R. 8 (T. P. Act, S. 93) — Mortgage — Redemption — Enlargement of time — Jurisdiction of Appellate Court.

Although the Court of first instance is the proper Court for dealing with applications under the last paragraph of S. 93 of the Transfer of Property Act, 1882, the appellate Court, nevertheless, has jurisdiction to allow the enlargement of time in cases where there has been an appeal. (1906) 1906 AWN 203 (203) : 3 ALJ 828.

——O. 34, R. 8 (S. 93, T. P. Act) — Redemption decree — Failure to pay money within fixed period — Enlargement of time.

Where in a redemption decree the mortgagor fails to pay the amount of the decree to the mortgagee within the period fixed therein, the mortgagor does not lose his right to obtain possession on the payment of the redemption money after that period and the Court may, under S. 93 on good cause shown, enlarge the time to pay money and impose such terms as it thinks fit. (1903) 5 Bom LR 719 : 28 Bom 102 (104) (DB).

——O. 34, R. 8 (T. P. Act, S. 93) — Redemption — Appeal — Enlargement of time — Expiration of time fixed.

An application for enlargement of time for redemption may be entertained and granted after the expiry of the time originally fixed. Where on appeal a decree for redemption was confirmed after six months from the date of the original decree and soon after the respondent applied for extension of time which the appellate decree had not provided for.

Held, that time should be extended. (1901) 3 Bom LR 554 (556, 557) : 26 Bom 121 (DB).

——O. 34, R. 8 (T. P. Act, S. 93) — Extension of time.

Per Bhashyam Aiyangar J. : An application for extension of time to redeem can be made by the mortgagor, though the mortgagee has not applied for an order absolute. (1901) 25 Mad 300 (307) : 12 MLJ 128 (FB).

——O. 34, R. 8 (T. P. Act, S. 93) — Application for enlargement of time to be made to Court of first instance.

Where a decree for redemption under S. 92 of the Transfer of Property Act is made by the appellate Court an application for extension of time should be made to the Court of first instance. (1900) 23 A 88 (90) : 1900 AWN 209 (DB).

6. Final decree for foreclosure or sale.

——O. 34, R. 8 — Preliminary decree — Payment out of Court, whether can be recognised in passing final decree.

After the passing of the preliminary decree in a mortgage suit, payment of the mortgage money made out of Court cannot be recognised in passing the final decree. There is no difference in this respect between the decree in a foreclosure suit and the decree in a redemption suit. AIR (Vol 18) 1931 Mad 592: 54 Mad 708 : 34 MLW 556 : 131 Ind Cas 487 (DB).

——O. 34, R. 8 — It is not a final order.

Where in a suit by mortgagee for a final decree debarring the mortgagor from redeeming the mortgaged land the Court merely refuses to pass a final decree in terms of the preliminary decree but leaves it open to the mortgagee to file another application under O. 34, R. 8 (2), C. P. Code, for a final decree in some other form ac-

cording to law, it is doubtful whether the order is a final order against which an appeal can lie. 10 Lah LJ 198: 110 Ind Cas 81: AIR (Vol 15) 1928 Lah 355 (DB).

——O. 34, R. 8 — Amount — Excess profits to be deducted.

In a suit for redemption and profits from the date of the deposit it is the duty of the Court to ascertain what those profits are and to pass a final decree for redemption on payment to the mortgagees of the mortgage amount in deposit minus the amount of those profits. 103 Ind Cas 290 : 10 NLJ 142: AIR (Vol 14) 1927 Nag 302.

——O. 34, R. 8 — Application for final decree.

After the passing of a preliminary decree in a mortgage suit, a person applying for the final decree, asks the Court to do no more and no less than to enforce such preliminary decree. 101 Ind Cas 174: 2 Luck 464: 4 OWN 235 : AIR (Vol 14) 1927 Oudh 156 (DB).

——O. 34, R. 8 — Final decree without preliminary decree.

Where there is a valid mortgage and a deposit is made in the Court by the mortgagor to redeem it, the Court is not bound to first pass a preliminary and then a final decree which means the prolongation of the proceedings, if no injustice will be done to either party by the passing of the final decree at once. 70 Ind Cas 899 : AIR (Vol 9) 1922 All 479.

——O. 34, R. 8 — Decree for sale — Right of mortgagor to apply.

S. 93, T. P. Act deals with a mortgagee's application for an order for sale. But a mortgagor can apply for execution under S. 92 and obtain an order for sale. A person obtaining a judgment on condition and not fulfilling it should be held to have waived the judgment is a rule which cannot be applied to decrees for redemption under the T. P. Act. The T. P. Act has deliberately omitted the provision that a suit for redemption should be dismissed if the mortgagor fails to pay the mortgage amount. (1913) 36 Mad 32 : 21 MLJ 941 : 10 MLT 322 : (1911) 2 MWN 323 : 12 Ind Cas 432 (DB).

——O. 34, R. 8 (T. P. Act, S. 93) — Application for order absolute not an application in execution.

An application for redemption or foreclosure under a charge is not an application in execution under the Civil Procedure Code but must be made in Court under the Transfer of Property Act, and until a decree nisi is made absolute there is no decree capable of execution. (1908) 10 Bom LR 1057 : 33 Bom 273 (277) : 2 Ind Cas 296.

7. Interpretation.

——O. 34, R. 8 — The proviso to R. 8 applies only to Cl. (4) and not Cl. (1). When the mortgagee has taken no action himself, the proviso would not apply if the mortgagor makes payment of the money due under the decree. 90 Ind Cas 418 : 28 OC 261: AIR (Vol 12) 1925 Oudh 649.

8. Limitation.

——O. 34, R. 8 — Date of appellate decree — Starting point.

A mortgagor applied for a final decree in a redemption suit. The preliminary decree was obtained on 29th June 1918; the application for final decree was made on 22nd October 1923. The preliminary decree, however, was taken up in first and second appeals which were respectively disposed of on 29th November 1919 and 8th February 1922. The judgment of the second appeal after notice to respondent was "no question of law. The second appeal is dismissed with costs".

Held, that the decision of the High Court was a decision after hearing the merits of the case, and its decree, therefore, superseded the decree of the lower appellate Court; and that the application for final decree was within time being within three years of the High Court's decree under Art. 181. 31 MLW 207 : 1930 MWN 104 : AIR (Vol 17) 1930 Mad 353 : 58 MLJ 207.

——O. 34, R. 8 — Payment — Limitation.

As it is not laid down that the mortgagor before paying money is to make any application to Court, the provisions of Art. 181 would not apply to the payment of money after the date fixed for payment. 90 Ind Cas 418: 28 OC 261 : AIR (Vol 12) 1925 Oudh 649.

——O. 34, R. 8 — Limitation — Redemption suit — Final decree for redemption.

There is no period of limitation for the passing of a final decree in a suit for redemption, the passing of such a decree being the duty of the Court. AIR (Vol 1) 1914 Mad 392: 22 Ind Cas 283 (DB).

——O. 34, R. 8 (S. 93, T. P. Act) — Extension of time for payment unnecessary in a decree for sale — Mortgagor entitled to pay at any time till 30 days after sale — C. P. C., S. 310-A. (1908) 18 MLJ 259 : 31 M 354 (358) : 3 MLT 281.

——O. 34, R. 8 (S. 93, T. P. Act) — Computation of time for payment — First Court's decree or appellate decree — Mortgagee's appeal dismissed.

Where the defendant was allowed six months by the first Court to pay off a mortgage-debt and upon appeal by the defendant the appeal was dismissed.

Held, that the six month's time allowed to the defendant should run from the date of the first Court's decree and not of the appellate decree. (1907) 11 CWN 679 (DB).

9. Redemption after due date.

——O. 34, R. 8 — Redemption suit — Failure to pay amount — Defendant's right to apply for sale — Final decree for sale — Power of Court to annual such decree — Inherent powers.

Under O. 34, R. 8 (4), Civil P. C., it is open to the defendant in a mortgage suit to ask on the failure of the plaintiff to pay the mortgage amount as directed by the Court, that the mortgaged property or a sufficient property thereof be sold, even though the preliminary decree does not contain any direction for such sale.

The Court has no authority to annual a final decree passed in favour of a party in due process of law in the exercise of an assumed inherent jurisdiction under S. 151 or S. 152, Civil P. C.

Section 151, Civil P. C., does not confer a new power on the Court, but makes a statutory recognition of the inherent power of the Court to do certain things ex debito justitiae. AIR (Vol 18) 1931 All 427: 132 Ind Cas 562 (DB).

——O. 34, R. 8 — Redemption, second suit for — When lies.

A mortgagor, who has failed to comply with the terms of a decree in a redemption suit filed by him, is not entitled during the continuance of that suit, or before the final decree in that suit has become incapable of execution, to maintain a second suit for redemption of the same mortgage. 100 Ind Cas 324: AIR (Vol 14) 1927 All 305.

——O. 34, R. 8 — Obiter — Until the final decree is made under sub-r. (2), the relationship of mortgagor and mortgagee cannot be extinguished; and so long as that relationship subsists it may be open to the mortgagors to file a second redemption suit. 50 Bom 730 : 28 Bom LR 1325 : 98 Ind Cas 943 : AIR (Vol 14) 1927 Bom 32 (DB).

——O. 34, R. 8 — When lies.

When a decree on a redemption suit has been given, and the provisions of the Code have not been observed, and an application under R. 8 has not been made, a second suit for redemption is competent and the title does not pass automatically to the mortgagee, and therefore a suit by mortgagee for declaration of title and possession is not competent. 7 Lah 420: 98 Ind Cas 650 : 27 PLR 659 : AIR (Vol 14) 1927 Lah 9 (DB).

——O. 34, R. 8 — When under a compromise arrived at in a redemption suit the parties did not agree that plaintiff's right to redeem would be extinguished absolutely, he is not prevented from bringing a second suit for redemption. The mortgagee is still a mortgagee and does not become the absolute proprietor of the property. 48 All 17: 23 ALJ 888: 92 Ind Cas 260: AIR (Vol 13) 1926 All 20 (DB).

——O. 34, R. 8 — Payment after date — Can be made till action is taken under Cl. 4.

The right of a mortgagor to pay the amount due under a preliminary decree is a continuous right and can be exercised at any time until a final decree for sale is passed. It is nowhere laid down that the mortgagor shall be debarred from paying the amount at any time subsequent to the time fixed so long as the mortgagee has not taken action under Cl. 4. 90 Ind Cas 418: 28 OC 261: AIR (Vol 12) 1925 Oudh 649.

——O. 34, R. 8 — Duty of mortgagee — He should apply for sale.

The mortgagor is not required by any rules of procedure to make an application and obtain an order thereon before he can pay the amount fixed by the decree for redemption of the mortgage. On the contrary, the duty is laid on the mortgagee to make an application under O. 34, R. 8 (4) for the purpose of obtaining the decrees directing the sale of the mortgage property. 80 Ind Cas 706 : 28 OC 46 : AIR (Vol 12) 1925 Oudh 255.

——O. 34. R. 8 — Article 181 of the Limitation Act applies to an application under O. 34, R. 8 (4). 80 Ind Cas 706 : 28 OC 46 : AIR (Vol 12) 1925 Oudh 255.

——O. 34, R. 8 — Intention — Payment after final decree, can be made and property redeemed.

Provisions of O. 21 would apply to sales ordered under O. 34 and a mortgagor is entitled to deposit the mortgage money and redeem the mortgaged property even after the decree absolute for sale is made. The intention of R. 8 of O. 34 is that an end should be put to the mortgage once a suit for redemption is brought and such an intention would be defeated if the mortgagee after obtaining the decree absolute for sale is permitted not to proceed with the sale and to prevent the mortgagor from satisfying the decree. If the mortgagor proposes to pay off the decree passed against him he is entitled to do so. Rules of procedure ought to be liberally construed in order to do justice between the judgment-debtor and the judgment-creditor. 72 Ind Cas 390 : 26 OC 306 : 11 OLJ 130 : AIR (Vol 10) 1923 Oudh 236.

——O. 34, R. 8 — Form of decree — Court's powers.

O. 34, R. 8 (4) authorises the Court to pass a decree that the mortgaged property be sold only when the mortgagee applies in that behalf. The decree should have been limited to granting plaintiff the right to redeem the mortgage upon payment of the sum found due. This decree the mortgagor could execute at any time within the period of limitation and if he failed to execute it he would have the right to sue again for redemption so long as his right to redeem remained alive. 146 PWR 1913 : 235 PLR 1913 : 19 Ind Cas 856 (DB).

——O. 34, R. 8 (T. P. Act, S. 93) — Lapse of time limited — Extension of time — Discretion.

Plaintiffs who have not applied for redemption in the proper time on the view now held to be erroneous in the Full Bench case, 25 Mad 300, that a second suit for redemption was maintainable, may apply for an extension of time, and it will be in the proper exercise of the Court's discretion to grant such extension. (1902) 13 MLJ 266 (267) (DB).

——O. 34, Rr. 8, 9 (T. P. Act, Ss. 93, 92) — Decree not drawn up strictly in accordance with S. 92 — Applicability of S 93 — Mortgages prior to Transfer of Property Act — Applicability of the procedure prescribed by T. P. Act.

The applicability of S. 93, Transfer of Property Act, is not taken away merely because the decree is not drawn up in the terms of S. 92 of the Act. S. 93 applies to mortgages executed before the passing of the Transfer of Property Act. (1900) 25 Bom 101 (103) : 2 Bom LR 633 (DB).

——O. 34, R. 8-A.

——O. 34, R. 8-A — Applicability to usufructuary mortgages.

Order 34, R. 8-A, Civil P. C., does not apply to usufructuary mortgages. AIR (Vol 20) 1933 Oudh 40: 9 OWN (CC) 1059: 141 Ind Cas 428 (DB).

——O. 34, R. 9.

——O. 34, R. 9 — Applicability of, to case governed by U. P. Debt Redemption Act, 1940, S. 9 (4).

Provisions of O. 34, R. 9, Civil P. C., are inconsistent with the Cl. 4 of S. 9, U. P. Debt Redemption Act and are hence, not applicable to a case governed by S. 9, Cl. 4, U. P. Debt Redemption Act. AIR (Vol 32) 1945 Oudh 310: 1945 OWN (CC) 324: 1945 RD 521: 1945 AWR (CC) 119 (3) and 222: 222 Ind Cas 386 (DB).

——O. 34, R. 9 — Rule 9 of O. 34, Civil P. C., applies to an inquiry on an application under S. 12 of U. P. Agri. Relief Act (XXVII of 1934) and the Court has jurisdiction on such application to pass a decree in favour of a mortgagor in respect of overpayments. AIR (Vol 29) 1942 Oudh 391 (2): 1942 OWN (CC) 345: 1942 RD 537: 1942 AWR (CC) 216: 18 Luck 183: 1942 AWR (Rev.) 89: 200 Ind Cas 614 (DB).

——O. 34, R. 9 — Mortgagor's rights.

Under O. 34, R. 9 the mortgagors are entitled not only to possession, but also to an account of the surplus profits from the date the mortgage amount was paid off. AIR (Vol 16) 1929 Bom 337: 31 Bom LR 476 (DB).

——O. 34, R. 10.

See also N. 35.

——O. 34, R. 10.

1. Scope and application.
2. Mortgagee, right of.
3. Costs properly incurred.
4. Costs of appeal.
5. Other costs.
6. Mode of realization.
7. Costs, Liability for.
8. Costs — Effect on mortgaged property.
9. Costs — Whether a mortgage debt or damages.

1. Scope and application.

——O. 34, R. 10 — General propositions governing cases falling within scope of O. 34, stated.

Cases falling within the scope of O. 34, Civil P. C. are governed by the following general propositions : (1) that unless a mortgagee is found to be

disentitled by his conduct from recovering his costs, he would be able to claim as of right, that costs of his suit be added to the mortgage money which is found by the Court to be due to him; (2) that in the cases covered by O. 34, a mortgagee who has been deprived of his costs by the decision of a Court would be entitled as of right to appeal to a higher tribunal, and (3) that provisions contained in S. 35, Civil P. C. are inapplicable to mortgage suits to which those stated specifically in O. 34, R. 10 apply. AIR (Vol 26) 1939 Mad 654 : (1939) MWN 288 : 49 MLW 525 : (1939) 1 MLJ 687: 184 Ind Cas 83.

——O. 34, R. 10 — Applicability.

Rule 10 has nothing to do with the costs awarded in execution proceedings. It relates to costs that have been incurred by the mortgagee since the passing of the preliminary decree and before the final decree is made in the case. The costs awarded in execution proceedings to the decree-holder are recoverable personally from the judgment-debtor. AIR (Vol 13) 1926 All 722 : 48 All 682: 96 Ind Cas 592. (DB).

2. Mortgagee, right of.

——O. 34, R. 10 — Redemption suit — Mortgagee, when not entitled to costs.

In a suit for redemption, the Court is bound to give the mortgagee his costs of the suit unless the Court is of opinion that his conduct has been such as to disentitle him thereto. AIR (Vol 29) 1942 Mad 592 : 55 MLW 413 : (1942) 2 MLJ 124: ILR (1943) Mad 205 : 205 Ind Cas 457 (DB).

——O. 34, R. 10 — Lease by usufructuary mortgagee — Suit for mortgage amount and rent — Claim to mortgage amount admitted but for rent disputed:

Held, that the mortgagee was entitled to costs on the uncontested scale so far as the admitted amount was concerned. The amount of costs should not be swelled merely because the plaintiff abstained from asking for the decree on confession to which he was entitled under O. 12, R. 6, Civil P. C. AIR (Vol 29) 1942 Mad 507 : (1942) MWN 232 : 55 MLW 247 : (1942) 1 MLJ 448: 202 Ind Cas 531 (DB).

——O. 34, R. 10 — Costs in redemption suit.

Ordinarily a mortgagee would be entitled to his costs in a redemption suit, but it is subject to the discretion of the Court where he raises questions which involve a denial of the mortgagor's right to redeem. AIR (Vol 13) 1926 Mad 405 : 91 Ind Cas 943.

3. Costs properly incurred.

——O. 34, R. 10 — Costs — Suit against mortgagors — Purchaser of mortgaged property in execution of simple money decree made party — Suit not necessary by any conduct on his part — His only defence being that he was not personally aware of mortgage — Whether can be made personally liable for costs of suit.

No doubt there is Jurisdiction for the Court to award costs personally against a subsequent encumbrancer or a subsequent purchaser of the mortgaged property. But before the Court can do so, there must be a finding that the suit was necessitated by any improper conduct on their part as having repudiated the title of the mortgagee or as having raised frivolous defence in the suit thus enabling the plaintiff to incur more costs than were necessary.

In a suit against the mortgagors the purchaser of the mortgaged property in a Court sale held in execution of a simple money decree was made a party. In the plaint the plaintiff alleged that before suit he called upon the purchaser to pay the debt due under the mortgage but he did not pay the same. The plaintiff prayed for a personal decree against the purchaser enabling him to recover the costs of the suit from him. The purchaser did not set up any defence in answer to the mortgage except stating that he was not personally aware of the mortgage and that he was obliged to add a plea that he was not personally liable for costs because the plaintiff claimed a personal decree against him. The Court awarded costs against him:

Held, that the suit was not necessitated by any conduct on the part of the purchaser and hence there was no justification for awarding costs against the purchaser. The mere fact that he did not comply with the notice of demand made upon him was not a reason recognized by law for awarding costs against him. AIR (Vol 26) 1939 Mad 583 : (1939) MWN 481 : 185 Ind Cas 434.

4. Costs of appeal.

——O. 34, R. 10 — Costs — Preliminary decree for sale against mortgagor and subsequent purchasers of part of mortgaged property — Appeal by purchasers only, dismissed with costs — Purchasers, held personally liable for costs of appeal.

In a mortgage suit preliminary decree for sale was passed against the mortgagor and subsequent purchasers of part of the mortgaged property. The mortgagor did not appeal, but the subsequent purchasers did, and that appeal was dismissed with costs:

Held that the subsequent purchasers were personally liable for the costs of the appeal. It would in this case be an unfair hardship on the mortgagor if the property mortgaged were to be saddled with the costs awarded against the subsequent purchasers and against them alone. The ordinary rule of the costs in a mortgage suit being amalgamated with the money realisable by sale of the mortgaged property did not apply to the case. AIR (Vol 27) 1940 Nag 74: 1939 NLJ 512: ILR (1940) Nag 45: 187 Ind Cas 427.

——O. 34, R. 10 — Costs — Preliminary decree in form as amended by Rule Committee of Rangoon High Court — Decree declaring that amount due by defendant to plaintiff comprised principal, interest and costs — Appeal by defendant dismissed — Appellate Court further directing defendant to pay costs of plaintiff in Appellate Court — Property sold and purchased by decree-holder — Application for personal decree for costs.

A preliminary decree in a mortgage suit as drawn up in the usual form as amended by the Rule Committee of the Rangoon High Court directed the defendant to pay the costs and declared that the amount due by the defendant to the plaintiff was certain sum comprising the principal and interest and costs. An appeal by the defendant was dismissed and the preliminary decree confirmed. The Appellate Court further directed the defendant to pay the costs of the plaintiff in the Appellate Court. The property was put up for sale and purchased by the decree-holder. The decree-holder, in execution, applied for formal decree for costs. The Court held that the costs could not be recovered if the original mortgage debt was barred and dismissed the application. The mortgaged property was sold:

Held, that personal decree could not be granted in respect of costs in the trial Court. They had merged in the mortgage money, but costs in the Appellate Court stood on different footing. The order for costs there, must be regarded as personal decree against the defendant. As regards these costs the plaintiff was entitled to personal decree. AIR (Vol 25) 1938 Rang 190: 1938 Rang LR 56: 177 Ind Cas 295 (DB).

——O. 34, R. 10 — Costs — Appellate Court — Personal liability.

Where the mortgagor defendant preferred a second appeal which was dismissed with costs after a final decree had been prepared in the case by the lower Court, held, the appellant was personally liable for the costs of the High Court. AIR (Vol 1) 1914 All 190: 24 Ind Cas 873.

——O. 34, R. 10 — Costs — Final decree applied for atfer an appellate decree for costs against one defendant — Costs of appeal if can be included in final decree.

Where an application is made for a final decree after an appellate decree for costs is passed against one defendant alone, the decree holder cannot ask for the costs of the appeal along with the amount finally held due. (1913) 11 ALJ 975: 22 Ind Cas 42.

——O. 34, R. 10 — Costs — Appellate Court — Personal liability.

A mortgagee obtained a decree for foreclosure. One of the defendants appealed to the High Court which dismissed the appeal with costs to be paid by appellants. Held, the costs of the High Court must be deemed to have been awarded against the appellant personally. (1913) 19 Ind Cas 729 (All).

——O. 34, R. 10 — The decree for costs on an appeal of the defendant from the decree for sale of mortgaged property is personal. (1913) 19 Ind Cas 384 (All.)

5. Other costs.

——O. 34, R. 10 — Rule 10 is imperative and all costs incurred in connexion wish the suit up to the time of the payment of the decree, whether before or after the final decree must be included in the sum which can be realized by the sale of the mortgaged property. AIR (Vol 17) 1930 Oudh 328: 122 Ind Cas 783: 7 OWN 398 (DB).

6. Mode of realization.

——O. 34, R. 10 — Costs — Trying Court imposing personal liability for costs on mortgagor—Execution of order against person of mortgagor without selling mortgaged property.

Ordinarily costs awarded to a mortgagee-decree-holder in a mortgage suit or appeal in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. Where the trying Court imposes pesonal liability for costs on the defendant-mortgagor in express terms, the order is intra vires and can be executed against the person of the mortgagor apart from the sale of the mortgaged poperty. AIR (Vol 25) 1938 Lah 188: ILR (1938) Lah 148: 40 PLR 640: 181 Ind Cas 487 (DB).

——O. 34, R. 10 — Costs — Appeal — Right to add on to the mortgage amount — Realization.

Costs awarded in mortgage suits including costs of appeal form part of the decretal amount and are realisable in the first instance by sale of the mortgaged property and not otherwise. AIR (V 5) 1918 Oudh 445: 48 Ind Cas 329 (DB).

7. Costs — Liability for.

——O. 34, R. 10 — Suit on mortgage — Puisne mortgagees and purchaser of equity of redemption also defendants — Mortgagor denying liability and remaining ex parte — Remaining defendants supporting mortgagor's statement and contesting suit — Decree making all defendants personally liable for costs.

In a mortgage suit, defendant No. 1 was not mortgagor, defendants Nos. 2 and 3 were puisne mortgagees, defendant No. 4 was the purchaser of the equity of redemption of the greater number of the items mortgaged, and defendant No. 7 was the purchaser of one item. Defendant No. 1 filed a written statement denying his liability and then remained ex parte. The other defendants mentioned above supported the written statement of defendant No. 1. Defendant No. 3 made a special claim to priority and defendant No. 7 raised a number of pleas in connection with the item of property that he had purchased. In the decree in the suit, the lower Court made defendants Nos. 1, 2, 3, 4 and 7 all personally liable for costs on the ground that defendants Nos. 2 to 4 and 7 supported defendant No. 1 in resisting the plaintiff's claim:

Held, that the defendants who were supporting the mortgagor defendant to resist the claim could be made liable personally for the costs along with the mortgagor. AIR (Vol 25) 1938 Mad 212: (1937) MWN 1173: (1937) 2 MLJ 896: 175 Ind Cas 441.

——O. 34, R. 10 — Where in a mortgage suit one of the defendants raises several pleas without any foundation whatever, he ought to be made personally liable for the costs of the plaintiff. AIR (Vol 20) 1933 Lah 329: 34 PLR 171: 144 Ind Cas 738 (DB).

8. Costs — Effect on mortgaged property

——O. 34, R. 10 — Effect.

The effect of Rule 10 is to make the mortgaged property liable for the amount of costs in the first instance. AIR (Vol 13) 1926 All 343: 93 Ind Cas 223.

9. Costs — Whether a mortgage debt or damages.

——O. 34, R. 10 — Costs in mortgage suit — Whether to be regarded as damages.

Costs in a mortgage suit are not like an award of damages, but are to be regarded as a liquidated amount capable of ascertainment. AIR (Vol 20) 1933 Cal 251: 60 Cal 19: 143 Ind Cas 679 (DB).

——O. 34, R. 10 — Costs — Whether part of the mortgage debt.

The costs of a suit allowed by a mortgage decree become part of the debt secured by the mortgage. AIR (Vol 1) 1914 All 444: 12 ALJ 645: 24 Ind Cas 63.

——O. 34, R. 11.

See also Civil P. C., S. 34 and O. 34, Rr. 2 and 4.

1. Charge
2. Damdupat.
3. Discretion.
4. Interest as damages.
5. Penal interest.
6. Pendente lite.
7. Post decree.
8. Post diem.
9. Prior to suit.
10. Rate of.

1. Charge.

——O. 34, R. 11 — Interest due on mortgage, if can be treated as charge on estate — Mere mention of separate date for payment of interest, whether sufficient to make general rule inapplicable.

As a general rule, the mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate and it is for those who allege the contrary to displace that general rule. The mere fact that a separate date is mentioned for the payment of the interest is not sufficient for this purpose. AIR (Vol 22) 1935 Lah 142: 157 Ind Cas 766 (DB).

——O. 34, R. 11 — Mortgage suit — Interest, whether charge.

In a mortgage-decree, interest on the mortgage amount should be made a charge on the property. AIR (Vol 20) 1933 Lah 941: 35 PLR 325: 148 Ind Cas 213 (DB).

——O. 34, R. 11 — Interest, whether charge on property — Contract to the contrary.

A mortgagee is entitled to treat interest due under a mortgage as a charge on the property in the ab-

sence of any contract to the contrary. A mere recital in the deed that in default of payment of interest it may be recovered from the person and property of the mortgagor by itself does necessarily mean that interest ceases to be charge on the property. AIR (Vol 20) 1933 Lah 289: 34 PLR 345: 142 Ind Cas 309.

——O. 34, R. 11 — Interest — Charge on property.

A mortgagee is entitled to treat interest due under the mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary. (1932) 135 Ind Cas 497: 32 PLR 735.

2. Damdupat.

——O. 34, R. 11 — Suit on mortgage — Limit as to interest imposed by rule of damdupat reached before suit — No further interest from date of suit to date fixed for payment under preliminary decree can be allowed.

Where the limit imposed by the rule of damdupat had been reached before the institution of the suit upon the mortgage (for foreclosure), the Court has no power under S. 34 or O. 34, R. 11 to grant interest from the date of the suit to the date fixed for payment under the preliminary decree.

The rule of damdupat operates only so long as the relation of creditor and debtor exists, but not when the contractual relation has come to an end by reason of a decree. The contractual relation of creditor and debtor arising out of a mortgage debt comes to an end on the expiry of the date fixed for payment under the preliminary decree in a suit on the mortgage if the property is not redeemed. The matter then passes from the domain of contract to the domain of judgment, and the rights of the mortgagee thenceforth depend, not on the contents of the bond, but on the directions in the decree. The operation of the rule of damdupat consequently is from the date of the mortgage to the date fixed for payment in the preliminary decree in the suit based on the mortgage. If, on any intermediate date, the limit imposed by the rule of damdupat is reached, no further interest can be granted under O. 34, R. 11, because the interest cannot be said to be legally recoverable within the meaning of O. 34, R. 11. Nor can the interest be allowed under Section 34 because the provisions of S. 34 do not permit the allowance of more interest than that calculated by the method provided by O. 34, Rr. 2, 4 and 11. AIR (Vol 33) 1946 Nag 210.

——O. 34, R. 11 — Mortgage for value of crops — Enhancement in price of crops — Effect — Principal amount — Determination of.

Where a person sold future crops for a certain price and further agreed that, if he failed to deliver the crops at the stipulated time, he would pay the price at the prevailing rates on that date with interest and as security mortgaged a house:

Held, that in a suit for redemption, the enhanced price or value in a contract of this description, where future crops were sold, could not form the principal for the purposes of the rule of damdupat but the principal must be the amount actually paid.

The rule of damdupat is an equitable rule in favour of the debtor and should be strictly applied.

In a suit for redemption of the mortgage, the rule of damdupat will apply and according to that rule, the principal will be the amount actually advanced at the time of the execution of the mortgage, and not the amount due on the date fixed for payment. AIR (Vol 20) 1933 Nag 293: 144 Ind Cas 135.

——O. 34, R .11 — Scope of the rule.

The rule of damdupat refers to double the original principal and not double the principal amount which remains due when the arrears of interest accrue. AIR (V 18) 1931 Nag 161 : 14 NLJ 109 : 27 NLR 312: 134 Ind Cas 274.

3. Discretion.

——O. 34, R. 11 — Discretion of Court — Interest pendente lite and future interest — Contractual rate — Duty of Court to award — Rate of 6 per cent. for pendente lite and future interest — Legality.

After the C. P. Code was amended in 1929, by the insertion of R. 11, in O. 34, C. P. Code, any conflict which might have existed between S. 34 and O. 34, Rr. 2 and 4, has been removed, and R. 11 newly added, gives the Court a discretion so far as interest pendente lite and subsequent interest are concerned. It is now no longer obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, or excessive, or substantially unfair. The Court may award such interest at 6 per cent. only. AIR (Vol 37) 1950 Pat 391 (DB).

——O. 34, R. 11 — Reduction in.

Interest to which mortgagee would be entitled under Civil P. C., O. 34, R. 11, can be limited under Section 7 of the Bihar Money Lender's Act. AIR (Vol 27) 1940 FC 7: (1940) 1 MLJ 23 Sup: ILR (1940) Kar (FC) 45 Sup: (1940)MWN 682: 21 PLT 631: 52 MLW 127: 44 CWN (FC) 18: 72 CLJ 174: (1940) FCR 31: 6 BR 499: 187 Ind Cas 436.

——O. 34, R. 11 — Where the rate of interest fixed is fairly high, the Court can exercise its discretion in favour of allowing sale in place of foreclosure. The fact that the mortgagee waited for 13 years before suing and allowed the sum of Rs. 726 to amount up to over Rs. 8,000 should also be taken into consideration. AIR (Vol 27) 1940 Nag 156: 1940 NLJ 179: ILR (1941) Nag 607: 190 Ind Cas 641.

——O. 34, R. 11 — The expression "on the principal amount found or declared due" refers not only to principal sum but also to amount due on interest which has become part of principal — Interest from date of suit till date of redemption on principal sum with interest can be awarded if deed provides it.

The words "on the principal amount found or declared due" in Cl. (a), Sub-Cl. (i) of O. 34, R. 11, Civil P. C., refer not only to the principal sum secured by the mortgage-deed but also to the amount due on account of interest which has become a part of principal in accordance with the terms of the deed on the date when the preliminary decree is prepared. There is no force in the contention that the Legislature, when they used the words "due or declared to be due" in Rule 11, enacted that in calculating interest from the date of the suit till the date fixed for redemption, no interest on interest was to be allowed to the mortgagee in spite of the terms of the morgage-deed. AIR (Vol 24) 1937 All 442: (1937) ALJ 324: 1937 AWR (HC) 305: ILR (1937) All 584: 169 Ind Cas 795 (DB).

——O. 34, R. 11 — Order 34, R. 11 does not give the Court discretion to order a less amount of interest for the period of 6 months from the date of the preliminary decree. AIR (Vol 22) 1935 All 1003: 1935 AWR (HC) 1107: (1935) ALJ 1161: 158 Ind Cas 233.

——O. 34, R. 11 — O. 34, R. 11 dealing with interest after the decree, is clearly a matter within the discretion of the Court, as the word used there is 'may.' AIR (Vol 22) 1935 Pat 98: 14 Pat 400: 16 PLT 579: 1 BR 590: 156 Ind Cas 290 (DB).

——O. 34, R. 11 — Discretion — Appeal.

The matter of interest from the date of the preliminary decree is within the discretion of the trial Court and if it has exercised its discretion, the Appellate Court will not interfere. AIR (Vol 19) 1932 All 123: 53 All 54: 137 Ind Cas 334 (DB).

——O. 34, R. 11 — Interest at bond-rate up to expiry of period of grace.

Though in a mortgage suit the Court can allow interest at the bond rate up to the expiry of the period of grace, there is nothing in the Civil P. C., compelling a Court to do so. AIR (Vol 19) 1932 Pat 332 : 13 PLT 545 : 140 Ind Cas 104 (DB).

4. Interest as damages.

——O. 34, R. 11 — No provision for interest on arrears of interest — Mortgagee kept out of his money for three years — Equitable right to interest by way of damages.

Where, in a mortgage bond, there was no provision for charging interest on arrears of interest but the mortgagee was kept out of his money for three years:

Held, that though mortgagee was not entitled to interest as of right, in equity he was entitled to some interest by way of damages which may be fixed at the Court rate of 6 per cent. per annum. AIR (Vol 21) 1934 Pesh 48: 151 Ind Cas 54 (DB).

5. Penal Interest.

——O. 34, R. 11 — Redemption suit — Charge for interest.

Under the terms of the mortgage deed, the property was to be enjoined by the mortgagee in lieu of interest and it was specifically stated in the mortgage-deed that from the expiry of three years fixed for payment of principal, interest at 12 per cent. was payable and that the mortgagee was to enjoy the property in addition to the right to recover interest. There was no recital in the document to indicate that it was the intention of the parties that there was to be no charge for interest. Subsequent to the mortgage the property was leased by the mortgagee to the mortgagor and another person. The rent was in arrears and a suit was filed in 1936 and decree obtained on March 25, 1937. In the meanwhile, on May 30, 1935, the mortgagor sold the property to S for Rs. 1,000 and directed him to redeem the mortgage by payment of Rs. 800. In a suit for redemption by S:

Held, that the mortgagee was entitled to recover interest.

Merely because the provision for payment of additional interest was penal, it could not be said that it was unenforceable.

Held, also that as the sale was subject to the mortgage and the vendee was directed to discharge the mortgage and had himself deposited the amount under S. 53 of the T. P. Act, it could not be said that the vendee was not aware of the terms of the mortgage:

Held, further that in the circumstances of the case, the Court, was justified in directing interest to be paid to the mortgage at 6 per cent. AIR (Vol 30) 1943 Mad 109: 55 MLW 661: (1943) MWN 19: 207 Ind Cas 351.

——O. 34, R. 11 — Stipulation for payment of, in nature of penalty — Stipulation held in nature of penalty and not binding on mortgagor — Contract Act (IX of 1872), S. 74.

A mortgage deed provided that the sum of Rs. 2,000 which was borrowed thereunder should be re-paid in eight annual instalments of Rs. 250 each, such instalments to count both towards principal as well as interest on the entire sum. The stipulation for payment of interest ran as follows: that in default of payment of sums due in any instalment, the sum remaining unpaid on the date shall be added to the principal and the entire amount become payable at once irrespective of future instalments, the entire sum carrying interest at 1 per cent. per mensem compound with yearly rests:

Held, that there was a clear penalty which the parties could not have intended to be enforced as damages for breach of the contract to pay annual instalments. The stipulation which required payment for compound interest at 12 per cent. per annum was, therefore, not binding on the mortgagor. AIR (Vol 26) 1939 Mad 481: (1939) 1 MLJ 491: (1939) MWN 323: 49 MLW 534: 185 Ind Cas 440 (2) (DB).

——O. 34, R. 11 — Interest on default.

In bonds securing payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with interest, if any, agreed upon. Any further contract to be binding on the promisor if he breaks this contract is regarded as a secondary one intended to secure the fulfilment of the primary contract. The line of demarcation between primary and secondary contract is the occurrence of the breach. Any contract that is to come into force after the breach is of a remedial nature.

The terms of the mortgage deed pertaining to interest were as follows: "We will pay interest at the rate of Re. 1 per cent. per month. We agree to pay annual interest at compound rate on the whole amount borrowed and pay the principal sum within five years on default in payment of interest in any year we agree to pay compound interest at the rate of Re. 1-4 per cent. per month on the whole amount":

Held, that the stipulation to pay compound interest could only come into operation after the debtor's default in payment of the simple interest. Therefore, it could not be treated as being a part of the primary contract. On this view it must be held that the original rate of interest was only Re. 1 per cent. simple and the compound interest was to become chargeable only on the debtor's failure to pay the simple interest. Therefore, the secondary agreement not only made the interest compound but also enhanced the rate of interest from Re. 1 to Re. 1-4 per cent. per month. Consequently, the stipulation must be regarded as a penalty.

Held, further, that under the cicumstances, it was open to the Court to follow any of the two alternatives, namely, to award compound interest at the original rate or simple interest, at the enhanced rate and where, in the exercise of its discretion, it has awarded compound interest at the rate of Re. 1 per cent. per month the High Court will not interfere. (1936) 163 Ind Cas 954: 18 NLJ 220 (DB).

——O. 34, R. 11 — Power to reduce.

Where a mortgage deed provided for 2 per cent. per mensem compound interest and there was nothing to show that any undue influence had been exercised:

Held, that the Courts would not be justified in reducing the rate of interest. AIR (Vol 20) 1933 Lah 682: 34 PLR 844: 145 Ind Cas 432 (DB).

6. Pendente lite.

——O. 34, R. 11 — Power of Court to vary contractual rate.

The Court has power to vary the contractual rate in respect of interest pendente lite in a mortgage suit. AIR (Vol 36) 1949 Cal 607 (DB).

——O. 34, R. 11 — Rule 11 of O. 34 does not affect the Court's power to allow pendente lite interest under O. 34, R. 2. The Court has a discretion under O. 34, R. 11, in the matter of awarding pendente lite interest. AIR (Vol 29) 1942 Pat 102 : 8 BR 83 : 21 Pat 167 : 196 Ind Cas 677 (DB).

——O. 34, R. 11 — Discretion.

Rule 11 of O. 34, Civil P. C., which removes any conflict that there might have been between S. 34 and O. 34, Rr. 2 and 4, gives a certain amount of discretion to the Court, so far as interest pendente lite and subsequent interest are concerned. It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. AIR (Vol 27) 1940 F C 20 : 6 B R 589 : ILR (1940) Kar (F C) 33 Sup. : (1940) 1 MLJ 14 Sup. : 44 CWN F C 21 : 72 CLJ 165 : 21 PLT 1109 : (1940) FCR 61 : 187 Ind Cas 796.

——O. 34, R. 11 — Interest from date of suit to date of redemption at rate fixed in mortgage deed, if can be recovered.

Mortgagee is entitled to claim interest from the date of the suit till the date of redemption at the rate fixed in the mortgage-deed as, till the period for redemption has expired, the matter remains in contract, and the interest has to be paid at the rate, and with the rests specified in the contract of mortgage. AIR (Vol 27) 1940 Lah 233 : ILR (1940) Lah 658 : 192 Ind Cas 505 (DB).

7. Post decree.

——O. 34, Rr. 11, 2, 4 — Mortgage suit — Interest up to date of preliminary decree — Interest for period subsequent to such date — Option given to Court.

Rule 11 of O. 34, C. P. C., must be read with Rr. 2 and 4. O. 34, R. 11, gives a discretion to the Court to allow interest up to the date fixed for redemption under the preliminary decree, and this interest is payable "on the principal amount found or declared due on the mortgage". This latter amount is obviously the amount found or declared due by the preliminary decree. Where the mortgage bond carries compound interest, the preliminary decree, according to the provisions of O. 34. R. 2 and R. 4, shall allow compound interest from the date of the bond up to the date of that decree. The Court has no option to disallow interest at the contract rate up to the date of the preliminary decree, unless, of course, the rate of interest is found penal or excessive. For the period subsequent to the date of the preliminary decree, however, the Court has under O. 34, R. 11, the option either to allow or refuse interest. AIR (Vol 28) 1941 Pat 373 : 22 PLT 317 : 7 B R 641 : 193 Ind Cas 661 (DB).

——O. 34, R. 11 (b) — Preliminary decree fixing date for payment — Rate of interest after such date is discretionary with Court — Decree not mentioning about future interest — If it can be assumed that Court allowed no interest — Successor of Judge passing decree, if can exercise discretion vested in Court by O. 34, R. 11 (b).

Where a preliminary mortgage decree fixes a date for the payment of the amount due under it, the rate of interest after such fixed date is a matter for the discretion of the Court under O. 34, R. 11 (b), Civil P. C. Where, in the decree, the space for entering rate of future interest until realization of the amount due is left blank, it cannot be said that the Court intended to allow such intrest but accidentally forgot to do so, and even if there is mention of such interest in the latter part of the decree, it must be assumed that the Court did not allow any such interest. The successor of the Judge who passed the decree cannot exercise discretion vested in the Court by O. 34, R. 11 (b) as one does not know what rate the Judge passing the decree might have thought suitable. AIR (Vol 24) 1937 Lah 894 : 39 PLR 769 : 175 Ind Cas 634.

——O. 34, R. 11 — Interest from date of sale to date of confirmation.

A decree-holder in a mortgage suit for a sale has a right to interest on the decretal amount from date of sale to date of confirmation of the sale. AIR ((Vol 24) 1937 Rang 193 : 169 Ind Cas 432 (DB).

——O. 34, R. 11 — Decree — Mortgage interest — Contract rate.

In mortgage decrees account should be made of moneys due at the contract rate of interest up to the date fixed in the decree for payment, and after that date interest should be allowed at such rate as the Court may fix. (1901) 29 C. 43 (52) (DB).

8. Post diem.

——O. 34, R. 11 — Mortgagee not paying part of principal forth-with as stipulated — Interest on such amount, when accrues — Redemption, if accrues only from date of payment.

Where, under a deed of mortgage, part of the money is made payable forthwith to another but due to unexpected events, the payment is made only after some years, the money cannot be deemed to have been paid to the mortgagor at the time of the mortgage. Nor can the mortgagee be considered to be the agent of the mortgagor in respect of the payment. Consequently, the mortgagee is not entitled to interest on that amount from date of mortgage but only from date of actual payment by him. The right to redeem also accruse after the expiry of the stipulated period from dates of actual payment. AIR (Vol 23) 1936 Lah 168 : 161 Ind Cas 251 (DB).

——O. 34, R. 11 — Absence of stipulation for post diem interest — — Interest, how to be awarded — Compound interest, if can be awarded in absence of agreement.

Even in a case where there is no express stipulation in a mortgage document for post diem interest, such interest may be awarded either under a contract to be implied or as compensation and the usual practice is to award such interest at the contract rate. AIR (Vol 20) 1933 Mad 171: 145 Ind Cas 762.

——O. 34, R. 11 — Post diem interest given to mortgagee by way of damages — Whether can be treated as charge on the estate.

Post diem interest given to a mortgagee or a charge-holder by way of damages cannot be treated as a charge on the estate although when compensation for breach of penal clauses, the damages for which may have even to be ascertained by Court, is awarded, it may be regarded as a portion of the mortgage-money as it fails to be decided inside the privisions of the contract of mortgage and not outside it. (1933) 143 Ind Cas 750 (FB) (Cochin.)

——O. 34 R. 11, S. 34 — Mortgage — 'Principal amount found on declared due on the mortgage', whether includes interest.

The question as to the rate of interest in the case of a mortgage is to be determined under O. 34 and not under S. 34. Allowing interest at the contract rate on the principal amount only from date of suit to date fixed for payment is proper. The words "the principal amount found or declared due on the mortgage" in O. 34, R. 11 (a) (i), do not include interest. AIR (Vol 20) 1933 Oudh 128:

10 OWN (CC) 173: 8 Luck 315: 144 Ind Cas 983. (DB).

——O. 34, R. 11 — **Interest from date fixed for re-payment to date of realisation — Discretion of Court.**

It is not obligatory on the Court to award in the case of a mortgage, interest for the period from the date fixed for re-payment until the date of actual realisation.

The discretion of the Court in the matter is not confined to the question of the rate of interest only. AIR (Vol 19) 1932 Cal 689: 59 Cal 722: 139 Ind Cas 455 (DB).

——O. 34, R. 11 — **Right to post diem interest — Usurious Loans Amendment Act (XXVII of 1926), whether applies to suits on mortgages executed before 1926.**

In a mortgage suit, the plaintiff will be entitled to interest up to the date of payment and not merely till the date of suit.

Where a mortgage is sought to be redeemed after the Usurious Loans Amendment Act, 1926, took effect, it is open to the Court to reduce the rate of interest payable to the mortgagee even though the mortgage was executed before the enactment of the said Act. AIR (Vol 19) 1932 Cal 83 (1): 35 C WN 654: 135 Ind Cas 800 (DB).

——O. 34, R. 11 — **Rate of interest after expiry of date of payment.**

After the day fixed for payment of mortgage money, the matter passes from the domain of contract to that of judgment and the rate of interest that should be fixed after the date fixed for payment is the court-rate, i.e., 6 per cent. (1907) 34 IA 9: 34 Cal 150 (161) (PC).

——O. 34, R. 11 — **Mortgage money — Mortgagor willing to redeem — Mortgagee's representatives legally unable to give valid discharge — Effect of — Period from which interest is stopped — How far tender necessary.**

On the 3rd February 1902, the defendants, executants of a mortgage, called upon the plaintiffs, the purchasers of the equity of redemption, to pay the amount due upon the mortgagee with interest within three months. The defendants, who were executors, applied on the 8th January 1902, calling upon the Registrar of Assurances to deposit the will in Court which was done on the 24th January 1902. The document was sent for translation and translated on the 2nd April. The defendants applied for probate on the 17th June 1902. In the meanwhile, plaintiffs called upon defendants several times in March and April to state if they had filed a petition for probate; and, later on, plaintiffs intimated to defendants that the money was ready and waiting to be paid to them.

Held, that the interest over the principal ceased to run from the 3rd May 1902, the time when the defendant's notice expired. (1902) 4 Bom LR 453: 26 B. 643 (648).

9. Prior to suit.

——O. 34, R. 11 — **Court has discretion to refuse interest — Interest prior to suit, held could not be allowed.**

Order 34, R. 11, Civil P. C., does not deprive the Court of discretion to refuse interest in appropriate circumstances. (In view of the plaintiff mortgagee's inaction to sue for nearly 12 years after the accrual of the right to sue on his mortgage, interest prior to suit, held should not be allowed). AIR (Vol 30) 1943 Sind 59: ILR (1942) Kar 452: 204 Ind Cas 574 (DB).

——O. 34, R. 11 — **Mortgage — Right of prior mortgagee to claim interest:**

Where a decree directed that the puisne mortgagee should pay to the prior mortgagee the amount due under his mortgage, it would be no answer to the latter's claim for interest that such claim should have been advanced in the suit itself. Such a claim may be advanced in the proceedings taken under S. 89 of the T. P. Act. 1903 AWN 219: 26 A 185 (188) (DB).

——O. 34, R. 11 — **Interest, calculation of — Period — Whether date on which money lent and date on which repaid should both be counted — Usage.**

In the absence of any proof as to any local usage amongst the bankers of the particular locality a mortgagee is not entitled to interest for the day on which the money was advanced as also for the day on which the money was repaid. (1903) 8 CWN 216 (217) (DB).

10. Rate of.

——O. 34, Rr. 4 and 11 — **Interest at contractual rate, awarding of — It may be disallowed altogether but if allowed, it must be allowed at contractual rate under O. 34, R. 11 (1) — Court not acting according to Rr. 4 and 11 — Reasons must be given.**

Under the provisions of O. 34, R. 11 and R. 4, interest should ordinarily be allowed at the contractual rate on the principal amount due, in the first place up to the date of the decree and in the second place from the date of the decree to the date fixed for payment under the provisions of R. 4. It is possible that in some circumstances for good reasons a Judge may disallow interest altogether but if he does allow interest, he must, under the provisions of O. 34, R. 11 (1), allow it on the principal amount at the contractual rate, if there is such a rate. The Court must give reasons why he has not acted in accordance with those provisions. AIR (Vol 29) 1942 All 444: 1942 AWR (HC) 330: (1942) ALJ 616: ILR (1942) All 908: 205 Ind Cas 207 (DB).

——O. 34, R. 11 — **Rate of interest.**

It is well-established that a mortgagee is entitled to the rate of interest stipulated for in the mortgage deed, and unless there are any good grounds to deprive him of that right, the rate agreed upon cannot be disallowed. AIR (Vol 25) 1938 Bom 357: 40 Bom LR 545: 177 Ind Cas 467 (DB).

——O. 34, R. 11 — **Excessive interest — Mortgage, whether invalid.**

The mere ground that the interest is excessive is no ground to make the mortgage invalid. AIR (Vol 23) 1936 All 712: (1936) ALJ 1262: 1936 AWR (HC) 887: 165 Ind Cas 498 (DB).

——O. 34, R. 11 — **Interest — Appropriation — Compound interest — Interest added to principal — Payment, how appropriated stated.**

In the case of simple interest, the interest remains always separate and apart from the principal. In the case of compound interest, as soon as the interest falls due, it becomes a part of the principal and does not remain separate from the principal: as soon as any interest falls due, it should be added to the principal of which it became a part. From it whatever is paid by the mortgagors on account of interest should be deducted. Similarly, in ordinary cases the money is first applied in payment of interest and then, when that is satisfied in payment

of the capital. AIR (Vol 23) 1936 All 712: 1936 AWR (HC) 887: (1936) ALJ 1262: 165 Ind Cas 498 (DB).

——O. 34, R. 11 — Mortgage deed — Interest stipulated 24 per cent — Mortgage created to deprive legatee of benefit of property.

In a mortgage deed, the rate of interest stipulated was 24 per cent. per annum. The mortgage was deliberately created in order to deprive the legatee under the will of the mortgagor for the benefit of the property. The mortgagee who was in collusion with the mortgagor allowed the interest on the mortgage to accumulate obviously with the intention of absorbing the entire property :

Held, that the rate of interest was very high and should be reduced to 6 per cent. per annum. AIR (Vol 23) 1936 Pat 3: 16 PLT 689: 2 BR 237: 160 Ind Cas 681 (DB).

——O. 34, R. 11 (1) (a) (b) — Interest how calculated — "Principal amount", whether includes interest due before suit on money secured by mortgage — Interest on costs during pendency of suit.

Clause (a), sub-cl. (i) of R. 11, O. 34, Civil P. C., provides that interest up to the date on which payment of the amount found due is to be made under the preliminary decree is to be calculated on the principal amount at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable. The words "principal amount" as used in this sub-clause mean the principay money secured by the deed of mortgage and interest which has accrued due before the suit cannot be regarded as part of the principal amount. It is wrong to allow interest at the contractual rate on the entire amount (i.e., principal and interest up to suit) claimed in the suit. Similarly, Sub-cl. (ii) of cl. (a) provides that interest on the amount of costs of the suit can be awarded only from the date of the preliminary decree. Interest on the costs during the pendency of the suit cannot be allowed. As regards interest subsequent to the date fixed for payment, cl. (b) of R. 11 makes provision for interest on the aggregate of the principal sum specified in cl. (a) and of interest thereon as calculated in accordance with that clause at such rate as the Court deems reasonable. The usual rate of interest allowed in such cases is 6 per cent. per annum.

Held, that there were no sufficient grounds for allowing interest at the higher rate of 9 per cent. per annum.) AIR (Vol 22) 1935 Oudh 263: 1935 OWN (CC) 228: 10 Luck 687: 154 Ind Cas 46.

——O. 34, R. 11 — Interest — 12 per cent. simple interest, if fair.

Prima facie and in the absence of special circumstances to the contrary, the rate of 12 per cent. per annum simple, may be taken as a fair, proper and reasonable rate in a mortgage transaction. AIR (Vol 21) 1934 All 938: 4 AWR (HC) 103: 153 Ind Cas 695 (DB).

——O. 34, R. 11 — Post diem interest allowed as damages.

Where a mortgage provided that (a) the mortgagee will remain in possession of the land; (b) the mortgage will continue for a term of five years; (c) out of Rs. 600 Rs. 300 only will carry interest at the rate of 9 p. c. p. a.; (d) the interest will be paid annually, failing which compound interest will be charged; (e) the mortgagor will not be competent to effect an alienation or redemption within the term fixed; (f) on the expiry of the term the entire mortgage money with interest will be paid; and (g) the mortgagee will be entitled to recover his dues from the property at any time he liked :

Held, that the mortgagees will be entitled to receive compound interest at the rate of 9 p. c. p. a. as stipulated for five years and simple interest at the same rate for a period of six years prior to the institution of the suit as damages. AIR (Vol 21) 1934 Lah 898 (DB).

——O. 34, R. 11 — Original rate 9 per cent. — Enhanced rate 12 per cent. on default instalments — Exigible clause after five instalments — Interest on defaulted instalments after whole amount has become payable, if can be reduced from 12 to 9 per cent.

Where the debt bears interest at 12 annas per cent. per month with an enhanced rate of one per cent. per mensem on defaulted instalment, the judge cannot reduce this to 12 annas per cent. only on defaulted instalments from the time when the whole sum becomes exigible, e.g., on the default of five instalments, because a clause concerning the exigibility of total payment cannot operate in the mortgagor's favour. AIR (Vol 21) 1934 Nag 264: 30 NLR 331: 153 Ind Cas 115.

——O. 34, R. 11 — Interest on interest — Provisions as to.

Under O. 34, R. 11, Civil P. C., interest, after it becomes due, shall be added to the principal money and the aggregate amount so found due shall be decreed to the mortgagee. AIR (Vol 21) 1934 Oudh 473: 11 OWN (CC) 1141: 151 Ind Cas 856 (DB).

——O. 34, R. 11 — Compound interest.

Compound interest cannot be awarded unless it has been specially agreed to. AIR (Vol 20) 1933 Mad 171: 145 Ind Cas 762.

——O. 34, R. 11 — Provision for interest in mortgage deed — Award of compound interest — Legality of.

Where a mortgage deed shows clearly that it was intended by the parties that compound interest should be paid under its terms, the Court is justified in awarding compound interest. Interest on interest always means 'compound interest'. AIR (Vol 20) 1933 Oudh 411: 10 OWN (CC) 915: 147 Ind Cas 807 (DB).

——O. 34, R. 11 — Interest — Presumptions as to rate.

If a mortgage deed contains stipulations regarding the payment of interest till the date fixed for payment, a presumption arises that the parties intended that interest should be paid after the date and where no inference regarding the rates can be drawn, the presumption is that it was intended to pay interest at a reasonable rate.

A mortgage deed in which prospective interest had been added as swai and which provided for payment in instalments contained a clause that if instalments were defaulted, interest at 2 per cent. per mensem compound was to be paid till satisfaction. There was, however, a further clause that, if two instalments were defaulted, the whole amount should become due. The deed made no provision for interest on the whole sum if it became due :

Held, (i) that as there was no precise definition of the rate of interest prior to default, it was not possible to draw an inference that the parties intended that after the whole amount became due, interest should be paid at the rate which can be deduced from the arrangement regarding addition of swai and payment by instalment:

(ii) that as the terms of the deed did not indicate what rate of interest should be paid after the entire amount became due, the plaintiff was only entitled to a reasonable rate of interest. AIR (Vol 19) 1932 Nag 39: 28 NLR 1: 136 Ind Cas 887.

——O. 34, R. 11 — Interest, rate of — Accounts between purchaser at mortgage sale and subsequent purchasers of equity of redemption not made parties in mortgage suit: See (1907) 11 CWN 403: 5 CLJ 315 (324).

——O. 34, R. 11 — Mortgage — Simple interest only provided — No mention of rests — Trade custom — Contract to the contrary.

In the absence of any custom of trade, and in the absence of any contract to the contrary, express or implied, where a bond provides only simple interest, only simple interest can be allowed. (1905) 7 Bom LR 772 (790).

——O. 34, R. 12.

See also Civil P. C., S. 73.

——O. 34, R. 12 — Suit by puisne mortgagee for sale — Prior mortgagee impleaded and consenting to sale entire property — Preliminary decree for sale of entire property is valid.

The Civil P. C. is not exhaustive and unless there is a prohibition the trial Court is fully entitled to make such orders and pass such decrees ex debito justitiae — even if not provided by the Court —as appear to be necessary in the circumstances, of the case. Order 34, R. 12, does not provide, that a decree for sale must necessarily have been passed before the date of the consent of the prior mortgagee. There can be no objection in construing it in such a way as to take within it the consent of a prior mortgagee preceding the decree for sale. Therefore, in a suit for sale brought by a puisne mortgagee when the prior mortgagee is impleaded as a party to the action and is willing to have the property sold free from his incumbrance on the condition that he should be paid first out of the proceeds of the property mortgaged with him, it is competent for the Court to pass a preliminary decree for the sale of the entire property. AIR (Vol 30) 1943 Mad 455 : (1943) MWN 111 : (1943) 1 MLJ 163 : 56 MLW 170 : 210 Ind Cas 194.

——O. 34, R. 12 — Construction — A mortgaging property X to B and subsequently properties X and Y to C — Mortgage decree by B without impleading C — Property X sold in execution and purchased by D — Suit by C on his mortgage impleading D — Court directing sale of property Y first and then of X, if necessary — No question of marshalling, held arose — Facts, held did not warrant inference of D being consenting party to order of sale free of his previous charge — D's omission to plead his prior rights in C's mortgage suit, held did not bar D from raising that question by suit against C — Constructive res judicata — D held could use first mortgage as shield against C.

Under O. 34, R. 12, Civil P. C., the Court can direct a sale of the mortgaged property at the instance of a subsequent mortgagee, free from any mortgage, only when the prior mortgagee gives his consent, and in that case he is bound to give the prior mortgagee the same interest in the proceeds of the sale as he had in the properties sold.

A mortgaged property X to B and subsequently mortgaged properties X and Y to C. B who was not aware of the rights of C obtained a decree without impleading C and in execution thereof got sold property X which was purchased by D. C then brought a suit on his mortgage making D also a party. The decree in C's suit directed that C should proceed in the first place against property Y and if the sale proceeds were insufficient to wipe off his dues he could then proceed to sell property X. It was not mentioned that the property X would be held free of the rights of D but the lower Court held that that must be the effect of the order which was made in the presence of D. It was also contended that the omission on D's part to plead his rights in C's mortgage suit barred him from raising that question again in a subsbequent suit, against C:

Held, that no question of marshalling arose on the facts of the case and D could not be said to be a consenting party to the order of sale in C's suit merely because it was at his instance that a discretion was given to sell property Y first. Even if such an order was made at the instance of D that fact alone did not justify the inference that he consented to have property X sold by the second mortgagee free and clear of his previous charge even though no order was made giving him a prior charge on the sale proceeds.

Held further that omission on D's part to plead his rights in the mortgage suit and to invite the Court to pass an order in his favour could not operate as a bar to his raising that question again by suit against C on the principle of constructive res judicata inasmuch as, in order to attract the doctrine of constructive res judicata, it must be shown that there were allegations made by C in his plaint in the mortgage suit which impugned or sought to displace the prior title of D. Far from containing any allegations in derogation of D's title, C expressly admitted his prior interest and claimed only a right to redeem. Consequently, the subsequent suit by D to establish his prior rights was not barred by constructive res judicata.

Held, also that though D was a purchaser at the mortgage sale held at the instance of the first mortgagee, he could use the first mortgage as a shield against the puisne encumbrancer. AIR (Vol 29) 1942 Cal 138 : 74 CLJ 1 : 45 CWN 705 : 202 Ind Cas 308 (DB).

——O. 34, R. 12 — A prior mortgagee is not necessary party to a suit on mortgage but if, however, a prior mortgagee is impleaded and he does not offer to redeem his mortgage, he will not be affected by decree in suit. The sale will be subject to the mortgage and provision of O. 34, R. 12 will apply. AIR (Vol 24) 1937 Cal 446 : 65 CLJ 1 : 170 Ind Cas 926 (DB).

——O. 34, R. 12 — Mere filing of application after decree — Whether can make an alleged prior mortgagee a party to the decree.

The mere filing of an application after a decree has been passed cannot make a prior mortgagee a party to the decree, even if a mortgage suit does not end until the property has been brought to sale. AIR (Vol 24) 1937 Mad 554 : (1937) MWN 353 : 45 MLW 646 : 170 Ind Cas 932.

——O. 34, R. 12 — Order under R. 12 — Whether a decree and appealable.

An order passed under O. 34, R. 12 after full enquiry will not amount to a decree and is not appealable. AIR (Vol 24) 1937 Mad 554 : (1937) MWN 353 : 45 MLW 646 : 170 Ind Cas 932.

——O. 34, R. 12 — Scope of — Enquiry into rights of stranger, if contemplated.

Order 34, R. 12, Civil P. C., does not contemplate enquiry whether a person who is a stranger to the suit is a prior mortgagee or not but contemplates the admitted existence of a prior mortgagee and lays down the procedure to be adopted in bringing the mortgaged properties to sale, the prior mortgagee being given the option of having the property sold subject to his mortgage or free of his mortgage. In the latter case, he is entitled to have his mortgage discharged out of the proceeds of the sale.

It is true that the executing Court has to make certain enquiries of an incidental nature but it cannot be said that this enquiry into the rights of a stranger to the suit is in the nature of an incidental enquiry in execution. An executing Court, whose primary duty it is to execute, would be exercising its discretion wrongly to go into a full enquiry into the claims of a person who is not a party to the suit in order that an order may be passed under O. 34, R. 12 in his favour. AIR (Vol 24) 1937 Mad 554 : (1937) MWN 353 : 45 MLW 646 : 170 Ind Cas 932.

——O. 34, R. 12 — Prior and subsequent mortgagee — Subsequent mortgagee being assignee of prior mortgagee also — Suit by puisne mortgagee — Subsequent mortgagee impleaded not as assignee but as subsequent mortgagee — Decree passed that claim of puisne mortgagee to be satisfied first and then that of subsequent mortgagee — In execution, claim put in by subsequent mortgagee as assignee of prior mortgagee:

Held, that the subsequent mortgagee was not a necessary party to the suit in his capacity as prior mortgagee. He was, therefore, under no obligation to defend his claim. AIR (Vol 22) 1935 Lah 218 (DB).

——O. 34, R. 12 — Scope of — Discretion of Court to direct sale free from prior mortgage — Consent of plaintiff or of any other person other than prior mortgagee — Whether necessary — Power of Court to act of its own motion.

Order 34, R. 12, Civil P. C., merely confers upon the Court the power of directing a sale free from the prior mortgage, subject to the condition prescribed in that rule, namely, that the property must be one of which the sale is directed under O. 34, and there must be the consent of the prior mortgagee. When these conditions are satisfied, the Court has full power in its discretion to direct the sale free from the prior mortgage. The rule does not require that the consent of the plaintiff is necessary or of any other person besides the prior mortgagee. The rule does not also say that the Court can make such an order only on the application of the plaintiff or any specified person. The rule confers a general power on the Court which the Court can exercise so long as the conditions are satisfied on the application of anybody or even of its own motion.

In execution of a decree in a suit on a subsequent mortgage, the mortgaged properties being sold, the prior mortgagee applied praying that the properties should be sold free of his prior mortgage:

Held, that O. 34, R. 12, applied to the case and that the executing Court had power to grant the application. AIR (Vol 22) 1935 Mad 453 : (1935) MWN 389 : 157 Ind Cas 40.

——O. 34, Rr. 12 and 13 — Suit by subsequent mortgagee — Impleading of prior mortgagee — Decree and sale:

Held, that the prior mortgagee is bound by the proceedings in the suit. He cannot exercise the right to hold up his prior simple mortgage as a shield, such right being exercisable only by a defendant in possession of the property. The prior mortgagee's remedy is either by availing himself of the provisions of O. 34, Rr. 12 and 13 and claiming that the property should be sold free from encumbrance and that the amount should be paid in the first instance or to redeem the subsequent mortgage and prevent the sale of the property. When he does not avail of any of these remedies, he can have no remedy except that of suing on the previous mortgage provided limitation has not expired. AIR (Vol 21) 1934 All 73 : (1934) ALJ 188 : 3 AWR (HC) 328 : 147 Ind Cas 380 (DB).

——O. 34, R. 12 — Calcutta Municipal Act (III of 1923), S. 205 — Sale of house in Calcutta by Registrar (Original Side) — Arrears of taxes to municipality due — No mention of arrears in prosecution — Liability to pay — Amount, if to be paid out of purchase money.

In execution of a mortgage-decree, a house in Calcutta was sold by the Registrar, High Court (Original Side). No mention was made in the notification of sale of the Municipal tax or of any other encumbrance. At the time of the sale, the Corporation represented that their arrears should be paid out of the sale proceeds. On the sale being confirmed, the proceeds were paid into Court:

Held, that the property was sold subject to a clean title being given, free from any prior mortgage or charge; and until the mortgagee was in a position to give such a title, he was not entitled to the purchase money. He could not give any such title until the first charge in favour of the Corporation had been disposed of. Consequently, the money in Court could not be paid out to him unless and until this claim had been settled, and it should be settled in accordance with the usual practice, that is to say, by payment to the Corporation by the Registrar out of the purchase-money. AIR (Vol 21) 1934 Cal 842 : 38 CWN 971 : 61 Cal 956 : 153 Ind Cas 247.

——O. 34, R. 12 — Where a party who is a prior mortgagee and nothing more, is impleaded and nothing is alleged in derogation of his priority he will be taken to have been impleaded under O. 34, R. 12 and his priority is not affected.

Where the party impleaded is a prior mortgagee, and nothing more, but an allegation is made in the plaint derogating from his priority, his priority is barred.

When the party impleaded is a puisne mortgagee and, therefore, a necessary party but claims priority, he must assert and prove the priority; otherwise he is barred. AIR (Vol 18) 1931 Pat 33 : 9 Pat 316 : 11 PLT 883 : 130 Ind Cas 168 (DB).

——O. 34, R. 12 — Prior mortgagee — Purchaser of equity of redemption paying off first mortgage — Suit on second mortgage — Sale to be made subject to purchaser's subrogated right.

A second mortgagee brought a suit on his mortgage impleading as defendants the mortgagor, the prior mortgagee and L who had purchased the equity of redemption after the execution of the second mortgage. The validity of the first mortgage was not disputed in the suit. L had paid off the first mortgagee before the decree in the suit was passed, but did not set up a claim that he was entitled to claim a charge on the property in respect of the payment to the prior mortgagee. The decree consequently contained no reference to the charge. Subsequently in proceedings relating to to the sale of the property L put forward that claim:

Held, that L was not a prior mortagee in the strict sense of the term as he had already purchased the equity of redemption, but that by virtue of S. 101, Transfer of Property Act as amended, he stood in the same position as a prior mortgagee for the purposes of O. 34, R. 12, and the property cannot be sold otherwise than subject to his claim. AIR (Vol 17) 1930 Lah 1063 (DB).

——O. 34, R. 12 — T. P. Act (IV of 1882), S. 96 — Suit on puisne mortgage impleading prior mortgagee as party.

In a suit on a puisne mortgage the prior mortgagee was made a party but no attack was made on the prior mortgage and its validity. A decree for sale was made and property was purchased by the puisne mortgagee. Held, that he had no power to sell free of mortgage without the consent suit by the prior mortgagee and that a subsequent suit by the prior mortgagee on his own mortgage is maintainable. AIR (Vol 7) 1920 PC 81: 47 Cal 662 : 47 IA 11 : 38 MLJ 424 : (1920) MWN 308 : 11 LW 518 : 22 Bom LR 557 : 18 ALJ 401 : 55 Ind Cas 959.

——O. 34, R. 12 — Prior mortgagee — Ex parte decree on puisne mortgage — Declaration of right.

A prior mortgagee made a party to the suit on a puisne mortgage can have his rights declared under O. 34, R. 12 even though he allowed an ex parte, decree to be passed. AIR (Vol 2) 1915 Cal 570 : 27 Ind Cas 164 (DB).

——O. 34, R. 12 — Decree nisi by consent — Sale by mortgagor — First to defendant and next to plaintiff — Suit by plaintiff for possession — Decree to be passed.

Where a decree nisi was got upon the mortgage by consent to the effect that the property should pass to the mortgagee without recourse to any process of public sale, on default of payment within a certain time, and the mortgagor sold his equity of redemption to the defendant and subsequently sold the same to the mortgagee plaintiff who thereupon sued for possession without obtaining an order absolute. Held. that the suit should be decreed subject to the defendant's right to redeem. (1913) 18 Ind Cas 457 (DB) (Cal).

——O. 34, R. 12 — Sale without reference to prior mortgagee.

A sale without reference to a prior mortgagee and without his consent free of his mortgage is irregular. (1913) 6 LBR 144 : 6 Bur LT 72 : 19 Ind Cas 2.

——O. 34, R. 12 (S. 96, old Code) — Parties joinder of — When prior mortgagee not necessary party — Decree, construction — Mortgage decrees, form of.

Section 96 of the Act does not necessarily imply that when property is not to be sold free from a prior mortgage the decree should under all circumstances expressly reserve the prior mortgagee's rights even when there is no contest about his rights and the plaintiff only prays for a sale subject to the prior mortgage. The proper course to be observed in drawing up a decree is that pointed out in 18 A 347.

Still, in construing a decree admissions in the pleading or in the course of the trial should not be ignored as the decree taken as negativing any right conceded by all the parties and with reference to which the Court was not called upon to adjudicate and to which there was no necessity to make any reference in terms in the decree, provided such a construction is not repugnant to any statutory provision.

Where a puisne mortgagee in a suit for sale upon his mortgage impleaded the prior mortgagee and prayed for sale only subject to the prior mortgagee's right and there was no dispute at all about the prior mortgagee's right by any of the parties to the suit, and in the decree for sale, the Court made no express reservation of the prior mortgagee's rights.

Held, the prior mortgagee's rights were not affected by the absence of any special reservation of his rights in the decree. (1905) 16 MLJ 50: 29 M 84 (86, 87) (DB).

——O. 34, Rr. 12, 13 (T. P. Act, Ss. 96, 97) — Civil Procedure Code (old), S. 295 — Mortgage — Suit for sale of entire property by holder of usufructuary and simple mortgages over the same property.

A mortgagee held several simple mortgages on properties A and B and also a usufructuary mortgage of prior date over property B. Held, that the mortgagee was not entitled to bring to sale the property covered by his simple mortgages, subject to the usufructuary mortgage held by him nor could he bring to sale the whole property for the aggregate amount of the mortgages, simple and usufructuary. 1903 AWN 177: 26 A 14 (17) (DB).

——O. 34, Rr. 12, 13 (T. P. Act, Ss. 96, 97) — Appropriation of surplus sale proceeds by mortgagee.

A mortgagee receiving the surplus sale proceeds of a portion of the mortgaged properties sold in execution of a decree on a prior mortgage of that part obtained against some of the mortgagors, is bound to apply the same towards the mortgage debt and not to other debts in case he received the money by means of or by virtue of the security, even though the money was paid by the mortgagors towards other debts due by them. (1903) 30 C 953 (958) (DB).

——O. 34, R. 13.

——O. 34, R. 13 — Scope of.

Rule 13 which lays down the method of appropriation, applies not merely to a case where a property is sold within the consent of the prior mortgagee, but also to other cases where there is not prior mortgage to consider and provide for.

Where the High Court stated in the judgment that the plaintiff should have a charge for "the aforesaid amount" which meant Rs. 6,156-6-11 on the family properties in the hands of defendant No. 1 and the properties were sold, it was held that the sale proceeds should first be appropriated towards interest and costs of the suit and appeal. AIR (Vol 32) 1945 Mad 392: (1945) 1 MLJ 430.

——O. 34, R. 13 — Applicability — Mortgage-decree — Appeal by alienee of portion of mortgaged property — Order for costs against appellant personally — Realisation of costs from property mortgaged.

In a mortgage, the Court has power to pass a personal decree for costs against defendants who were not parties to the mortgage. Where a Court of appeal in dismissing the appeal by an alienee of a portion of the mortgaged property and accepting the cross objections expressly makes the appellant personally liable for costs in appeal and there is order for costs against other defendants, the order as to costs can be executed personally against the appellant and it cannot be claimed that the sale proceeds of the mortgaged property should first be appropriated towards costs. AIR (Vol 31) 1944 Mad 553: 57 MLW 462: (1944) 2 MLJ 178: (1944) MWN 570: ILR (1945) Mad 165: 217 Ind Cas 37 (FB).

——O. 34, R. 13 — Calcutta Corporation who have a statutory charge for unpaid taxes is not a person interested in the property sold within the meaning of this rule. (1942) 75 CLJ 363.

——O. 34, R. 13 — Mortgage-decree — Subsequent interest — Sale proceeds should be applied first in payment of subsequent interest and costs and thereafter the balance to discharge the principal.

The general principle of appropriation of payments towards a debt is that, in the absence of a specific indication to the contrary by the debtor, the money is first applied in payment of interest and then when that is satisfied, in payment of the

capital. This principle applies even to the sale proceeds of the properties sold in execution of a mortgage-decree.

Hence in the absence of a direction to the contrary in the decree, the sale proceeds of the properties sold in execution of a mortgage decree must be applied first in payment of subsequent interest and costs, and thereafter the balance to discharge the principal sum declared as payable in the decree. AIR (Vol 28) 1941 Lah 386: 43 PLR 521: ILR (1941) Lah 740: 196 Ind Cas 625 (FB).

(Overrules AIR (Vol 25) 1938 Lah 289: 178 Ind Cas 189.)

——O. 34, R. 13 — Whether applies to contract of suretyship — Scope of the rule — Claim for interest due by surety, if a claim apart from claim upon mortgage — Whether constitutes separate cause of action.

Order 34, R. 13, Civil P. C., does not apply to a case of suretyship. Rule 13 is meant to regulate the position as between mortgagor and mortgagee. It is meant to protect the position of the mortgagee. The claim for interest due by a surety is a claim, apart from the claim upon the mortgage. The surety may be sued for the amount of interest due, quite apart from any suit based on the mortgage. It is in reality a separate cause of action. AIR (Vol 22) 1935 Lah 334: 158 Ind Cas 126 (DB).

——O. 34, R. 13 — The residue should be paid out unconditionally to the person entitled to it as having an interest in the property. (1934) 1934 MWN 1255.

——O. 34, R. 13 — Surplus assets — Subsequent incumbrancer's right to.

Surplus assets after an auction sale should not be paid out to a subsequent incumbrancer otherwise than with the consent of the mortgagor. Neither S. 73 nor O. 34, R. 13, are applicable to the case of whether or not a subsequent incumbrancer is to be paid out of the surplus assets arising from the auction sale. 101 Ind Cas 505: 25 ALJ 390: 49 All 636: AIR (Vol 14) 1927 All 467 (DB).

——O. 34, R. 13 — Mortgagee whose right is barred not entitled to.

After a mortgagee obtains a decree for sale he becomes a decree-holder and not a mere mortgagee. If he allows his rights under that decree to become barred by time he cannot be said to be a person who still has interest in the property sold and, therefore, he is not entitled to any surplus of the sale proceeds of the mortgaged property sold in execution of prior mortgagee's decree. 22 ALJ 825: 5 LRA Civ. 596: 83 Ind Cas 1033: AIR (Vol 12) 1925 All 6 (DB).

——O. 34, R. 13 — Applicability of — Presumption.

O. 34, R. 13 C. P. C., applies to cases of sale held free of prior mortgages and the principle of the rule applies also to the appropriation of sale proceeds held subject to a mortgage. In the absence of a distinct order to the contrary the Court must be taken to have directed the amount should be applied towards the costs of the suit and the interest first and then the balance towards the principal. (1913) 25 MLJ 552: 21 Ind Cas 691 (DB).

——O. 34, R. 14.

1. **Applicability — Scope.**
2. **Claim unconnected with mortgage.**
3. **Claim under mortgage.**
4. **Compromise Decree.**
5. **Enforcement of Charge.**
6. **Instalment Decree.**
7. **Maintenance Decree.**
8. **Personal Remedy.**
9. **Sale in contravention — Effect.**
10. **Security.**

1. Applicability — Scope.

(a) **General.**
(a-1) **Ineffective mortgage.**
(b) **Other Acts.**
(c) **Retrospective effect.**
(d) **Where T. P. Act does not apply.**

(a) General.

——O. 34, R. 14 — Essential ingredient.

One of the essential ingredients for the application of R. 14 is that the earlier decree for payment of money must have been "for satisfying a claim arising under the mortgage". AIR (Vol 34) 1947 Oudh 135: 1946 OA 234 (DB).

——O. 34, Rr. 14 and 15 — 'Claims arising under mortgage' — Meaning of, explained — Charge created by decree itself — Order 34, R. 14 does not apply — Transfer of Property Act (1882), S. 100.

The prohibition under O. 34, R. 14 applies only to claims arising under the mortgage. Where a decree for future maintenance provides that maintenance will be a first charge upon certain specified properties, the claim does not arise under any mortgage or charge but arises under the decree itself; the charge is provided by the decree itself only as an additional safeguard for the decree-holder in securing its enforcement. It would be grossly anomalous and unfair to hold that the provision put into the decree as an additional safeguard for the decree-holder would prevent her from executing her decree at all as she would otherwise have done. Order 34, R. 14, Civil P. C., read with S. 100, T. P. Act, would not apply to such a case. AIR (Vol 33) 1946 Pat 216: 12 BR 333: 223 Ind Cas 173.

——O. 34, R. 14, Civil P. C., aims at affording to the mortgagor a measure of protection against the mortgaged property being sold at a disadvantage, while S. 90, Trusts Act is much wider in scope preventing, as it does, persons standing in a special relationship to certain others from taking advantage of their position to secure a benefit to themselves in derogation of the rights of those others. AIR (Vol 30) 1943 Mad 202: 55 MLW 735: (1942) MWN 828: (1943) 1 MLJ 477: ILR (1943) Mad 418: 207 Ind Cas 526 (DB).

——O. 34, R. 14 — Object of sale in execution of mortgage decree and money decree — Difference.

O. 34, R. 14, Civil P. C., is for the protection of the mortgagor. The sale in execution of a decree on a mortgage passes the interest of both the mortgagee and mortgagor while the sale in execution of a money decree conveys only the interest of the mortgagor, namely, the equity of redemption. The object of the rule is to prevent the mortgagee from bringing to sale the equity of redemption in execution of a money decree which he may obtain in respect of a claim arising under the mortgage. AIR (Vol 30) 1943 Pat 282: 22 Pat 207: 10 BR 54: 24 PLT 296: 208 Ind Cas 457 (DB).

——O. 34, R. 14 — Applicability — Mortgagee and decree-holder must be identical — Held, O. 34, R. 14 did not apply.

Order 34, R. 14, Civil P. C., applies only if the mortgagee and the decree-holder can be identified as the same person or the same legal entity. Where a mortgage is entered into by the manager of the

joint Hindu family, the son does not thereby become the mortgagee and similarly, where the son obtains a decree, his father does not thereby become the decree-holder; nor can the family as a unit be said to have entered into either transaction :

Held, on facts that the mortgagee and the decree-holder were not identical and O. 34, R. 14, did not apply. AIR (Vol 26) 1939 Mad 436: 39 MLW 411: (1939) MWN 302: (1939) 1 MLJ 680: 189 Ind Cas 390.

——O. 34, R. 14 — Word 'mortgagee' means holder of subsisting and effective mortgage.

The word "mortgagee" in R. 14 of O. 34 of the Civil P. C., is intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against the purchaser or would be purchaser of the mortgaged property. AIR (Vol 26) 1939 Oudh 126: 1939 OWN (CC) 227: 180 Ind Cas 136 (DB).

——O. 34, R. 14, O. 21, Rr. 30, 54 — Charge created by money decree — No prior mortgage — O. 34, R. 14, if applies to execution of the decree — Attachment, if necessary for execution.

Order 34, R. 14, only applies where a mortgagee obtains a decree for payment of money in satisfaction of a claim remaining under a mortgage. Where there is no mortgage and the decree itself creates the charge, O. 34, R. 14, does not apply to the execution of that decree. In such a case, the proper form of execution is the one directed in this case, viz., that the property be sold in execution of the decree, and it is not necessary to make a prohibitory order of attachment under O. 21, R. 54., inasmuch as attachment by a prohibitory order is a step in execution designed for the protection of a judgment-creditor and not for the benefit of the judgment-debtor. AIR (Vol 21) 1934 Bom 241: 36 Bom LR 523: 151 Ind Cas 96 (DB).

——O. 34, R. 14 — Scope — Maintenance decree declaring liability to pay and creating charge on property for payment — Whether can be brought within the ambit of the rule — Decree, if can be treated purely as a declaratory decree.

The object of O. 34, R. 14, Civil P. C., is to prevent a mortgagee from bringing the mortgaged property to sale in execution of any decree other than the one for sale. The provision is intended to obviate the sales in execution proceedings of the bare equity of redemption and thus deprive the mortgagor of his right of redemption which he would have under a decree for sale. The rule precludes mortgagees from bringing to sale the mortgaged property in execution of a decree for the payment of money in satisfaction of a claim arising under the mortgage. The rule can have no application where the charge or mortgage is created by the decree itself.

Where a maintenance decree first declares the liability of the judgment-debtors to pay as maintenance a certain amount and directs them to pay it and as a security for this payment creates a charge on some property, it cannot be brought within the ambit of O. 34, R. 14.

A decree which creates a charge on some property for payment of maintenance allowance cannot be treated purely as a declaratory decree. AIR (Vol 21) 1934 Nag 83: 148 Ind Cas 196.

——O. 34, R. 14 — Where a mortgage has been declared to be a nullity and the mortgagee obtains a money decree in lieu of what was originally considered to be a mortgage, there is no subsisting mortgage and O. 34, R. 14 can have no application. AIR (Vol 16) 1929 All 580: 118 Ind Cas 590: 1929 ALJ 958 (DB).

——O. 34, R. 14 — The object of O. 34, R. 14 is to prevent mortgagees from suing their mortgagors on the mortgage debt as such and in execution selling the bare equity of redemption depriving the mortgagor of the right of redemption that would be given to him by the decree for sale. AIR (Vol 12) 1925 Sind 156: 78 Ind Cas 49 (DB).

——O. 34, R. 14 — O. 34, R. 14 is confined to claims arising under the mortgage and does not apply to a case where the sale takes place in execution of a decree for money upon a claim not arising under the mortgage. AIR (Vol 10) 1923 Cal 121: 76 Ind Cas 241: 27 Cal WN 38: 37 Cal LJ 265 (DB).

——O. 34, R. 14 — Applicability of — Mortgage not intended to be operative.

Section 99 of the T. P. Act (O. 34, R. 14, C. P. C.) cannot be applied to the case of a mortgage which was never brought into operation or which according to its terms could not come into operation until a condition was fulfilled and that condition was not fulfilled. AIR (Vol 7) 1920 Mad 319: 55 Ind Cas 417 (DB).

——O. 34, R. 14 — Scope of — "Bring the property to sale" — Meaning of.

The words include not only all the steps preliminary to the sale but the sale itself. AIR (Vol 5) 1918 Cal 705: 45 Cal 530: 41 Ind Cas 73 (DB).

——O. 34, R. 14 — Scope of — Mortgagee — Meaning of — Application of rule.

"Mortgagee" in R. 14 of O. 34 means the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against a purchaser or would-be purchaser of the property. AIR (Vol 4) 1917 All 470: 39 All 36: 14 All LJ 902: 36 Ind Cas 907 (DB).

——O. 34, Rr. 14, 15, 4 and 5 — Scope of.

Rule 14 is confined to cases where a mortgagee has obtained a personal decree against a mortgagor on a mortgage debt. In this case, the mortgagee is not entitled to bring the mortgaged property to sale in execution of the personal decree. He can sell the property only in a regular suit for sale under Rr. 4 and 5. Rules 14 and 15 read with S. 100, T. P. Act mean that where immoveable property has been made security for the payment of the money and the beneficiary has obtained a decree for the payment of money, so secured, he cannot bring the property to sale only by a suit for sale. The decree referred to in R. 14 must be a decree subsequent to the creation of the security. AIR (Vol 3) 1916 Pat 252: 2 Pat LJ 55: (1917) Pat HCC 67: 3 Pat LW 202: 38 Ind Cas 791 (DB).

——O. 34, R. 14 — Scope of — T. P. Act (IV of 1882), S. 99.

The new C. P. Code repeated S. 99, T. P. Act and substituted in its place O. 34, R. 14 and thus merely effected a change of procedure in which mortgaged property has to be realized in execution of money decrees and therefore, the statutory rule

in force for the execution of the unsatisfied portion of the decree passed in 1897 was the rule contained in O. 34, C. P. Code (1908). (1911) 35 Bom 248: 13 Bom LR 245: 10 Ind Cas 815 (DB).

——O. 34, R. 14, (T. P. Act, Ss. 67, 99, 100) — Applicability — Attachment.

Section 99 contemplates an attachment by a mortgagee. The proper time to consider whether or not S. 99 has any application is only when an application for sale is made: and a Court should not, on an application for attachment, reject the application on the ground that the proper remedy is by a suit under S. 67. (1908) 32 Bom 205 (207) (DB).

——O. 34, R. 14 (T. P. Act, S. 99) — Attachment of mortgaged property — Sale in execution — Separate suit.

Section 99 of the T. P. Act, forbids the sale of the mortgaged property in execution of the decree at the instance of the mortgagee but it is no bar to an attachment of the property. (1906) 8 Bom LR 576 (577) (DB).

——O. 34, R. 14 (T. P. Act, S. 99) — 'Mortgagee' — Does it include assignee of money bonds from mortgagee — Suit by assignee.

(1905) 7 Bom LR 816 (818) (DB).

(a-1) Ineffective mortgage

——O. 34, R. 14 — The mortgage referred to in O. 34, R. 14, must be a subsisting mortgage and not one which by reason of the flow of time or any other circumstances, has ceased to be enforceable by law. AIR (Vol 8) 1921 All 131: 63 Ind Cas 445: 43 All 677: 19 All LJ 728 (DB).

——O. 34, R. 14 — Sale not barred.

Where the mortgage right is extinguished by limitation or by compromise or is in some way ineffective through some legal defect, O. 34, R. 14, will not bar a sale in execution of a simple money decree. AIR (Vol 8) 1921 Mad 477: 62 Ind Cas 756: 14 Mad LW 331: 1921 Mad WN 376: 41 Mad LJ 160 (DB).

(b) Other Acts

——O. 34, R. 14 and U. P. Agriculturists Relief Act (XXVII of 1934), S. 3 — Applicability of O. 34, R. 14 — Charge created by decree — Nature and liability in respect of charge created by Court under S. 3 of the U. P. Agriculturists Relief Act.

Order 34, R. 14 does not apply to a case in which a charge has been created by the decree itself. It applies to a case in which the decree has been obtained for the payment of money in satisfaction of a claim arising under the mortgage. It cannot apply to a charge created by Court under S. 3 of the U. P. Agriculturists Relief Act on the property of the judgment-debtor. It attaches to the rights and interests of the judgment-debtor in the property and is binding on the person succeeding to the property after the death of the judgment-debtor whether by succession or survivorship. AIR (Vol 40) 1953 All 253.

——O. 34, R. 14 — Order 34 is confined entirely to mortgages of immoveable property. Hence O. 2, R. 2 is not affected by O. 34, R. 14 as regards movable properties. AIR (Vol 20) 1933 Bom 51: 34 Bom LR 1615: 57 Bom 346: 142 Ind Cas 370 (DB).

——O. 34, R. 14 — An award under the Co-operative Societies Act directing the sale of property comprised in a mortgage does not militate against O. 34, R. 14, Civil P. C. AIR (Vol 20) 1933 Nag 211: 142 Ind Cas 487.

——O. 34, R. 14 (T. P. Act, S. 99) — Hypothecation of property to Government for taccavi advances — Realization of debt under Public Demands Recovery Acts VII of 1880 and I of 1895 (BC) — How far barred — Quaere.

Whether the recovery of tuccavi advances under the Public Demands Recovery Acts VII of 1880 and I of 1895 of the Bengal Council is barred by S. 99 of the Transfer of Property Act in case the property is hypothecated to Government for such advances. (1902) 6 Cal WN 484: 29 Cal 537 (542) (DB).

(c) Retrospective effect.

——O. 34, R. 14 (T. P. Act, S. 99) — Retrospective effect of old law.

The provisions of S. 99, T. P. Act, cannot be applied to sales perfected before the Act came into force in execution of money decrees obtained by mortgagees on claims independent of the mortgage. (1903) 15 Mad LJ 445: 29 Mad 421 (423) (DB).

(d) Where T. P. Act does not apply

——O. 34, R. 14 — Order 34, R. 14, Civil P. C., which does not apply to the Punjab, is really intended to create a prohibition to the mortgagee securing the sale of the mortgaged property without first bringing a suit for the sale thereof. There is no ground, to hold that but for this rule such a suit would have been barred under O. 2, R. 2. AIR (Vol 22) 1935 Lah 672: 16 Lah 640: 37 Pat LR 816: 158 Ind Cas 238 (2) (FB).

——O. 34, R. 14 — In view of the provisions of O. 34, R. 14 (2), in the province of the Punjab at any rate, as the T. P. Act is not in force, a decree for sale is not a necessary preliminary to the sale of the equity of redemption at the instance of the mortgagee in all circumstances. AIR (Vol 18) 1931 Lah 483: 33 Pun LR 345: 13 Lah 143: 132 Ind Cas 215 (DB).

——O. 34, R. 14 — Transfer of Property Act not having been extended to Santhal Parganas, O. 34, R. 14 (1) has no application there. AIR (Vol 16) 1929 Pat 439 (DB).

——O. 34, R. 14 — Rule 14 of O. 34 does not apply to the Punjab. AIR (Vol 15) 1928 Lah 209: 103 Ind Cas 449.

2. Claim unconnected with mortgage

——O. 34, R. 14, S. 11 — Lease by mortgagee back to mortgagor part of mortgage transaction and merely machinery for realizing interest — Suit for rent under lease — Under decree in such suit equity of redemption, when can be sold.

When a lease back is part of a transaction of mortgage and is merely a piece of machinery for realizing the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realize the interest on the mortgage and under a decree in such a suit the equity of redemption could not be brought to sale unless the suit was actually framed as a suit on the mortgage. The fact that the mortgage was on one day and the lease on the next day has very little bearing on the question whether the lease and the mortgage form part of the same transaction. Nor the fact that an advance by way of security for rent was paid necessarily makes the

lease something separable from the mortgage. Similarly, the fact that the lease is expressed as ending on the same date as the date on which the right of redemption begins, is a clear indication that both the deeds form part of one and the same transaction. AIR (Vol 27) 1940 Mad 59: 50 Mad LW 677: (1939) Mad WN 1145: (1940) 1 Mad LJ 143: 187 Ind Cas 852.

——O. 34, R. 14 — Mortgage debt — Suit against principal debtor and surety — Plaint stating "plaintiffs have given up only the mortgage right and filed the suit as on a simple bond" — Construction — Surety, if discharged — Mortgage right, if extinguished — Registration Act (XVI of 1908), S. 17 (i) (b).

In a suit against a principal debtor and his surety on a debt due under a mortgage bond, the plaint contained a statement "the plaintiffs have given up only the mortgage right and filed the suit as on a simple bond." On this statement it was argued that the surety was discharged:

Held, that the only reasonable construction of this statement in the plaint was that the plaintiff was content to enforce the bond as a money claim and did not want a mortgage decree, and that notwithstanding this statement, by reason of the provisions of O. 34, R. 14, Civil P. C., it was still open to the plaintiff to sue to enforce the mortgage:

Held, further, that if the statement could be construed as amounting to anything more than a statement of an intention not to claim the relief by way of sale, it would be inoperative in law because under S. 17(i)(b) of the Registration Act, no document which is unregistered can extinguish the mortgage, because the mortgage was admittedly for more than Rs. 100. AIR (Vol 24) 1937 Mad 501: (1937) Mad WN 132: (1937) 1 Mad LJ 469: 45 Mad LW 602: 169 Ind Cas 679.

——O. 34, R. 14 — Mortgage — Suit for foreclosure or sale — Court deciding that amount in suit was not charged on mortgaged property — Simple money-decree granted — Attachment of property in execution — Legality of — O. 34, R. 14, if operates as bar.

In a suit on a mortgage the plaintiff wanted the amount due under the mortgage by foreclosure of the mortgaged property or by sale of the mortgaged property. The Court holding that the mortgage was an anomalous mortgage if it was a mortgage at all, decided that the plaintiff was not entitled to a decree for foreclosure on the ground that the amount in suit was not charged upon the mortgaged property. In execution, the property in dispute being attached, it was contended that the decree-holder was not entitled to proceed this way by reason of O. 34, R. 14, Civil P. C.:

Held, that the property could be attached as according to the finding of the Court, the mortgage security no longer subsisted and as a separate suit under O. 34, R. 14, was sure to be dismissed on the ground of res judicata, O. 34, R. 14 did not apply. It was not the intention of the Legislature that the plaintiff should be driven to another suit by reason of O. 34, R. 14, when it is certain that such a suit would be dismissed. AIR (Vol 23) 1936 All 8: 1936 All WR (HC) 1216: (1936) All LJ 407: 160 Ind Cas 370.

——O. 34, R. 14 — Debt contracted by the managing member of a joint Hindu family for a joint family purpose:

Held, that the creditor cannot ask for money-decree against all the members of the joint family as primary relief before bringing mortgaged property to sale. AIR (Vol 21) 1934 Cal 73: 60 Cal 1197: 37 Cal WN 1087: 58 Cal LJ 135: 149 Ind Cas 878 (DB).

——O. 34, R. 14 — Where a mortgagee purchases the property in execution sale without taking care to see that his mortgage is mentioned in the proclamation of sale and in the sale certificate, this fact alone is not sufficient to show that he gave up his charge. AIR (Vol 19) 1932 Lah 56 (2): 32 Pun LR 759: 135 Ind Cas 201.

——O. 34, R. 14 — Equity of redemption — Mortgagee purchasing in execution of money decree by a stranger.

A mortgagee is competent to purchase the equity of redemption brought to sale at the instance of a stranger decree-holder, although the position is different where he acquires the equity of redemption at an execution sale at his instance in contravention of the rule enunciated in S. 99 of the T. P. Act. AIR (Vol 5) 1918 Cal 475: 27 Cal LJ 431: 43 Ind Cas 212 (DB).

——O. 34, R. 14 — Claim under the mortgage — T. P. Act, S. 99 — Distinction.

Difference between the provisions of O. 34 R. 14 and S. 99, T. P. Act is that by the repeal of S. 99 a mortgagee can sell mortgaged property on a claim unconnected with the mortgage. AIR (Vol 5) 1918 Mad 668: 33 Mad LJ 601: (1917) Mad WN 782: 22 Mad LT 386: 6 LW 701: 42 Ind Cas 975 (DB).

——O. 34, R. 14 and T. P. Act, S. 99 — Distinction between.

A decree-holder getting a money decree on a mortgage bond with a declaration of lien on the property cannot bring to sale the property but must sue on the basis of the declared lien. Distinction between the two provisions pointed out. AIR (Vol 4) 1917 Cal 82: 25 Cal LJ 354: 40 Ind Cas 230 (DB).

——O. 34, R. 14 — Debts of mortgagor unconnected with the mortgage.

A mortgagee is entitled to have the equity of redemption sold in satisfaction of any debt which he might have against the mortgagor unconnected with the mortgage. Order 34, R. 14 is restricted only to claims arising under a mortgage. AIR (Vol 3) 1916 Lah 196: 18 PR 1916: 194 PWR 1915: 33 Ind Cas 802 (DB).

——O. 34, R. 14 — Sale of mortgaged property for any claim unconnected with mortgage.

A mortgagee is competent to have his mortgaged property sold in execution in satisfaction of any claim which he may have against the mortgagor, if the claim may be unconnected with the mortgagee. AIR (Vol 2) 1915 Cal 427: 42 Cal 780: 30 Ind Cas 988 (DB).

——O. 34, R. 14 (T. P. Act, S. 99) — Purchase by mortgagee at Court sale — Validity — Sale in contravention — Irregularity merely.

The view that a mortgagee cannot acquire the equity of redemption directly or indirectly by purchase at a Court sale except by a suit brought on the mortgage is based on a misapplication of a

sound principle of equity. That principle is that a mortgagee cannot, by obtaining a money decree for the mortgage debt, and taking the equity of redemption in execution, relieve himself of his obligation as mortgagee or deprive the mortgagor of his right to redeem on account taken, and with the other safeguards usual in a suit on the mortgage. A sale taking place in contravention of the above principle cannot be treated as a nullity as the irregularity is one of procedure only. (1905) 9 Cal WN 201: 7 Bom LR 1: 1 Cal LJ 584: 2 All LJ 71: 32 Cal 296 (316): 32 IA 23 (PC)

——**O. 34, R. 14 (T. P. Act, S. 99) — Purchase by mortgagee of mortgaged property in execution of money decree — Liability to account.**

Where a mortgagee purchases mortgaged properties in execution of a money decree of his against the mortgagor, the purchase is null and void, and the possession obtained by him is not in accordance with law, and so he is liable to render account of money realised from the mortgaged properties during the term of his possession. (1903) 30 Cal 463 (466): 7 Cal WN 532 (DB).

——**O. 34, R. 14 (T. P. Act, S. 99) — Mortgagee purchasing equity of redemption in execution sale by a stranger — Redemption.**

A mortgagee who purchases the equity of redemption in the mortgaged property at a sale held in execution of a money decree obtained by a stranger against the mortgagor is not liable to be redeemed, either by the mortgagor or by those on whom the money decree was binding. 23 Mad 377 Not foll. (1903) 27 Mad 428 (429) (DB).

3. Claim under mortgage.

(a) General
(a-1) Decree for interest
(b) Decree for rent and possession
(c) Money decree

(a) General

——O. 34, R. 14 — Order 34, R. 14, Civil P. C., implies that the claim arising under a mortgage must be a claim for which the mortgage is still enforceable and upon which a suit for sale could be brought. AIR (Vol 29) 1942 Pat 50: 20 Pat 751: 8 BR 481: 23 PLT 267: 199 Ind Cas 22 (DB).

——**O. 34, R. 14 — Word "mortgagee" means holder of subsisting and effective mortgage — Suit on mortgage executed by father — Sons made party on their application — Objection by sons that property was joint property and mortgage was invalid — Mortgagee asking for simple money-decree against father alone — Such decree passed — Decree-holder attaching mortgaged property in execution of decree.**

The word "mortgagee" in R. 14 of O. 34 of the Civil P. C., is intended to mean the holder of a subsisting and effective mortgage which could still be set up by the mortgagee against the purchaser or would-be purchaser of the mortgaged property.

In a suit on a mortgage executed by a father, his sons were made parties upon their application. They challenged the validity of the mortgage on the ground that the mortgaged property was the joint ancestral property of the father and the sons and that there was no legal necessity for executing the mortgage-deed. It was stated on behalf of the plaintiff that she wanted a simple money decree against the father only upon the personal covenant to pay and that the other defendants be discharged. A simple money-decree was passed against the father. The decree-holder and the judgment-debtor then entered into a compromise, under which the decretal amount was made payable by instalments, and in case of default of any instalment, the decree-holder was entitled to recover the decretal amount by getting a warrant issued against the judgment-debtor or in any other manner she might choose. The decree was amended accordingly. On default by judgment-debtor, the decree-holder put her decree into execution and attached the same property which had been mortgaged to her. The judgment-debtor filed an objection on the ground that under O. 34, R. 14, the property was not liable to attachment and sale in execution without instituting a suit for sale in enforcement of the mortgage:

Held, that the provisions of O. 34, R. 14, Civil P. C., did not apply to the case because the mortgagee having obtained only a simple money-decree against the mortgagor, there was no subsisting mortgage, and it was not open to the mortgagee to bring a separate suit for the enforcement of such a mortgage as provided for in O. 34, R. 14. He was clearly entitled to attach the interest of the mortgagor and put it up for sale. AIR (Vol 26) 1939 Oudh 126: 1939 OWN (CC) 227: 180 Ind Cas 136 (DB).

——**O. 34, Rr. 14 (1), 6 — Suit by mortgagee only against certain items — Decree passed and those items sold — Balance found still due — Money decree — Mortgagee, whether can proceed against excluded items of property.**

The plaintiff brought suit under O. 34, R. 4, for the sale of property by enforcement of mortgage but in the plaint he asked that the suit should be only against four of the items of property exempting certain items. A final decree for sale was passed and the four items of property were sold; but some balance remained. Then the decree-holder obtained a simple money decree under O. 34, R. 6. In execution of that simple money decree, the decree-holder applied for the sale of the excluded item as a part of the property of the judgment-debtor:

Held, that O. 34, R. 14(1), was no bar to his bringing the exempted property to sale as he could not bring any mortgage suit against the exempted share on account of O. 2, R. 2(2). AIR (Vol 25) 1938 All 341: (1938) All LJ 379: ILR (1938) All 466: 1938 All WR (HC) 245: 175 Ind Cas 938 (DB).

——**O. 34, R. 14 — Suit for sale on mortgage — Personal decree — Right to attach and sell mortgaged properties — Scope of O. 34, R. 14.**

Order 34, R. 14, Civil P. C., expressly relieves a plaintiff from the bar of res judicata which is contained in O. 2, R. 2, but it does not relieve a plaintiff from the bar of res judicata which is set up by S. 11.

Order 34, R. 14 really applies to cases in which when one person has mortgaged property to another, the latter seizes on some collateral covenant in the mortgage. In such cases he is entitled to sue on this side covenant and get a decree, but in execution of it he cannot bring the whole of the mortgaged property to sale, but when he has already sued for sale of the property and, for some reason or another, has not got the order for sale which he has prayed

for, this rule does not prevent him from attaching and selling the mortgaged property in execution of the decree which he has obtained. AIR (Vol 20) 1933 Rang 158: 145 Ind Cas 373.

——O. 34, R. 14 — Suit for contribution — Co-mortgagors — Decree for contribution — No suit necessary.

Property mortgaged by co-mortgagors was freed from liability to attachment by one co-mortgagor under the mortgage decree and he brought a suit to obtain contribution from the other owners of the mortgaged property. A decree was passed in the contribution suit, and in order to obtain execution of that decree an application was presented by the co-mortgagor for leave to execute the decree by selling the properties of the other owners to the extent to which under the decree they were proportionately liable to contribution.

Held that it was not necessary to bring a separate suit under Rr. 14 and 15, O. 34, to effect the sale of the said property, but the sale could be effected in execution of the present decree. AIR (Vol 15) 1928 Cal 191: 47 Cal LJ 107: 107 Ind Cas 724 (DB).

——O. 34, R. 14 — Charge can be claimed in separate suit.

Notwithstanding that the mortgagee has obtained a personal decree against the mortgagor for money due under the mortgage, it is open to a mortgagee to claim a charge in respect of it by a separate suit, and that right he can exercise by compelling the mortgagor to pay it before redemption. AIR (Vol 8) 1921 Mad 183: 61 Ind Cas 612: 44 Mad 301: 40 Mad LJ 236 (DB).

——O. 34, R. 14 — Claim under mortgage — Mortgagor in possession as lessee — Decree for rent — Sale of equity of redemption.

Under a usufructuary mortgage the mortgagor passed a rent note to the mortgagee and remained in possession. The rent not having been paid the mortgagee obtained a decree for rent and the assignee of the rent decree having applied to execute the decree by sale of the mortgagor's equity of redemption, held, that the assignee was not competent to have the mortgaged property sold inasmuch as the agreement whereby the mortgagor agreed to pay rent was passed at the same time as the mortgage and was therefore part of the mortgage transaction. The assignee was not in this respect in a better position than his assignor. AIR (Vol 7) 1920 Bom 202: 44 Bom 366: 22 Bom LR 113: 55 Ind Cas 536.

——O. 34, R. 14 — Claim under mortgage — Lease — Rent.

Where the mortgagee being in possession gave the mortgaged property in lease to the mortgagor it being stipulated that the rent payable under the lease would be taken in lieu of interest and the equity of redemption was sold in execution of his decree for arrears of rent obtained by the mortgagee on the basis of the lease and purchased by the mortgagee.

Held, that the sale was not in execution of a decree for the satisfaction of a claim arising under the mortgage. AIR (Vol 7) 1920 Cal 363: 47 Cal 377: 24 Cal WN 229: 31 Cal LJ 98: 55 Ind Cas 157 (FB).

——O. 34, R. 14 — Claim under mortgage — Usufructuary mortgage — Lease to mortgagor — Sale of equity of redemption — Arrears of rent.

Where a usufructuary mortgagee in possession of the mortgaged property granted to the mortgagor a lease of the said mortgaged property and the mortgagor having failed to pay the amounts due under the lease the mortgagee instituted a suit for their recovery and obtained a decree and in execution of it sought to bring to sale the mortgagor's equity of redemption.

Held, the sale was not barred by O. 34, R. 14, C. P. C. The claim on the basis of the lease was not a claim arising under the mortgage and the suit out of which the decree is sought to be executed was a suit by a landlord for rent against his tenant and not that of a mortgagee against his mortgagor. The suit was brought not for the recovery of interest but for rent. The mortgage and the lease must be regarded as separate transactions. Where the mortgagee, granted the mortgagor a lease of the mortgaged property and obtained a decree against him for failing to pay the rent.

Held the decree was not in respect of a sum due in satisfaction of a claim arising under the mortgage within the meaning of O. 34, R. 14 and the equity of redemption could be sold in execution. AIR (Vol 7) 1920 Pat 723: (1920) Pat HCC 250: 1 Pat LT 694: 57 Ind Cas 384 (DB).

——O. 34, R. 14 — Claim under mortgage — Occupancy rights — Proprietary right.

Occupancy rights do not merge in proprietary rights if they are purchased by the proprietor of a part of a Taluka. (1920) 2 UP LR (BR) 4: 57 Ind Cas 319.

——O. 34, R. 14 — Claim under the mortgage — Mortgagor lessee — Suit for sale in execution of rent decree.

A mortgagee granting lease of the property to the mortgagor cannot bring a suit for sale of the property under a rent decree obtained on the basis of the lease. To escape, O. 34, R. 14, C. P. C. the mortgagee's claim should be distinct from, i.e., unconnected with the mortgage transaction. AIR (Vol 6) 1919 All 435: 41 All 399: 17 All LJ 481: 50 Ind Cas 134 (DB).

——O. 34, R. 14 — Claim under the mortgage — Rent decree.

A usufructuary mortgagee of a share of a Zemindari can sue for rent under S. 78 of the Land Registration Act and the suit is not barred by R. 14 of O. 34 of C. P. C. AIR (Vol 1) 1914 Cal 910: 18 Cal WN 1016: 23 Ind Cas 981 (DB).

——O. 34, R. 14 — Claim under mortgage — Costs — Suit for possession.

A suit was filed for the possession of the mortgaged property and a decree was obtained with costs. The mortgaged property i.e., the equity of redemption can be attached in execution of a decree for costs as it is not a claim arising under the mortgage (1913) 35 All 518: 11 All LJ 841: 20 Ind Cas 896 (DB).

——O. 34, R. 14 — Claim under the mortgage — Decree for costs — Execution by attachment.

Where a usufructuary mortgagee who was not given possession by the mortgagor sued for possession, and the suit was decreed with costs.

Held, that the claim for costs is not a claim under the mortgage but by virtue of the decree for costs, and that an attachment of the equity of redemption in execution of the decree does not contravene the provisions of O. 34, R. 14. (1913) 16 OC 350: 20 Ind Cas 898.

——**O. 34, R. 14 — Claim under the mortgage — Independent transaction.**

A mortgagee might, by a suit on an independent transaction bring to sale and purchase the equity of redemption. (1913) 7 SLR 11: 20 Ind Cas 523 (DB).

——**O. 34, R. 14 (T. P. Act, S. 99) — Usufructuary mortgage — Possession not given to mortgagee — Suit for possession compromised — Mortgagee taking simple money decree — Sale of mortgage property.**

Where a usufructuary mortgagee not having obtained possession brought a suit therefor, but consented to take a simple money-decree instead:

Held, that he was entitled in execution of the consent decree to bring the mortgaged property to sale. In principle. (1910) 5 Ind Cas 419: 7 All LJ 321: 32 All 377 (380) (DB).

——**O. 34, R. 14 — Claim under the mortgage — Sale under a mortgage and another a claim.**

A mortgagee, who cannot bring the property to sale under the mortgage but can bring to sale under another claim against the mortgagor can bring it to sale under the consolidated claim. 16 All 415: 17 All 520, Diss. from. (1910) 6 Nag LR 20: 5 Ind Cas 701.

——**O. 34, R. 14 — Claim under mortgage — Usufructuary mortgage — Simple money decree — Attachment and sale of the mortgaged property not allowed.**

The decree-holder who obtained a usufructuary mortgage for 8 years in 1892 never got possession of the property. He subsequently sued for sale of the property and got only a simple money decree under the provisions of S. 67 of the T. P. Act. In execution of the decree, the decree-holder attached the property mortgaged to him.

Held, that under S. 99 of the T. P. Act the decree holder could not sell the mortgaged property. (1909) 6 All LJ 731: 6 Mad LT 182: 3 Ind Cas 537 (DB).

——**O. 34, R. 14 (T. P. Act, S. 99) — Civil Procedure Code, S. 316 — Mortgage — Simple money decree accepted by mortgagee — Sale of mortgaged property in execution of such decree.**

Even though the mortgagee disclaims all interest in his mortgage and asks for and obtains a simple money-decree, he is precluded by S. 99 of the Transfer of Property Act, 1882, from bringing the mortgaged property to sale in execution of the simple money decree. But if such a sale does in fact take place and is confirmed and a certificate is granted to the auction-purchaser, the sale cannot afterwards be impeached upon the ground that it was in violation of S. 99 of the Transfer of Property Act. 33 Cal 283 Diss. from. (1908) 1908 All WN 49: 5 All LJ 121: 30 A 146 (148) (DB).

——**O. 34, R. 14 (T. P. Act, S. 99) — Mortgage — Sale of mortgage-property in execution of a decree for costs — Sale confirmed — Subsequent suit for redemption.**

Part of a property, the subject of a mortgage, was sold in execution of a decree for costs, otherwise than in accordance with the provisions of S. 99 of the Transfer of Property Act, 1882, and was purchased by the assignees of the mortgagee decree-holder, and this sale was confirmed.

Held, that the mortgagor could not obtain redemption of the portion of the property so sold, although — the integrity of the mortgage having been broken up — it was possible for him to obtain a decree for redemption of the unsold portion. (1908) 1908 All WN 48 (48) (DB).

——**O. 34, R. 14 (T. P. Act, S. 99) — Suit for sale of mortgaged property for interest due on the mortgage.**

Section 99, T. P. Act, has no application where the decree sought to be executed is one obtained in terms of the mortgage bond for sale of the mortgaged property subject to the mortgage itself and obtained in respect of interest due on the mortgage there being no attachment required or made in the case. (1904) 31 Cal 922 (927): 8 Cal WN 264 (DB).

(a-1). Decree for interest.

——**O 34, R. 14 — Usufructuary mortgagee to appropriate rent of mortgaged property towards interest — Property let out to mortgagor — Claim for rent by mortgagee, if claim arising under mortgage.**

Where a usufructuary mortgagee who, under the terms of the mortgage, is to appropriate the rent of the mortgaged property in lieu of interest on the mortgage loan, subsequently lets out the property to the mortgagor under a Kerayanama executed by the mortgagor, the claim for rent by the mortgagee against the mortgagor is a claim arising under the mortgage and, therefore, the mortgagee cannot execute the decree for rent obtained against the mortgagor by sale of the equity of redemption. AIR (Vol 30) 1943 Pat 282: 22 Pat 207: 10 BR 54: 24 PLT 296: 208 Ind Cas 457 (DB).

——**O. 34, R. 14 — Decree for interest on mortgage — Sale of equity of redemption — Voidable.**

A sale of equity of redemption in execution of a decree for money due under the mortgage (e.g. accumulated interest) it is not void but voidable at the instance of the mortgagor or any other person interested in the equity of redemption. AIR (Vol 13) 1926 Lah 490: 27 PLR 494: 8 LLJ 464: 97 Ind Cas 181 (DB).

(b). Decree for rent and possession

——**O. 34, R. 14 — Usufructuary mortgage of property — Leave to mortgagor — Rent falling in arrears — Mortgagee getting rent decree — Property, whether can be attached and equity of redemption sold.**

A usufructuary mortgagee who had leased the property to the mortgagor obtained a decree against the mortgagor for arrears of rent. The mortgagee applied to eject the judgment-debtor and later sought to attach the equity of redemption and to have the same put up for sale:

Held, that the arrears of rent in respect of which the decree was passed represented in substance the usufruct of the mortgage property and that the decree was a decree which the mortgagee had obtained for the payment of money in satisfaction of a claim arising under the mortgage. That being so, he could not, by reason of the provisions of O. 34, R. 14, Civil P. C., attach the property and put the same up for sale. AIR (Vol 23) 1936 All 708: 1936 RD 300 (2): (1936) A LJ 1218: 1936 AWR (HC) 713: 165 Ind Cas 402.

——**O. 34, R. 14 — Of mortgaged property — Suit for sale necessary.**

Where a mortgage-deed and a lease, back to the mortgagor, form part of the mortgage transaction the mortgagee landlord cannot bring the mortgaged property to sale in execution of a decree for arrears of rent due under the lease otherwise than by instituting a suit for sale in enforcement of the mortgage. AIR (Vol 14) 1927 Cal 884: 55 Cal 104: 104 Ind Cas 353 (DB).

——**O. 34, R. 14 — Mortgage and lease in one transaction — Decree for rent — Claim under the mortgage.**

Where there was a mortgage with possession and lease back on the same day, the two documents must be treated as one. Though in the lease deed it is agreed that arrears shall be paid by the sale of the equity of redemption, this is not sufficient to justify their being treated as separate documents. Once the two documents are treated as one, although the mortgagee may obtain a decree for rent on the lease document alone nevertheless his claim is one arising under the mortgage and within the mischief of O. 34, R. 14. AIR (Vol 12) 1925 Mad 127: 47 MLJ 798: 82 Ind Cas 504: 20 M LW 649: 35 MLT 118: 1924 MWN 771.

——**O. 34, R. 14 — Suit for possession and rent by mortgagor — Is a claim arising under the mortgage.**

Where a mortgagee with possession allows the mortgagor to be in possession on the basis of a rent note and subsequently on default in payment of rent sues for possession and arrears of rent, his claim is "claim arising under the mortgage". AIR (Vol 8) 1921 Bom 285: 45 Bom 174 (DB).

——**O. 34, R. 14 (T. P. Act S. 99) — Sale in execution of a decree for rent — Landlord having a mortgage of portion. C. P. C., S. 244 (1905) 33 C. 283 (286) : 7 CLJ 188 : 12 CWN 267 (DB).**

——**O. 34, R. 14 — (T. P. Act S. 99) — Sale in execution of decree for rent by landlord having a mortgage on the holding.**

A sale of a holding by the landlord having a mortgage of the holding in execution of decree for rent is void. (1905) 33 C. 113 (115) (DB).

(c). Money Decree.

——**O. 34, R. 14 — Decree on basis of hundi — Security bond creating mortgage for satisfying decree — Decree-holder, if precluded from executing decree by O. 34, R. 14.**

Where the decree obtained is on the basis of a hundi and a mortgagee is created by a security bond for the purpose of satisfying decree, the decree-holder is not precluded from executing the decree by O. 34, R. 14. AIR (Vol 27) 1940 All 196: (1940) ALJ 164: 1940 AWR (HC) 128: 187 Ind Cas 741 (DB).

——**O. 34, R. 14, S. 47 — Money-decree ordered to be paid in instalments — Judgment-debtor executing security bond hypothecating immovable property — Default in paying instalments — Property, if can be sold in execution of money-decree — Fresh suit, if essential — In execution, property purchased by another decree-holder — Execution of first decree against property as if it is charge — Purchaser decree-holder to be given opportunity of redemption.**

Where a money-decree is ordered to be paid by instalments on the judgment debtor executing a security bond hypothecating immovable property for the satisfaction of the decree and a default in payment of instalments committed, the hypothecated property can be sold in execution of the decree and a fresh suit is not necessary.

When this money decree is being executed against the hypothecated property, it is not being executed as a simple money decree but as a decree against the property on which it is a charge. Consequently, when such property is subsequently purchased by another decree-holder in execution of his money-decree, the property is transferred to him only subject to the charge and hence, in execution proceeding by the former decree-holder against such property, the purchaser decree-holder should be present as he is a representative of the judgment-debtor within S. 47, Civil P. C., so that he may be given an opportunity to redeem the property by paying off the amount due to the prior decree-holder. AIR (Vol 23) 1936 Pat 289: 2 BR 508: 17 PLT 434: 15 Pat 545: 162 Ind Cas 830 (DB).

——O. 34, R. 14 — Mortgagee paying revenue and land tax in respect of mortgaged property is not bound to add such money to principal mortgage-money — A suit for such money is competent and O. 34, R. 3 (6), Civil P. C., is no bar for bringing mortgaged property to sale in execution of decree obtained in such suit. AIR (Vol 23) 1936 Rang 47: 161 Ind Cas 626.

——**O. 34, R. 14 — Mortgage by father of joint family property — Legal necessity not proved to some extent — Mortgage declared invalid — Simple money decree — Execution-sale of property covered by mortgage — O. 34, R. 14, if a bar — Auction-purchaser, whether takes free of charge — Hindu Law — Debts.**

When the father executed a mortgage of the joint family property and a suit is brought on it, and the mortgage is found not for legal necessity to a certain extent and is declared invalid but a simple money decree is passd against the father, in execution the decree-holder can attach and sell the property covered by the mortgage and O. 34, R. 14, Civil P. C., is no bar to his so doing. If in execution of such a simple money decree, the mortgaged property is sold, the auction-purchaser will take it subject to the charge, so far as it has been found to be valid. The two debts are separate and distinct. AIR (Vol 22) 1935 All 507: 1935 AWR (HC) 431: 157 Ind Cas 1010.

——**O. 34, R. 14 — Application for execution of money-decree by attachment and sale — Part of property hypothecated to decree-holder as security bond — Objection by judgment debtor that suit on bond should be instituted first.**

In an application for execution of simple money-decree by attachment and sale of properties, the judgment-debtor filed an objection stating that the judgment-debtor had hypothecated a certain house which had been attached in lieu of the amount due to the decree-holder by a security bond and as long as the decree-holder did not file a suit in the Court on the basis of the security bond and obtain a decree for sale and for enforcement of the hypothecation lien, the said house could not be sold in execution of the decree for the amount according to law:

Held, that it was open to the decree-holder to proceed on the security and if he desired to do so, it would very probably have been necessary for him to proceed by a suit. That question was not before the Court and the application filed should be granted. The matter of the security bond was introduced merely by the judgment-debtor and it could not be said that because there had been a hypothecation lien the rights of decree-holder under his simple money-decree had ceased to exist. AIR (Vol 22) 1935 All 179: 1935 AWR (HC) 534: 153 Ind Cas 422.

——**O. 34, R. 14 — Decree for money declaring charge immovable property — Mode of enforce-**

ment — Preliminary decree for sale, whether necessary.

Where a decree is not one for sale of immovable property but a decree for payment of money with a declaration that the plaintiff has also a charge on certain properties for unpaid purchase-money, the decree-holder cannot bring the properties to sale without getting a preliminary decree for sale. (1935) 159 Ind Cas 804 (1): 69 MLJ 854: (1935) M WN 1236: 43 MLW 144.

——O. 34, R. 14 — Money-decree — Property hypothecated as security — Decree-holder, if can bring property comprised in security bond to sale without bringing suit on the basis of security bond.

The decree-holder is entitled to sell the property hypothecated under a security bond in execution of his decree without bringing a suit on the basis of it. The case is not governed by O. 34, R. 14, Civil P C., for the simple reason that the decree under execution has not been obtained by the decree-holder in satisfaction of a claim arising under any mortgage. AIR (Vol 21) 1934 All 524 (1): (1934) ALJ 865: 4 AWR (HC) 514: 149 Ind Cas 1104 (DB).

——Order 34, R. 14 — Mortgagee obtaining simple money-decree — Right to sell mortgaged property — O. 34, R. 14, scope of.

Two-thirds of a mortgage were redeemed and the mortgagee subsequently sued on the basis of the mortgage for recovery of the amount remaining due on the mortgage and obtained a simple money-decree. The decree contained a provision that the mortgagor was entitled to recover possession of the mortgaged property which was still in the possession of the mortgagee, and that the mortgagee would have no title or concern with the mortgaged property after the passing of the decree. In execution of the decree the decree-holder sought to bring the mortgaged property to sale and the judgment-debtors pleaded the bar of the provisions of O. 34, R. 14, Civil P. C.:

Held, that O. 34, R. 14, had no application to the case and the mortgaged property could be sold.

The test applicable to these cases would consist of an inquiry whether the mortgage security did or did not exist at the time the simple money-decree was obtained. If it did exist, the provisions of O. 34, R. 14, Civil P. C., must be given effect to. If it did not, then it will be found possible in certain cases to sell the mortgaged property in execution of the money decree. AIR (Vol 18) 1931 All 350: (1931) ALJ 159: 131 Ind Cas 119 (DB).

——O. 34, R. 14 — Sale in execution of money decree — On failure as mortgage — R. 14 no bar.

Where in a suit to enforce a mortgage, it is decided that there is no mortgage at all and a simple money decree is passed in favour of the mortgagee, the decree, not being one for the payment of money in satisfaction of a claim arising under the mortgage, might be satisfied in execution by attachment and sale, and O. 34, R. 14 is no bar. AIR (Vol 17) 1930 Mad 138: 31 MLW 38: 1929 MWN 917: 122 Ind Cas 366 (DB).

——O. 34, R. 14 — Money decree on mortgage — Right of sale.

In execution of a money decree, the judgment-debtor's property cannot be sold without its being first attached Even the contention of mortgagee that the mortgage in his favour can take effect as against the property acquired by the mortgagor subsequent to the money decree, does not enable the mortgagee to bring the property straightaway to sale, when the decree he seeks to execute is an ordinary money decree. AIR (Vol 17) 1930 Mad 138: 31 MLW 38: 1929 MWN 917: 122 Ind Cas 366 (DB).

——Order 34, R. 14 — Where a mortgage is merged in a decree creating a new charge on the property but the decree-holder gives up the charge under the decree, and is executing it as if it is a mere money decree R. 14 does not apply. (1929) 115 Ind Cas 829 (DB).

——O. 34, R. 14 — Money decree under a different mortgage — Rule does not apply.

Where there are simultaneous & different mortgages which could reasonably be treated as constituting one transaction the Court would be slow to allow the plaintiffs to resort to a device which would enable them to do something which it is the object of the Rule 14 to prevent. But where the transactions are distinct and independent, it does not matter if the plaintiffs seek to enforce the decree against the mortgaged property so long as the claim in respect of which they have obtained a decree is not a claim under the particular mortgage. Whether the claim arises under another mortgage or is a simple money claim cannot make any difference to the application of Rule 14. AIR (Vol 12) 1925 Bom 239: 49 Bom 208: 27 Bom LR 202: 86 Ind Cas 870 (DB).

——O. 34, R. 14 — Money decree — Suit for sale on mortgage.

In a suit for sale on a mortgage the Court held the mortgage not enforceable as such and passed only a simple money decree. The decree-holder attached and sought to sell the mortgaged property in execution.

Held, that O. 34, R. 14 of the C. P. C. did not apply as the mortgage having been held to be unenforceable there was no longer any subsisting and effective mortgage. AIR (Vol 7) 1920 All 165 : 18 ALJ 677 : 2 UPLR (All.) 196 : 57 Ind Cas 14 (DB).

——O. 34, R. 14 — Money decree — Charge on immoveable property — Execution — Separate suit.

A money decree which imposed a liability on the deft. to pay a sum of money to the plaintiffs also declared that the plffs. had a first charge on certain immoveable property of the deft. The plffs. having applied in execution proceedings for sale of the property charged.

Held by Shah, J. agreeing with Heaton, J. (Pratt, J. Dissenting) that the plffs. had the right to bring the property charged to sale in execution proceedings, and that it was not necessary to bring a separate suit for the sale of the property. Per Shah, J. O. 34, R. 14 of the C. P. Code means that the decree should relate to the payment of money in satisfaction of a claim arising under the mortgage, (i.e.) mortgage independent of the decree. It can have no application where the charge or the mortgage is created by the decree and where the direction as to the payment of money is in no sense a claim arising under the mortgage. AIR (Vol 6) 1919 Bom 56 : 43 Bom 631 : 21 Bom LR 698: 51 Ind Cas 929 (DB).

——O. 34, R. 14 — Attachment — Execution of money decree based on the mortgage.

Under O. 34, R. 14, C. P. C. a mortgage is not precluded from attaching the property in execution of his money decree based on the mortgage so long as the sale is postponed till the obtaining of a decree on the mortgage. (1917) 4 OLJ 571 : 18 Ind Cas 201 (DB).

——O. 34, R. 14 — Money decree — Sale —Redemption.

Where a sale in favour of a mortgagee in execution of a simple money decree obtained for the mortgage debt is confirmed the sale can be set aside in a redemption suit by the mortgagor or his

sons. AIR (Vol 1) 1914 All 343 : 36 All 516 : 12 ALJ 855 : 24 Ind Cas 612 (DB).

——O. 34, R. 14 — Money decree — Mortgage decree — Sale under both.

Where a decree-holder holds a money decree as well as a decree for sale of the mortgaged properties against the same judgment-debtor, there is nothing irregular in selling the properties for the amounts of both decrees. (1909) 31 All 114 : 6 ALJ 43 : 1 Ind Cas 162 (DB).

——O. 34, R. 14 (T. P. Act S. 99) — Transferee-decree-holder — C. P. C., Ss. 232, 233 — Equities.

A transferee of a simple money-decree from the original decree-holder who holds a mortgage from the judgment-debtor is precluded from selling the mortgaged property in execution of the money-decree both by Ss. 232, 233, C. P. C., and the fact that it is not open to the transferee to institute a suit under S. 67 does not relieve him from the condition imposed by S. 99, T. P. Act. There is nothing in S. 99, T. P. Act, to prohibit the attachment of the mortgaged property. 27 A. 450 diss. from. (1907) 17 MLJ 503 : 31 M 33 (34) : 3 MLT 107 (DB).

——O. 34, R. 14 (T. P. Act S. 99) — Assignee from mortgagee — Charge not assigned — C. P. C., S. 233.

Where a usufructuary mortgagee obtains a simple money decree (not in respect of the mortgage) against his mortgagor and assigns it to a third party, S. 99 will not prevent the assignee from executing the same by attachment and sale of the judgment-debtor's equity of redemption. S. 233, C. P. C., will not help the judgment-debtor unless there has been an assignment of the mortgage too. (1904) 2 ALJ 121 (123) : 27 A. 450: 1905 AWN 42 (DB).

——O. 34, R. 14 (T. P. Act S. 99) — C. P. C., S. 43 — Sale of mortgaged property in execution of money decree held by mortgagee set aside — Subsequent suit for sale or mortgage not barred.

Where a mortgagee had brought the mortgaged property to sale in execution of a simple money decree held by him against the mortgagor, and such sale was set aside with regard to the provisions of S. 99, T. P. Act.

Held, that the mortgagee was not debarred from subsequently bringing a suit for sale on his mortgage, notwithstanding S. 43 C. P. C. (1904) 1904 AWN 2 : 26 A 223 (224) (DB).

4. Compromise decree

——O. 34, R. 14 — Compromise decree in suit on pro-note — Instalment decree — Hypothecation of property — Default — Decree.

Held, that the decree-holder can proceed against person and other property of judgment debtor in execution of consent decree but that if he desires to have hypothecated property sold, he must institute suit under O. 34, R. 4, Civil P. C. A I R (Vol 19) 1932 All 439 : (1932) A L J 486 : 54 All 763 : 138 Ind Cas 603 (DB).

——O. 34, R. 14 — Consent decree — Executability.

Where a compromise decree was passed in a mortgage suit the effect that the plaintiff would be entitled to realise the whole amount by taking out execution and that the properties mortgaged shall remain charged under the mortgage.

Held, that O. 34, R. 14 being not applicable, the decree could be executed against the property. A I R (Vol 11) 1924 Cal 645 (DB) : 83 Ind Cas 424 : 28 C W N 550 (DB).

——O. 34, R. 14 — Mortgage decree ending in compromise — Separate suit for sale is not necessary.

Where the suit was a mortgage suit praying for the sale of the mortgaged properties but by a compromise between the parties instead of the ordinary form of mortgage-decree being passed, the compromise-decree provided that the judgment-debtor should pay the decretal amount by certain instalments and if he should fail in the payment of three consecutive instalments then execution for the whole amount due should issue against the other properties of the judgment debtor and in the event of the amount not being realised in that manner, against the mortgaged properties.

Held, that O. 34, R. 14, did not apply and no separate suit was necessary to bring the mortgaged property to sale. A I R (Vol 11) 1924 Pat 20 : 74 Ind Cas 144 : 2 Pat. 787 : 1923 P H C C 209 (DB).

——O. 34, R. 14 — Consent decree for maintenance.

The language of R. 14 makes it clear that the rule does not apply unless the decree falls within the description of a decree for payment of money in satisfaction of a claim arising under the mortgage or charge. The mortgage or charge mentioned in this rule must obviously be a mortgage or charge existing prior to the date of the decree and not one created by the decree. It is not obligatory upon a person to take recourse to a suit to enforce a charge on immoveable property created by a consent decree. A I R (Vol 9) 1922 Cal 35 : 64 Ind Cas 852 : 35 C L J 61 (DB).

——O. 34, R. 14 — Consent decree — Default in payment — Application to sell a part of the mortgaged property to recover unpaid instalment.

A mortgage decree payable in instalments provided that if any two instalments remained unpaid up to six months from the date of the second instalment the whole amount then remaining due would be payable at once. The first instalment was paid in time the second was in default and third was paid. The decree-holder applied to recover the amount of the second instalment by sale of a part of the mortgaged property.

Held, that the application was premature as under O. 34, R. 14 where a mortgagee had obtained a decree for payment of money in satisfaction of a claim arising under the mortgage, he could not bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. A I R (Vol 7) 1920 Bom 56 : 22 Bom L R 650 : 58 Ind Cas 221 (DB).

——O. 34, R. 14 — Compromise decree.

A usufructuary mortgagee, who having failed to obtain possession, got a money decree can bring the property to sale under the money decree. (1910) 32 All 377 : 7 A L J 321 : 5 Ind Cas 419 (DB).

5. Enforcement of charge

——O. 34, R. 14 — Charge decree — Power of executing Court.

In the case of a charge decree against several properties, the Court has the power to sell the charged property or a sufficient part thereof or to decide in a suitable case what property should be proceeded with, without prejudicially affecting the right of the decree-holder. The order refusing the prayer of the transferee of charge property requesting that property transferred to him should be sold after exhausting other property is appealable. A I R (Vol 31) 1944 Nag 25 : 1943 N L J 532 : I L R (1944) Nag 230 : 210 Ind Cas 548.

——O. 34, Rr. 14, 15, O. 2, R. 2 — Charge created on property — Chargee, whether can bring suit for money in first place and subsequently another suit to enforce charge — Deed — Construction — Deed held created charge — Subsequent suit to enforce charge not barred by O. 2, R. 2.

A chargee may bring a suit to recover the money charged on immovable property and may subsequently bring a suit to bring that immovable property to sale in satisfaction of his decree. A chargee cannot, on obtaining a money decree, execute that decree against the charged property. He must by subsequent suit bring the charged property to sale. Order 34, Rr. 14 and 15, Civil P. C. are an exception to the general rule laid down in O. 2, R. 2.

The plaintiff Bank appointed one A as a manager of one of their branches. Before taking up duties, A executed document which referred to the agreement between him and the Bank to furnish security up to Rs. 4,000 for due and proper discharge of his duties and stated "that in pursuance of the agreement and in consideration of the said post of manager.....the said A doth hereby grant, convey and transfer unto the said Bank or its successor in office his house named 'Kirk View' .....valued at Rs. 4,000.....To have and to hold as security for the said post of manager .....provided always that in the event of the removal of the said A from the post of manager, by resignation, dismissal, death or otherwise, the said Bank shall reconvey the kebala of the aforesaid house unto and to the use and possession of the said A". A was subsequently discharged on account of his misconduct and the Bank brought a suit to recover from A the amount of loss caused by his misconduct and obtained a money decree. On the death of A, the Bank brought a suit against his sons to recover the balance due on the decretal amount claiming to realise the amount out of the house charged by the document.

Held, that on proper construction, the document created a charge on the house to the extent of Rs. 4,000 and the house was held by the Bank as security for any sum which might become due from the manager to the Bank as the result of misconduct, neglect, or such like.

Held, also that the provisions of O. 34, Rr. 14 and 15 applied to the case and the Bank was entitled to bring a suit for money in the first place and subsequently to bring a suit for enforcement of the charge and O. 2, R. 2, did not apply. A I R (Vol 27) 1940 Pat 283 : 6 B R 304 : 21 P L T 262 : 186 Ind Cas 221 (DB).

——O. 34, Rr. 14, 15 — Where a decree creates a charge on specified properties for payment of decretal amounts, the decree can be executed and the properties sold and a separate suit is not necessary. Order 34, Rr. 14, 15, Civil P. C. do not apply to the case. A I R (Vol 22) 1935 Nag 129 : 157 Ind Cas 292.

——O. 34, R. 14 — Applicability.

Decree creating charge — Separate suit is not maintainable under S. 47 to enforce it — It must be enforced in execution of decree which created it — Order 34, R. 14 does not apply. A I R (Vol 21) 1934 Cal 327 : 60 Cal 1467 : 149 Ind Cas 224.

——O. 34, Rr. 14, 15 — Compromise followed by money decree creating charge on property — Execution — Charged property, whether can be sold — Separate suit, if essential — Transfer of Property Act (IV of 1882), S. 67.

Where, in a suit for money, a decree based upon a compromise is passed creating a charge on certain properties for the satisfaction of the decretal debt, the provisions of O. 34, Rr. 14, 15 of the Civil P. C. do not apply to the case and the decree is capable of execution by sale of the charged properties without the necessity of having recourse to a suit to enforce the charge under S. 67, T. P. Act. A I R (Vol 21) 1934 Nag 147 : 30 N L R 325 : 150 Ind Cas 492.

——O. 34, R. 14 — Decree creating charge — Sale without fresh suit or attachment.

Where a decree creates a charge on property in favour of a person, such person is entitled to execute the decree without any further suit for sale of the property covered by the charge, nor need the charged property be first attached before it can be brought to sale. A I R (Vol 18) 1931 Mad 603 (1) : 33 M L W 559 : 131 Ind Cas 15.

——O. 34, R. 14 — Rule 14 (1) does not apply unless the decree obtained is for the payment of money in satisfaction of a claim arising under the mortgage. The mortgage referred to in this rule must be a mortgage existing prior to the date of the decree and not one created by it. A money decree in terms of a compromise was obtained by the plaintiff against the defendant and the decree further declared that certain property belonging to defendant should be hypothecated to secure payment under the decree and in default of payment plaintiff would be entitled to sell the property.

Held, that plaintiff had the right to bring the property charged to sale in execution proceedings and no separate mortgage suit for the sale of the property was necessary. 28 All 58 and 22 Cal 859 not App. AIR (Vol 16) 1929 Pat 439 (DB).

——O. 34, R. 14 — Decree declaring charge — Enforceable in execution.

It is not necessary that in every case where it is sought to enforce a charge created by a declaratory decree the person for whose benefit the charge is created must resort to the procedure for enforcement of claims under a mortgage. 22 Cal 859 Not Foll.

Plaintiff obtained a decree declaring that she was entitled to a certain maintenance allowance from the defendant to be recovered from certain properties belonging to the defendant. In execution of this decree the plaintiff made an application for the recovery of a certain sum on account of arrears of maintenance by sale of the properties charged.

Held, that although the decree obtained by the plaintiff was declaratory in form it was capable of execution and the decree obtained by the plaintiff being a money decree the interest of the judgment-debtor in the properties charged with the payment of maintenance allowance could be sold in execution of the decree. The provision of R. 14 of O. 34 of the C. P. Code, did not apply to such a case. A I R (Vol 13) 1926 Pat. 31 : 4 Pat. 693 : 6 P. L. T. 802 : 88 Ind Cas 923 (DB).

——O. 34, R. 14 — Charge — Rent decree,

The section applies to enforcement of a charge for rent payable in money to the landlord by the tenant. A I R (Vol 7) 1920 Mad 183 : 11 L W 466 : (1920) M W N 294 : 39 M L J 30 : 28 M L T 44 : 57 Ind Cas 764 (DB).

(See contra A I R (Vol 5) 1918 Pat 428 : 42 Mad 114 : 48 Ind Cas 694.)

——O. 31, R. 14 — Charge — Payment of Government revenue by mortgagee.

Where the mortgagee in order to protect his mortgage lien deposits the arrears of Government revenue, the amount of deposit forms a charge on the mortgaged property. The remedy of the mortgagee to recover the deposit is by a suit under O. 34 of the C. P. C. A I R (Vol 7) 1920 Pat. 521 : 5 Pat. L J 248 : 1 Pat. L T 225 : 57 Ind Cas 653.

——O. 34, R. 14 — Charge — Arrears of rent — Madras Estates Land Act, S. 5.

A statutory charge for arrears of rent is not a charge within S. 100 of the T. P. Act. A sale in execution of a decree for rent in Revenue Court passes the property to the purchaser free of all encumbrances except those specified in S. 125 Madras Estates Land Act. A I R (Vol 6) 1919 Mad 733 : 42 Mad 114 : 35 M L J 443 : (1919) M W N 25 : 25 M L T 365 : 48 Ind Cas 794 (DB).

(See Contra A I R (Vol 7) 1920 Mad 183 : 39 M L J 30 : 57 Ind Cas 764.)

——O. 34, Rr. 14 and 15 — Charge — Before decree.

The provisions of O. 34, Rr. 14 and 15 do not apply unless the charge was created before the decree was obtained. AIR (Vol 5) 1918 Pat 380: 46 Ind Cas 169 (DB).

——O. 34, R. 14 — Charge — Moveable property — Flags of Pragwals — If can be charged for payment of annuity.

The flag of the Pragwals at the confluence of the Ganges and Jumna is a valuable property and may be charged with the payment of an annuity and may be sold subject to such charge even in execution of a decree for arrears of the annuity. AIR (Vol 2) 1915 All 3: 37 All 72: 13 ALJ 9: 26 Ind Cas 427 (DB).

——O. 34, R. 14 — Charge — Rights of purchaser.

A charge on immoveable property created by a will, which is not compulsorily registrable and of the terms of which, the auction-purchaser could not be cognizant cannot be enforced against the latter, he being a bona fide purchaser without notice. (28 All 655 Diss, from). A I R (Vol 1) 1914 Oudh 349 : 1 O L J 43 : 23 Ind Cas 867.

——O. 34, R. 14 — Charge — Assignment — Construction of.

Though the parties to a transaction have described it as a lien or charge it cannot deprive it of its real nature if in substance it is an assignment. (1909) 33 Bom 610 : 10 Bom L R 1146 : 4 Ind Cas 804 (DB).

——O. 34, R. 14—Charge—Created by decree—T. P. Act, S. 99.

S. 99 of the T. P. Act does not apply where the decree both creates the mortgage and gives power to sell in execution. In such a case the plaintiff may realise the decretal amount by execution. (1909) 3 S. L. R. 120 : 4 Ind Cas 606 (DB).

6. Instalment Decree.

——O. 34, R. 14 — Default — Clause — Suit for sale doubtful.

Where at time when personal remedy would be barred by limitation, an instalment decree is passed on an award in a mortgage suit and the decree contains a default clause entitling the decree-holder to execute the decree and bring the property to sale and where such an application for execution is dismissed as being premature it is very doubtful if it will be a correct reading of O. 34. R. 14 to hold that a suit may be brought for the recovery of the amount by sale of the property. A I R (Vol 9) 1922 Bom 237 : 67 Ind Cas 817 : 24 Bom L R 410 : 46 Bom 843 (DB).

7. Maintenance Decree

——O. 34, R. 14 — Decree in favour of Hindu widow for future maintenance making it charge on property in possession of member of her husband's family — Property sold in execution subject to her right — Again default in payment — Widow can again apply for sale of that property without bringing suit under S. 67, T. P. Act — Order 34, R. 14 does not affect her in any way, for, if her status is deemed to be that of a mortgagee, it is obvious that the decree for the payment of money which she obtained is not in satisfaction of a claim under the mortgage, because, prior to the decree she has no charge on any immovable property and it is only by virtue of the decree that for the first time she acquires a charge. Under the provisions of O. 34, R. 14, Civil P. C., a mortgagee can have the mortgaged property sold in execution of the decree in a claim which is not connected with the mortgage. A I R (Vol 26) 1939 All 579 : (1939) A L J 542 : 1939 A W R (H C) 551 : 184 Ind Cas 626 (DB).

——O. 34, R. 14 — Decree for maintenance in favour of a Hindu woman declaring her right to it and making it charge on some properties.

Held, that the properties charged could be sold in execution without fresh suit for sale. A I R (Vol 24) 1937 Pat 654 : 18 P L T 834 : 4 B R 140 : 172 Ind Cas 234 (DB).

——O. 34, R. 14 — Maintenance decree declaring liability to pay and creating charge on property for payment — Whether can be brought within the ambit of the rule — Decree, if can be treated purely as a declaratory decree.

Where a maintenance decree first declares the liability of the judgment debtors to pay as maintenance a certain amount and directs them to pay it and as a security for this payment, creates a charge on some property it cannot be brought within the ambit of O. 34, R. 14.

A decree which creates a charge on some property for payment of maintenance allowance cannot be treated purely as a declaratory decree. A I R (Vol 21) 1934 Nag 83 : 148 Ind Cas 196.

——O. 34, R. 14 — A decree creating charge for future maintenance can be passed and executed without any fresh suit for sale being filed. A I R (Vol 20) 1933 Pat 306 : 12 Pat 359 : 14 P L T 1 Sup : 145 Ind Cas 1 (DB).

——O. 34, R. 14 — Maintenance decree — Charge — Execution.

O. 34, R. 14 of the C. P. Code does not prevent a maintenance decree-holder from proceeding in execution against the property charged under the maintenance decree, 17 M L J 270 Not Foll. A I R (Vol 6) 1919 Mad 894 : 23 M L T 355 : 47 Ind Cas 630 (DB).

——O. 34, R. 14 — Maintenance — Annuity for.

An arrangement for the maintenance payable by a Zemindar and his heirs to the junior members created a charge on the assets of the Zemindari and the provisions of the deed were not obnoxious to the rule against perpetuities or any other rule of law. AIR (Vol 5) 1918 PC 156: 42 Mad 581: 17 ALJ 153 : 36 M L J 164 : 23 C W N 549 : 29 C L J 551 : 25 M L T 400 : 21 Bom L R 885 : (1919) M W N 511 : 10 L W 322 : 49 Ind Cas 704.

(Affirming AIR (Vol 2) 1915 Mad 664: 27 MLJ 694 : 27 Ind Cas 283).

8. Personal Remedy

——O. 34, R. 14 — Mortgage — Decree on personal covenant — Order in execution — Subsequent proceeding to enforce liability on property — Res-judicata — Nature of subsequent proceedings.

An order passed in execution of a decree obtained by a mortgagee to enforce a personal liability would not operate as res judicata in a subsequent proceeding to enforce a liability on the mortgaged property inasmuch as the subsequent proceeding is really a suit and not a mere execution proceeding. A I R (Vol 18) 1931 All 65 : (1930) A L J 913 : 52 All 964 : 130 Ind Cas 712 (DB).

——O. 34, R. 14 — Personal decree — Suit for sale necessary.

The right of a mortgagee to obtain a personal decree against the mortgagor, where there is an express personal covenant in the mortgage-bond, is quite distinct from his right to enforce the security clause by the sale of the mortgaged property. But the mortgagee cannot sell the mortgaged property without instituting a suit for sale in enforcement of the mortgage, O. 34, R. 14 is an exception to O. 2, R. 2, C. P. Code. (1921) 63 Ind Cas 303 (Pat) (DB).

——O. 34, R. 14 — Personal remedy — As well as against property — Personal remedy, if can be enforced first.

In Sind where the Transfer of Property Act is not in force where a mortgage decree is, of an anomolous character giving remedy both against the security and against the person, the personal remedy may be enforced first and the mortgagee may sell his security in execution of a money decree. But where the Transfer of Property Act is in force, S. 99 is a bar to such a procedure. (1911) 5 S. L. R. 71 : 11 Ind Cas 192.

9. Sale in contravention — Effect.

——O. 34, R. 14 — Sale in contravention of, whether void or voidable — Setting aside — Limitation for.

It is now settled law that sale held in contravention of O. 34, R. 14 is not void but only voidable and is good until it is set aside. The violation confers on the person affected only a right to have the sale set aside either by way of application or by way of suit, if a suit is permissible. But the application or suit should be filed within the time provided by law, that is, one year from the sale. The sons and grandsons of a Hindu judgment-debtor are bound by such a sale if it is not set aside. The fact that they were not parties to the suit is of no consequence as the father could represent their interest and it could be sold in execution of a decree against the father.

Quaere.— Whether where a separate pro-note is executed for arrears of interest and a sale is held in execution of a decree on the pro-note there is a contravention of O. 34, R. 14. AIR (Vol 34) 1947 Mad 72: 1946 MWN 534: (1946) 2 MLJ 121.

——O. 34, R. 14 — Voidable sale — Remedy and time.

A sale in contravention of the provisions of section 99, Transfer of Property Act, is voidable and not void and if the mortgagor fails to take any objection to the confirmation of the sale on the ground that it was contrary to S. 99. Transfer of Property Act, and the sale is confirmed, the mortgagor has no right to redeem the mortgage. Even assuming that mortgagee is a trustee for mortgagor, in such case a suit by the plaintiff to enforce the trust is governed by Art. 120, Limitation Act. AIR (Vol 14) 1927 Mad 1135: 101 Ind Cas 89.

——O. 34, R. 14 — A sale in contravention of section 99, T. P. Act, (now substituted by O. 34, R. 14 C. P. Code) is merely irregular and is valid unless set aside before confirmation. (1926) 97 Ind Cas 256 (All).

——O. 34, R. 14 — Remedy.

A sale held in contravention of the provisions of the rule is not void but voidable at the instance of the mortgagor, and in order to avoid it it is sufficient for mortgagor to show that the sale contravenes the provisions of Rule 14. But the proper remedy is not a suit but an application under section 47 to set aside the sale. But the Court has jurisdiction to treat a suit as an application subject to the rule of limitation laid down by Art. 166, Limitation Act. AIR (Vol 8) 1921 Bom 285: 45 Bom 174 (DB).

——O. 34, R. 14 — Sale in contravention void or voidable.

A right to make an application to set aside a sale held in contravention of Section 99 of the Act continues up till the time of the confirmation of the sale. After confirmation of the sale that right no longer exists. If the right ceases on confirmation of the sale, it ceases altogether and cannot be revived or continue to exist if the person who might have taken advantage of S. 99 of the Act before the confirmation of the sale was a minor at the time. (1920) Pat HCC 259 (DB).

——O. 34, R. 14 — Sale in contravention of purchase by mortgagee — Leave to bid — Mortgagee purchaser if a trustee — Limitation Act, S. 10 and Arts. 120 and 148.

Full Bench: Where a mortgagee in contravention of Section 99 of the Transfer of Property Act has attached the mortgaged property and brought it up to sale and purchased it himself the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside under S. 47, C. P. C. Assuming that upon purchase by the mortgagee himself of the equity of redemption in contravention of S. 99, Transfer of Property Act, the mortgagee merely became a trustee for the mortgagor in respect of it. Held, by the majority that the mortgagor's right to recover the property cannot be enforced by a suit for redemption within the time prescribed by Art. 148 of the Lim. Act. AIR (Vol 7) 1920 Cal 363: 47 Cal 377: 24 CWN 229: 31 CLJ 98: 55 Ind Cas 157 (FB).

——O. 34, R. 14 — Sale in contravention — Voidable.

When a mortgagee purchases at an execution sale in contravention of the terms of S. 99 of the T. P. Act, the sale is voidable and the mortgagor is entitled to redeem. AIR (Vol 6) 1919 Cal 1008: 28 CLJ 151: 46 Ind Cas 493 (DB).

——O. 34, R .14 — Sale in contravention of — Mortgagee's position — Purchase of equity of redemption.

A mortgagee purchasing the equity of redemption in execution of a money decree against the mortgagor does not become a trustee in respect of the property to the mortgagor. AIR (Vol 6) 1919 Pat 47: 50 Ind Cas 472: (1919) Pat HCC 92 (DB).

——O. 34, R. 14 — Sale in contravention of — Whether voidable or void.

A sale contravention of Section 99 of the T. P. Act (O. 34, R. 14, C. P. C.) is only voidable and not void and must be set aside under R. 90 of O. 21, C. P. C. by a suit within a year of the confirmation of sale, under Art. 12, Lim. Act before redemption can be allowed. A suit for redemption is not a suit to set aside the sale, though the irregularity may be sufficient by itself to entitle the plaintiff to avoid the sale by a proper proceeding under the C. P. Code or by a suit. 14 CWN 579, Diss. AIR (Vol 4) 1917 Pat 608: 1 Pat LW 729: 2 Pat LJ 587: (1917) Pat HCC 373: 41 Ind Cas 533 (DB).

——O. 34, R. 14 — Sale in contravention of — Irregular but not void — T. P. Act, S. 99.

The violation of S. 99 of the T. P. Act (O. 34, R. 14, C. P. C.) merely renders the execution sale irregular and does not make it a nullity. AIR (Vol 3) 1916 Bom 61: 41 Bom 357: 19 Bom LR 75: 39 Ind Cas 3 (DB).

——O. 34, R. 14 — Sale in contravention — Voidable, not void.

A sale in contravention of S. 99 is not void but merely voidable. On confirmation of the auction, the title of even the mortgagee purchaser without leave under C. P. C. (O. 21, R. 72) becomes indefeasible. Case-law discussed. AIR (Vol 3) 1916 Lah 196: 18 PR 1916: 194 PWR 1915: 33 Ind Cas 802 (DB).

——O. 34, R. 14 — Sale in contravention.

Section 99 of the T. P. Act (O. 34, R. 14, C P C.) does not render a sale in violation of its terms absolutely null and void. It is only voidable. If no objection is taken to such a sale before confirmation such objection cannot be taken later. AIR (Vol 2) 1915 All 70: 37 All 163: 13 ALJ 138: 27 Ind Cas 795 (FB).

——O. 34, R. 14 — Sale in contravention of — Suit for redemption.

The sons in a Hindu family can sue to redeem the joint family property which has been purchased by the mortgagee at a Court sale in execution of a simple money decree obtained against the father in a suit on the mortgage bond given by the father. AIR (Vol 1) 1914 All 343: 36 All 516: 12 ALJ 855: 24 Ind Cas 612 (DB).

——O. 34, R. 14 — Sale in contravention of — Purchase by mortgagee of equity of redemption in Court sale.

Section 99 of the T. P. Act does not lay down as a general principle that a purchase by the mortgagee of the mortgagor's equity of redemption is invariably and in all cases invalid even in the absence of fraud, misrepresentation or misconduct. (1912) 15 Ind Cas 589 (Mad) (DB).

——O. 34, R. 14 — Sale in contravention of — Not void.

A sale in contravention of the terms of Section 99, T. P. Act is not void but is simply irregular and can be avoided on proof that the terms of the section have been contravened. (1910) 14 CWN 579: 12 CLJ 574: 6 Ind Cas 47 (DB).

——O. 34, R. 14 — Sale in contravention of — Sale voidable.

Confirmation of sale does not necessarily bar a subsequent application, if the applicant can show that the voidability of the sale under S. 99 of the T. P. Act was kept from his knowledge until after the confirmation of the sale. (1909) 5 MLT 84: 4 Ind Cas 1096 (DB).

——O. 34, R. 14 (T. P. Act, S. 99) — Semble.

A sale in contravention of S. 99. T. P. A., is absolutely null and void. (1908) 1908 AWN 1 (2): 4 ALJ 787: 3 MLT 132.

——O. 34, R. 14 (T. P. Act, S. 99) — C. P C., Section 244, when a bar —Sale in contravention — Purchase by stranger, effect of — Suit to redeem — Suit to set aside sale

If property is sold in contravention of S. 99 of the Transfer of Property Act and bought by a stranger, the proper course for the judgment-debtor is to seek to set it aside in execution and not by a separate suit. A sale in contravention of S. 99 of the Transfer of Property Act, is not void but only voidable; and where the mortgagee himself becomes the purchaser, he cannot by such sale and purchase free himself from his liability to be redeemed. But this equity does not arise against a stranger auction-purchaser. (1906) 17 MLJ 163: 2 MLT 181: 30 M 313 (315) (DB).

——O. 34, R. 14 (T. P. Act, S. 99) — Execution sale — Effect of confirmation of sale — Mortgagor and mortgagee — Redemption — Integrity of mortgage broken up.

A sale held in violation of the provisions of S. 99, T. P. A., if confirmed cannot be impugned by the judgment-debtor-mortgagor, even if the purchaser is a representative of the mortgagee. No suit can, therefore, be subsequently maintained for redemption of the property affected by the sale. 18 A. 325 applied. But the portion of the mortgaged property not affected by such sale may be subsequently redeemed as by reason of the mortgagee purchasing the equity of redemption in respect of a part, the integrity of the mortgage is broken up. (1905) 2 ALJ 123 (125) (DB).

——O. 34, R. 14 (T. P. Act, S. 99) — Time for objection — Non-compliance with provision — Sale.

Where the mortgagor-judgment-debtor takes no objection to a sale held in direct contravention of the provisions of S. 99, T. P. A., and the sale becomes final, neither the judgment-debtor, nor the judgment-creditor--mortgagee can dispute the title which the purchaser obtains thereunder. (1904) 1 ALJ 360 (363) (DB).

10. Security.

——O. 34, R. 14 — Mortgagee relinquishing mortgage security — Obtaining simple money-decree.

By mere declaration that the mortgaged security has been relinquished, the mortgagee does not become entitled to put the mortgaged property to sale in execution of his simple money decree because the decree which he obtains is in satisfaction of a claim arising under the mortgage and his declaration that he gives up the mortgage security unsupported since it is by consideration, might not be capable of enforcement and cannot be regarded as an extinguishment of the mortgagee rights. AIR (Vol 23) 1936 All 663: (1936) ALJ 692: 1936 AWR (HC) 510: 165 Ind Cas 124 (DB).

——O. 34, R. 14 — Security bond can be enforced in execution by sale of the property even if the property is subsequently alienated, to the extent of the sum secured thereunder. AIR (Vol 23) 1936 Mad 589: (1936) MWN 443: 165 Ind Cas 453.

——O. 34, R. 14 — Mortgagee's suit for money-decree — Plaintiff stating in plaint that he surrenders security — Mortgagee's rights, if extinguished.

Where in a suit by a mortgagee for a money-decree he stated in the plaint that he surrendered the mortgage security but in execution he applied for leave to execute the decree against the property which under the mortgage was security for the loan of the payment of which he had obtained the money decree:

Held, that the mortgagee's rights were not extinguished by the mere averment in the plaint that he had given up the security. AIR (Vol 22) 1935 Rang 132: 13 Rang 292: 157 Ind Cas 363 (DB).

——O. 34, R. 14 — A security bond executed by a judgment-debtor for the purpose of removing an attachment before judgment can be enforced in the course of execution. A separate suit to enforce the security is not necessary. AIR (Vol 21) 1934 Cal 64: 37 CWN 973: 60 Cal 1298: 149 Ind Cas 399 (DB).

——O. 34, R. 14 — Decree-holder not bound by R. 14.

Where under a bond of suretyship the surety of a judgment-debtor mortgages his property as security for his liability, on default by the judgment-debtor to pay, the decree-holder can enforce the security against the property under S. 145, without following the procedure provided for by O. 34, R. 14. AIR (Vol 13) 1926 Bom 279: 50 Bom 339: 28 Bom LR 603: 95 Ind Cas 696 (DB).

——O. 34, R. 14 — Can be enforced without suit.

Where the charge is created by the decree itself O. 34, R. 14 can have no application. Security given by a judgment-debtor in execution for due performance of the decree can be enforced and the property covered by the bond can be sold in execution by the decree-holder without being compelled to file a regular suit. The fact that the security bond is taken under O. 20, R. 11 makes no difference. AIR (Vol 13) 1926 Mad 194: 49 MLJ 643: 1925 MWN 907: 92 Ind Cas 497 (DB).

——O. 34, R. 14 — Surety — Performance of decree — Obligee not named in the bond.

Where a person hypothecates his properties as security for mesne profits that might be awarded by the Appellate Court and executes a bond without naming an obligee a suit to enforce the obligation against the surety is not maintainable. The remedy is by application in the original suit itself to make the surety a party and pass a decree against him for mesne profits. AIR (Vol 6) 1919 PC 55: 42 All 158: 46 IA 228: 22 OC 212: 6 OLJ 682: 38 MLJ 302: 18 ALJ 263: 22 Bom LR 521: 55 Ind Cas 550.

——O. 34, R. 14 — Security — Order for.

An order directing security to pay does not amount to a decree for the payment of money within the meaning of above rule. AIR (Vol 4) 1917 Pat 489: 38 Ind Cas 130 (DB).

——O. 34, R. 14 — Surety — Execution against surety's property.

Rule 14 does not prevent sale of mortgaged property of a surety under a compromise decree where the suit was for money. AIR (Vol 3) 1916 All 57: 38 All 327: 14 ALJ 385: 33 Ind Cas 982 (DB).

——O. 34, R. 14 and S. 47 — Security — Compromise decree and execution.

When security of some property was given in compromising a suit for money due on a hand note, and a decree was passed in terms of the compromise, it was held that under the provisions of O. 34, R. 14, C. P. C. property given as security could not be subject to sale in execution of the compromise decree. AIR (Vol 3) 1916 Pat 61: (1917) Pat HCC 371: 1 Pat LW 69: 37 Ind Cas 397 (DB).

——O. 34, R. 14 — Security — Costs of the Privy Council — Execution.

A decree-holder seeking to execute his decree for costs of the Privy Council against the property offered as security must proceed by suit as it is a claim arising under the mortgage. AIR (Vol 2) 1915 Cal 533: 19 CWN 178: 27 Ind Cas 365 (DB).

——O. 34, R. 14 — Security bond — Performance of decree — Enforcement in execution.

A security bond given by the judgment-debtor for the due performance of the appellate decree can be enforced in execution. A separate suit is unnecessary. (1913) 17 CLJ 267: 18 Ind Cas 900 (FB).

——O. 34, R. 14 (T. P. Act, S. 99) — Applicability of, to security bonds constituting mortgages.

When a security bond amounts to a mortgage it is equally subject to the provisions of S. 99, Transfer of Property Act. (1905) 9 CWN 372 (374, 376): 32 Cal 494: 1 CLJ 118 (DB).

——O. 34, R. 15.

See also T. P. Act, Ss. 58 and 100.

——O. 34, R. 15 — Decree — Amount payable every year — Charge created — Decree-holder, if should first enforce charge or if can execute decree personally against judgment debtor.

Where in case of a maintenance decree the amount is made payable every year and a charge is created, the decree-holder should not be forced to apply to the Collector for sale of specific items of property every time the maintenance falls due. To insist on such a procedure which might take over a year to fructify and which affords ample opportunity for obstruction on the part of the judgment-debtors, would amount to a denial of justice. The decree-holder can execute the decree personally against the judgment-debtors without first enforcing the charge. AIR (Vol 29) 1942 Nag 58: ILR (1942) Nag 159: 1942 NLJ 74: 199 Ind Cas 573.

——O. 34, Rr. 15, 4 — Suit to enforce charge — No decree for sale — O. 34, R. 15 does not apply.

If in a suit instituted to enforce a charge, a preliminary decree for sale is passed, then no doubt under R. 6 of O. 34, the sale of the property must precede any personal decree. But when no decree for sale was asked for by the debtor as he is entitled to do and there has been no decree for sale, and the decree passed is really a money decree with a declaration of a charge for the amount decreed, there is no room for the operation of R. 15, for the decree is not of a form contemplated by the earlier rules of O. 34. AIR (Vol 29) 1942 Sind 83: ILR (1942) Kar 163: 202 Ind Cas 96.

——O. 34, Rr. 15, 4 — Suit to enforce charge on immovable property — Preliminary decree for sale should be passed.

In view of R. 15 of O. 34, Civil P. C., read with R. 4 of that Order, a preliminary decree for sale should be made in a suit to enforce a charge. AIR (Vol 29) 1942 Sind 83: ILR (1942) Kar 168: 202 Ind Cas 296.

——O. 34, R. 15 — Procedure.

Where in execution of decree in a suit to enforce charge, the charged property is sold without there being any preliminary decree for sale as in ordinary mortgage suit, this can be regarded only as an irregularity. AIR (Vol 27) 1940 Cal 60: 44 CWN 240: 186 Ind Cas 833.

——O. 34, R. 15 — Charge created on property for payment of money — Chargee can sue for money in first place and subsequently bring suit to enforce charge — Subsequent suit is not barred by O. 2, R. 2.

By reasons of R. 15 of O. 34 the provisions of R. 14 apply to a charge. A chargee may therefore bring a suit to recover the money charged on movable property and may subsequently bring a suit to bring that immovable property to sale in satisfaction of his decree. Neither a mortgagee nor a chargee can, on obtaining a money decree, execute that decree against the mortgaged or charged property. They must, by a subsequent suit, bring the mortgaged or charged property to sale. Order 34, Rr. 14 and 15 are an exception to the general rule laid down in O. 2, R. 2, which does not bar such a suit. AIR (Vol 27) 1940 Pat 283: 6 BR 304: 21 PLT 262: 186 Ind Cas 221 (DB).

——O. 34, R. 15 — The effect of a decree on a charge is the same as that of a decree on a mortgage. AIR (Vol 24) 1937 Cal 129: ILR (1937) 1 Cal 203: 64 CLJ 280: 170 Ind Cas 214 (DB).

——O. 34, R. 15 — Charge-holder, if can obtain personal decree.

The holder of a charge like a mortgagee suing for sale, is entitled to obtain remedy by a personal decree. The words of O. 34, R. 15, Civil P. C., in their ordinary significance would limit the applicability of only those provisions in the Order which relate to the sale or redemption of mortgaged property to property which is subject of a charge. AIR (Vol 19) 1932 Cal 775: 56 CLJ 187: 36 CWN 709: 59 Cal 1314: 140 Ind Cas 788 (DB).

——O. 34, R. 15, — Mortgage decree — Sale in auction — Compromise by which defendant was given property in lieu of payment — Payment not made — Mortgage of property — Transaction of compromise, held amounted to sale and that under S. 55 (4) (b), T. P. Act, the seller was entitled to a charge upon property in hands of purchaser for the amount of purchase-money and for interest thereon and thus charge could be enforced by sale of property under O. 34, R. 15, Civil P. C. as in the case of a simple mortgage. AIR (Vol 23) 1936 PC 204: 40 CWN 1130: (1936) MWN 791: 38 Bom LR 760: 71 MLJ 347: (1936) ALJ 915: 44 MLW 452: 59 Mad 910: 63 IA 304: 2 BR 653: 63 CLJ 376: 1936 AWR (HC) 815: 163 Ind Cas 4.

——O. 34, R. 15 — Applicability.

A decree for realization of money in the first place by the sale of certain property is in no way different from a usual mortgage decree and sale of such property is governed by provisions as to sale contained in O. 34. 121 Ind Cas 369: AIR (Vol 17) 1930 Lah 685.

——O. 34, R. 15 — When the charge is created by a decree, which is in its terms final, the provisions of O. 34, R. 15 will not apply. 120 Ind Cas 218: AIR (Vol 17) 1930 Nag 17.

——O. 34, R. 15 — Charge — Application.

The rule applies to enforcement of a charge payable in money. (1920) MWN 294: 39 MLJ 30: 11 LW 466: 28 MLT 44: 57 Ind Cas 764: AIR (Vol 7) 1920 Mad 183 (2) (DB).

——O. 34, R. 15 — Charge — Transfer of Property Act, S. 68 (b).

Because the words of S. 100 are very wide the provisions of S. 68 as to the liability of a mortgagor apply to a person creating a mere charge also. 27 MLJ 494: 33 Ind Cas 321: AIR (Vol 2) 1915 Mad 633 (DB).

——O. 35, R. 1.

See also Civil P. C., S. 88.

——O. 35, R. 1 — Nature of suit — Jurisdiction.

Since in an interpleader suit, the matter in dispute is the title to a certain property which is claimed by two or more persons, the proper Court for determining the question of title in respect of the property in question would be that of the Civil Judge, having regard to the value of the property. AIR (Vol 27) 1940 All 452: 1940 ALJ 578: 1940 AWR (HC) 448: 191 Ind Cas 531.

——O. 35, R. 1 — Discretion under.

The discretion which is allowed to the Court in O. 35, R. 1, is a discretion which is unqualified and unfettered. This rule is solely intended to protect defendants from plaintiffs carrying on business out of the jurisdiction of the Court when they can indicate to the Court that these persons are of no financial standing or substance. The Court is not bound to exercise the discretion in favour of the defendant provided the requirements of the rule as to the nature of property are fulfilled. (1936) 164 Ind Cas 560: 40 CWN 511: 63 Cal 897.

——O. 35, R. 1 — Court-fee — Appeal.

In an appeal from a decision in an interpleader suit in respect of money, a Court-fee of Rs. 10 is sufficient and appellant need not pay a Court fee calculated according to S. 7 (IV) (c) of the Court Fees Act. AIR (Vol 8) 1921 Pat 305: 2 PLT 280: 61 Ind Cas 820.

——O. 35, R. 1 — Interpleader suit becoming partition suit.

When the preliminary decree is passed in an interpleader suit it becomes to all intents and purposes a partition suit. AIR (Vol 17) 1930 Mad 988: 1930 MWN 644 (DB).

——O. 35, R. 1 — Interpleader suit — Mortgagee not denying assignment, but contending it as void, as between him and assignees.

Where a mortgagee does not deny an assignment by him of his rights under the bond, but contends that it is void, the mortgagor is not bound to bring an interpleader suit making the mortgagee and his assignee to interplead as between them. AIR (Vol 1) 1914 Mad 624: 1 LW 419: 15 MLT 331: 27 MLJ 134: 23 Ind Cas 607 (DB).

——O. 35, R. 2.

——O. 35, R. 2 — Deposit in Court — Allowing a party to draw it out.

Investment of money deposited in Court pending decision with a party is objectionable as the successful party is entitled to the money from the Court without further proceeding. (1913) 13 MLT 326: 24 MLJ 404: (1913) MWN 363: 19 Ind Cas 219.

——O. 35, R. 4.

——O. 35, R. 4, Ss. 88, 151 — "First hearing" — On completion of pleadings, plaintiff applying to be removed from proceedings.

The words "first hearing" in O. 35, R. 4, mean the date on which the Court goes into the pleadings in order to understand the contentions of the parties. It is obviously undesirable that a person who claims no right in the property at sta which is the subject-matter of conflicting claims by, two defendants should be retained on the record and forced to join in the various interlocutory proceedings which may be necessary pending the final disposal of the rights of the parties. A plaintiff in an interpleader suit is entitled to apply to the Court, so soon as the pleadings have been completed, for an order that those persons who have adverse claims to the property in dispute should continue their contest without having the plaintiff retained on the record. This will save costs, not only for the plaintiff, but also for the defendants themselves. In the interests of justice of the parties concerned such an order can be made under the inherent powers of the Court. AIR (Vol 25) 1938 Cal 287: ILR (1938) 1 Cal 53: 41 CWN 1229: 175 Ind Cas 284.

——O. 35, R. 4 — Interpleader suit — Non-appearance of — Claimants — Procedure.

The plffs. in possession of a sum of money, filed an interpleader suit against two rival claimants (defendants) who did not appear at the trial. Held, that the proper order would be to discharge the plffs. from all liability to the defts. in respect of the money and dismiss them from the suit, and to direct them to pay the balance into the Court to the credit of the proper claimant after getting their costs. The Court might further order that the defts. or either of them might apply for payment or make one of the defendants a plaintiff and raise an issue. AIR (Vol 6) 1919 Bom 15: 21 Bom LR 948: 53 Ind Cas 365.

——O. 35, R. 4 — Interpleader — Suit to redeem against two parties claiming mortgage money — Appropriate relief.

When a mortgagor was about to pay off the mortgage amount to an assignee of the mortgage, the mortgagee disputed the assignment and also claimed to be paid the mortgage amount. The mortgagor, therefore, filed a suit impleading both the mortgagee and the assignee as defendants. The plaint contained in substance a claim for redemption, but it also prayed that the defendants should be required to interplead concerning their claims to the mortgage amount, and that the mortgagor should be indemnified in consequence of the loss of the original mortgage deed. Prior to the hearing of the defendants agreed that the assignee was entitled to receive the mortgage amount. The suit was dismissed as not being maintainable as an interpleader suit, 'inter alia', because plaintiff

claimed an indemnity and consequently had an interest. On appeal.

Held — that it was erroneous to treat the suit as only one of interpleader. Inasmuch as the plaint also contained in substance a claim for redemption, that was the appropriate relief in the circumstances. (1908) 10 Bom LR 314: 32 Bom 592 (597) (DB).

——O. 35, R. 5.

——O. 35, R. 5 — Suit by tenant.

A tenant is not permitted to deny his lessor's title at the commencement of the tenancy, and, therefore, in order that an interpleader suit may lie, the claim of the party other than the landlord must be consistent with the title of the landlord at the commencement of the tenancy in question. AIR (Vol 27) 1940 Bom 414: 42 Bom LR 881: ILR (1940) Bom 842: 191 Ind Cas 655 (DB).

——O. 35, R. 5 — Suit by tenant.

The object of O. 35, R. 5 is to prevent a tenant from compelling his landlord to have his title determined as against a stranger, but an interpleader suit is maintainable if the landlord, subsequent to the letting, does anything whereby his right to recover the rent is entangled. AIR (Vol 26) 1939 Bom 249: 41 Bom LR 460: ILR (1939) Bom 383: 182 Ind Cas 991.

——O. 35, R. 5 — Interpleader suit — Landlord and tenant.

A tenant cannot bring a suit to determine which of the two defts. is his landlord and entitled to the rent. AIR (Vol 6) 1919 Cal 913: 48 Ind Cas 733 (DB).

——O. 35, R. 5 — Interpleader suit — Railway Company accepting goods — Whether agent of the consignor.

A Railway Company by accepting goods for carriage does not become the agent of the consignor within the meaning of the rule. The Company may file an interpleader suit against consignor and another party claiming adversely against consignor. AIR (Vol 2) 1915 Bom 28: 17 Bom LR 339: 28 Ind Cas 948 (DB).

——O. 35, R. 5 — Interpleader suit — Tenant suing to determine the landlord — If maintainable.

Where a tenant was sued by another posing as the former's landlord for rent and a decree was passed against him on the ground that he was the plaintiff's tenant and the tenant thereafter sued to have it declared that he was the tenant of another, held, that such a suit was in the nature of an interpleader suit and was not maintainable under S. 42 of the Specified Relief Act as the deft. was not a person interested in denying the plff's. tenancy to another and as no injunction was asked for and that it was also barred by 'res judicata'. (1912) 15 CLJ 653: 13 Ind Cas 40 (DB).

——O. 35, R. 5 — Interpleader suit — Tenant — Rival landlord.

The person, passing two Kabuliats, in favour of two persons in respect of the same land, and then being perplexed as to the title of each cannot maintain an interpleader suit. (1910) 37 Cal 552: 11 CLJ 577: 14 CWN 784: 5 Ind Cas 577 (DB).

——O. 36, R. 1.

——O. 36, R. 1 — Necessary elements.

Rule 1 obliges the parties to enter into an agreement in writing stating the question in the form of a case for the opinion of the Court, and providing that upon the finding of the Court with respect to such question (a) a sum of money shall be paid by one party to the other, or (b) some property movable or immovable shall be delivered, or (c) one or more of the parties shall do or refrain from doing some other particular act specified in the agreement. AIR (Vol 17) 1930 Bom 232 : 32 Bom L R 416 (DB).

——O. 36, R. 1 — Special case — Re-opening of.

It is settled practice that where a special case is stated by consent it can only be re-opened by mutual consent. AIR (Vol 5) 1918 Bom 88 : 43 Bom 281 : 20 Bom L R 839 : 47 Ind Cas 642.

——O. 36, R. 5.

——O. 36, R. 5 — 'Fit to be decided — Tests.

Where a Court can give merely a declaration without any substantial relief and such substantial relief was reserved to entirely different tribunals under the statute, thereby barring a fresh suit founded on the declaration, the case cannot be one "fit to be decided" within the meaning of O. 36, R. 5 (2) (c). AIR (Vol 17) 1930 Bom 232 : 32 Bom L R 416 (DB).

——O. 37.

——O. 37, — Leave to defend. — Valid defence.

In a suit on a dishonoured bill of exchange after the defendant has accepted the Bill and by so doing has got possession of the goods, he cannot be allowed to plead that he was merely an agent acting for the drawer. He cannot be allowed to defend himself on the lines. AIR (Vol 16) 1929 Sind 172 : 23 SLR 479 : 117 Ind Cas 160.

——O. 37 — Madras rule 63.

Rule 63 requiring all suits on negotiable instruments to be brought in a summary manner is purely one of procedure and does not affect any substantive rights of parties. AIR (Vol 14) 1927 Mad 34 : 51 MLJ 716 : 99 Ind Cas 464 : 49 Mad 815 : 24 MLW 704 (FB).

——O. 37 — Limitation.

——S. 5 — Limitation Act applies.

A suit on a negotiable instrument provided for under O. 37, falls under the category of suits of the nature referred to in S. 128 (2) (f), and Act 5 of the Limitation Act of 1908 applies to such suits. 52 Cal 954 : AIR 1925 Cal 781. Diss. from. AIR (Vol 14) 1927 Sind 90 : 21 SLR 257 : 98 Ind Cas 78.

——O. 37 — Applicability — Shah jog hundi.

Obiter — Other conditions being fulfilled, a suit on a shah jog hundi will lie under O. 37. AIR (Vol 14) 1927 Sind 90 : 21 SLR 257 : 98 Ind Cas 78.

——O. 37 — Extension of time — Bombay High Court rules.

The discretion is vested in the Chamber Judge in a fit case to extend the period of ten days allowed under R. 193, sub-R. (1), in cases to which O. 37 is applicable. AIR (Vol 13) 1926 Bom 578 : 28 Bom L R 1080 : 97 Ind Cas 766.

——O. 37 — Suits under O. 37, are not governed by Art. 5 of the present Limitation Act. AIR (Vol 12) 1925 Cal 781 : 88 Ind Cas 400 : 52 Cal 954 : 41 CLJ 368: 29 CWN 589.

——O. 37 — Insincere defence — Conditional leave.

Where a suit on a pro-note under O. 37, the defendant applies for leave to appear and defend the suit, and the Court doubts the sincerity of the defence, it should grant leave on condition that the defendant should pay into Court the amount claimed. AIR (Vol 7) 1920 Mad 969 : 60 Ind Cas 639 : 12 MLW 712 (DB).

——O. 37 — Scope of.

O. 37 of the Code refers only to the mode of trial in suits and does not confer any jurisdiction. (1912) 5 SLR 155 : 13 Ind Cas 244 (DB).

——O. 37 — Pleas.

In summary suits under O. 37 it is impossible to go into partnership accounts and so the plea that

it is part of partnership account cannot be raised. (1911) 9 Ind Cas 299 (Sind).

——O. 37, R. 1.

——O. 37, Rr. 1, 2 and 4 — Suit on promissory note under the summary provisions of O. 37 — Ten days' time allowed for leave to defend as per Form 4 in Appendix B, C. P. Code — Application for leave to defend made beyond the time given — Condonation of delay — Jurisdiction of Court.

It is not necessary that every procedural order of a Court should be supported by a specific statutory provision, and when there is neither provision nor prohibition it has to be guided by ordinary principles of common sense, justice, equity and good conscience.

Where a suit was filed under O. 37, R. 1, C. P. Code, on a promissory note and the summons served on the defendant was in Form No. 4 in Appendix B, C. P. Code, allowing ten days to the defendant within which he should apply for leave to defend, but the defendant applied for leave to defend, a day after the expiry of the time allowed, on the question whether the Court had jurisdiction to condone the delay and give leave to defend,

Held, as no decree had been passed when the leave to defend was asked, the Court had ample discretion to give the defendant such leave as he wanted, notwithstanding the fact he had not appeared within ten days of the service of summons. 62 LW 316: AIR (Vol 36) 1949 Mad 742: (1949) 1 MLJ 514.

——O. 37, R. 1 — Small Cause powers — Judge exercising — Cannot act.

A Subordinate Judge who is a presiding officer of an ordinary Sub Court and not of a Court of Small Causes, has no authority, when exercising Small Cause powers, to act under O. 37, C. P. Code. 51 Mad 491 : 27 MLW 450: 109 Ind Cas 446: AIR (Vol 15) 1928 Mad 517: 55 MLJ 114 (DB).

——O. 37, R. 1 — Lahore sub-rule (e) — Scope of.

The addition of Cl. (e) to O. 37, R. 1 by the Lahore High Court in the exercise of the powers conferred by S. 122, C. P. Code, is not ultra vires. The making of this rule does not confer on any Court any pecuniary or territorial jurisdiction, but merely empowers them to follow a certain definite procedure for the expeditions disposal of suits. 8 Lah 156 : 9 LLJ 57: 99 Ind Cas 648: 28 PLR 539: AIR (Vol 14) 1927 Lah 174 (DB).

——O. 37, R. 2.

——O. 37, Rr. 2, 3 — Suit on promissory note — Pledge of jewellery as security — Plaintiff asking leave under O. 2, R. 2 to reserve right as pledge — Defence of repayments — Leave to defend suit on furnishing security for costs.

In their plaint the plaintiffs stated that they were pledges in respect of certain articles of jewellery for payment of the money due in respect of the pro-notes and they asked for leave under O. 2, R. 2, to reserve their right as such pledgees. The defendant also stated that since the execution of the promissory note various sums of money have been paid in satisfaction of the amount due and that upon a proper account being taken, it would be found that the amount claimed was in excess of the amount due and he should be allowed leave to defend:

Held, that leave to defend should be granted on the defendant giving security for costs only. AIR (Vol 23) 1936 Cal 476 : 166 Ind Cas 827.

——O. 37, R. 2 (a) — Negotiable Instruments Act (XXVI of 1881), Ss. 79, 80 — Power of Court to award interest in the absence of express provision.

The operation of S. 80 of the Negotiable Instruments Act is not excluded by O. 37, R. 2. On the other hand, that rule makes S. 79 or S. 80, as the case may be ,specifically applicable to a case filed under O. 37.

The admission of the allegations in the plaint referred to in R. 2 of O. 37, cannot refer to the award of interest inasmuch as specific provision for interest is made in Cl. (a) of the said rule. AIR (Vol 20) 1933 Mad 299 : 37 MLW 104 : 64 MLJ 117 : 56 Mad 398 : (1933) MWN 125 : 141 Ind Cas 809 (DB).

——O. 37, R. 2 — There is nothing in O. 37 to limit or restrict the jurisdiction of the Court to pass an order for instalments under O. 20, R. 11 (1), Court is competent to pass an order for payment of decretal amount in a suit based on a promissory note. AIR (Vol 20) 1933 Rang 245 : 11 Rang 424: 148 Ind Cas 369.

——O. 37, R. 2 — Bill of exchange — Counterclaim not allowed.

In a suit brought on a bill of exchange under O. 37, the defendant cannot be allowed to counterclaim for the damages caused by an alleged failure of the plaintiff to supply goods of the right sort. (1929) 120 Ind Cas 528 (Sind).

——O. 37, R. 2 — Interest — Neg. Inst. Act, S. 80 — Statutory rate if alleged rate not believed.

Plaintiff sued on pro-note no leave to defend was obtained. Rate of interest at 18 per cent. (agreed orally) was alleged in the plaint and a sum calculated accordingly including interest was mentioned in the writ of summons. Held, interest at 6 per cent. should be allowed from the date of the pronote to the date of the decree and at the same rate from the date of the decree to that of realization. It is important to take care that summary procedure, necessary and safe when applied to mercantile instruments, is not allowed for the purpose of enforcing alleged verbal agreements of a collateral or separate character. "S. 80 of the Negotiable Instruments Act seems to confuse very unhappily two entirely different things: (i) what the presumed promise as to interest is; (ii) what under O. 37 are to be taken as the facts and what relief can be given thereupon. It does not mean that upon bringing a suit under O. 37 the plaintiff loses his substantive right to six per cent. It would indeed be an extraordinary intention that mercantile instruments should be excepted from this discretionary power in cases where there is no defence. 70 Ind Cas 130 : 49 Cal 716: AIR (Vol 9) 1922 Cal 513.

——O. 37, R. 2 — Suit on shajak Hundi — Leave to defend — Affidavit in support — Set off.

An affidavit in support of an application for leave to defend as required by O. 37, R. 3 (1) of the C. P. Code must disclose fact sufficient to support the application. O. 37 contains provision for a summary procedure, which is antagonistic to an investigation of claims to a set-off, unless of the clearest description. 12 SLR 70: 49 Ind Cas 193: AIR (Vol 6) 1919 Sind 88.

——O. 37, R. 3.

1. Tests for granting leave to defend.
2. Unconditional leave.
3. Conditional leave.
4. Failure to fulfil condition.
5. Refusal of leave to defend.
6. Appeal
7. Revision.
8. Other remedy for defendant.
9. Charge on property.

1. Tests for granting leave to defend.

——O. 37, R. 3 — Leave to defend — Grant of — Rule as to.

The power to give summary judgment under O. 37, C. P. Code, is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay. Indeed the rule is that leave to defend must be given unless it is clear that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment. If the defendant by his affidavit shows that there are facts which, if true, constitute a defence to the claim, he should be given leave to defend. The defence set up need only show that there is a triable issue for permission to defend the suit. AIR (Vol 37) 1950 EP 247 : 52 PLR 207 (DB).

——O. 37, R. 3 — Leave to defend suits — Tests to be applied — Triable issue — Security.

The question to be considered on an application under O. 37, R. 3, is whether or not a triable issue was disclosed by the defendants on affidavit or otherwise; a triable issue meaning a plea which is at least plausible. Once the Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring the defendant either to pay the amount claimed into Court or to furnish security therefor; such a condition must be imposed only in exceptional cases where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time.

Held, on facts, that leave to defend should be granted but on condition of the defendant's furnishing security as the Court had a grave suspicion that the defence set up was not entirely honest. AIR (Vol 21) 1934 Sind 191 : 153 Ind Cas 400.

——O. 37, R. 3 — Triable issue — Plausible plea.

The question to be considered on an application under O. 37, R. 3, C. P. Code, is whether or not a triable issue was declared by the defts. on affidavit or otherwise, a 'triable issue' meaning a plea which was at least plausible. Once the Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring defendant either to pay the amount claimed into Court or to furnish security therefor. Such a condition must be imposed only in exceptional cases where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time. The question whether the plaintiffs are, or are not, holders in due course for value is a triable issue between the parties. 98 Ind Cas 72 : AIR (Vol 14) 1927 Sind 60.

——O. 37, R. 3 — Triable issue — Plausible plea.

The question to be considered on application under O. 37, R. 3 is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must say what the defence is & as a rule bring something before the Court to show that it is a bona fide defence and not a mere attempt to gain time by getting leave to defend. Where there is a triable issue it will not be right to say that as condition of being heard at all the defendants should find money or security; because if they are not able to do so it will be depriving them altogether of a right that they have got of having their case tried. It is only in exceptional cases that the exceptional provisions of O. 37 come into operation to the extent of depriving a man of this right. In cases of this sort the Court has to find if there is any plausible defence and where there is one, effect must be given to that fact and leave to defend should be granted and it should be made conditional only in cases where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time. 78 Ind Cas 505: 19 MLW 342: 34 MLT 310: 1924 MWN 240: AIR (Vol 11) 1924 Mad 612: 46 MLJ 255 (DB).

2. Unconditional leave.

——O. 37, R. 3 — Summary suit on negotiable instruments — Leave to defend — Security.

In a summary suit on a negotiable instrument if the defence discloses a triable issue, the Court ought to grant leave to defend without requiring the defendant either to pay the amount claimed or to furnish security, and the Court would therefore be acting with material irregularity if it orders the defendant to furnish security, without considering whether there is a triable issue in the case. AIR (Vol 22) 1935 Mad 302 : (1935) MWN 280 (1): 68 MLJ 407: 41 MLW 573 : 157 Ind Cas 591.

——O. 37, R. 3 — Leave to defend — Principles — Triable issue.

In a summary suit upon a negotiable instrument, if the defendant sets up a defence in his affidavit in support of his application for leave to defend which, if he should succeed in proving, would entitle him to succeed in the suit, then the Master or the Court before whom the application comes has no discretion whatever in the matter and unconditional leave to defend should be granted. It is not open to the Master or anybody else other than the trial Judge to go into the merits and discover whether the case set up by the defendant is a true one. AIR (Vol 22) 1935 Mad 43 : 40 MLW 650 : 68 MLJ 16 : 58 Mad 116 : 152 Ind Cas 687 (2) (DB).

3. Conditional leave.

——O. 37, R. 3 — Bona fides of defendant doubted — Conditional leave.

Where in a suit on a promissory note instituted under O. 37, the defendant applies for leave to appear and defend, but the Court doubts the sincerity of the defence as disclosed in the affidavits filed with the application and vague assertions are made, only to gain time, the proper procedure is to grant leave to defend on condition of the defendant paying into Court the amount claimed. AIR (Vol 23) 1936 Lah 584 : 165 Ind Cas 166 (DB).

——O. 37, R. 3 — Power of Court to give leave to defend on furnishing security.

In suits under O. 37, the Court has jurisdiction in a proper case to impose conditions when granting leave to defend though, as a rule of practice, the rule that the condition as to payment in the Court or giving security is seldom imposed and only in cases where the defendant consents or there is good ground in the evidence for believing that the defence set up as a sham defence, may be a safe rule to follow . It will not be right to crystallise into rules of law the circumstances under which, in the exercise of the discretion vested in it by the second clause of O. 37, R. 3, the Court can demand security. AIR (Vol 23) 1936 Mad 246 : (1936) MWN 175 (2) : 70 MLJ 241 : 43 MLW 298: 161 Ind Cas 182.

——O. 37, R. 3 — Negotiable instrument — Leave to defend — Practice.

Where in a suit on a promissory note filed under O. 37, R. 3 the defendant by his affidavit shows that he has a real defence to the suit but the sincerity of the defence is open to doubt, the proper course is to give the defendant leave to defend on his bringing the moneys into the Court. AIR (Vol 7) 1920 Mad 969: 12 LW 712 (DB).

4. Failure to fulfil condition.

——**O. 37, R. 3, S. 105 — Failure to fulfil condition — Validity of order granting leave, if can be canvassed.**

When a conditional order granting leave to defend is passed and on faiure of the defendant to fulfil the condition, the Court decrees the suit, it is open to the appellant to canvass the validity of the order on which the decree is based. AIR (Vol 22) 1935 Rang 245 : 13 Rang 239 : 157 Ind Cas 773 (DB).

5. Refusal of leave to defend.

——**O. 37, R. 3 — Hundis not without consideration on defendant's own showing — Hundis not carrying interest — Future interest.**

Where, in a suit on hundis, on the defendant's own showing the hundis were not without consideration, he should not be given leave to defend the suit under O. 37, R. 3.

In a suit on hundis when the hundis do not carry interest, the Court exercises its discretion in sound and judicial manner in not allowing future interest. AIR (Vol 20) 1933 Lah 440 : 145 Ind Cas 725.

——**O. 37, R. 3 — Question of law — Should be refused.**

Where in a suit on a pro-note there is no triable issue dependent on facts, which is to be investigated, but simply a question of law, no leave should be given to the defendant to put in a defence in the ordinary way. 46 CLJ 566 : 32 CWN 125: 106 Ind Cas 848: AIR (Vol 15) 1928 Cal 123 (DB).

6. Appeal.

——O. 37, R. 3 — An appeal lies from the final judgment passed in a summary suit directing the defendant to pay the amount of the decree claim in default of security not having been furnished to defend the suit under O. 37, R. 3 (2). 32 Bom LR 660: AIR (Vol 17) 1930 Bom 364 (DB).

——**O. 37, R. 3 — Report of no instructions — Appeal is the remedy.**

Where after many hearings the defendant's vakil states on the final hearing day that he has no instructions, but the Court disposes of the case on the merits, there is an appearance and O. 37, R. 3 applies to the case. The remedy of the defendant against the Court's order is by way of appeal and not by way of an application to set aside the decree as if it had been made under O. 9, R. 13. 82 Ind Cas 1028 : AIR (Vol 12) 1925 Mad 316 (DB).

7. Revision.

——**O. 37, R. 3 — Leave to defend given conditionally.**

Order giving leave to defend conditionally is an interlocutory order and does not amount to "case decided" within the meaning of S. 115. In the matter of giving leave with or without condition, the Court has discretion. In giving leave to defend conditionally the Court cannot be said to act with material irregularity in the exercise of jurisdiction. AIR (Vol 25) 1938 Lah 548 : 40 PLR 69 : ILR (1938) Lah 289 : 177 Ind Cas 778 (DB).

——**O. 37, R. 3 — Leave to defend — Valid defence — Conditional leave bad.**

Where on a summary suit the Courts grant only conditional permission to defend despite its finding that there is a defence which has to be considered, the case is revisable. 119 Ind Cas 64: AIR (Vol 16) 1929 Mad 841.

8. Other remedy for defendant.

——**O. 37, Rr. 3 and 4 — Ex parte decree in summary suit — Remedy of defendant not obtaining leave to defend — Decree, if can be set aside.**

The only remedy of a defendant against whom a decree has been passed in a summary suit under O. 37, C. P. C., he having found it impossible to obtain the required leave to defend within the time allowed, is by an application to set aside the ex parte decree and on such applications, leave should be given to him to defend the suit. (1911) 11 Ind Cas 433 (Sind).

9. Charge on property.

——**O. 37, R. 3 — Charge on the property.**

An order charging the property of an insolvent-debtor for the repayment of plaintiff's claim on conditions of granting permission to defend his suit is a permanent charge till re-payment of claim. AIR (Vol 7) 1920 Cal 525 : 24 CWN 401 : 58 Ind Cas 10 (DB).

——**O. 37, R. 4.**

——**O. 37, R. 4 — Ex parte decree — Defendant alleging that his non-appearance was due to a fraudulent agreement of compromise by plaintiff —Interference under O. 37, R. 4, whether warranted.**

The defendant alleged that he was prevented from attending Court on the day of hearing due to an offer of a compromise agreement from the plaintiff; and hence moved Court to set aside the decree either under O. 9, R. 13, or under O. 37, R. 4. The Court did not think it fit to intervene as there was no such circumstance to warrant it. The affidavit filed by the defendant was disbelieved and the Court thought it highly improbable that even if there was such agreement the defendant would place faith on a money-lender. Moreover, the defendant had another way to redress his grievance, if genuine, by instituting a regular suit to set aside the decree on ground of fraud or obtain damages for breach of contract, for misstatement of a future event. 48 Bom LR 635 : AIR (Vol 34) 1947 Bom 87.

——**O. 37, R. 4 — O. 37, R. 3 — Application for instalments — No leave — Should apply under R. 4.**

Where in a summary suit the defendant does not obtain leave from the Judge under R. 3 to appear and to defend the suit, he cannot be allowed to appear in order to apply for payment of the decretal amount by instalments. The way open to the defendant in such a case is to ask the Court to grant him any of the reliefs mentioned therein under R. 4. 50 Bom 262: 28 Bom LR 138 : 94 Ind Cas 9: AIR (Vol 13) 1926 Bom 250 (DB).

——**O. 37, R. 4 — Deposit of money — Question of ownership.**

Where money is deposited by a defendant as a condition precedent to the setting aside of a decree under the rule, the decretal amount is a charge on the deposit if final judgment is passed against the defendant. The Court is not competent to enquire into the ownership of the money deposited. The case may be different if land was furnished as security. In such a case the title of the owner would not be lost. 5 LW 407 : 32 MLJ 503 : 38 Ind Cas 481 : AIR (Vol 5) 1918 Mad 1158 (DB).

——**O. 37, R. 6.**

——**O. 37, R. 6 — Negotiable Instrument Act (1881), S. 45 — Failure of partial consideration — Suit for damages.**

A suit under O. 37, cannot be maintained where the loss caused to the defendant by failure of partial consideration cannot be ascertained in money; or where breach of contract by plaintiff causes damage to defendant exceeding the amount of Hundi. A suit for damages is the proper remedy. (1910) 4 SLR 147 : 8 Ind Cas 124.

——O. 38.

See also Civil P. C., Ss. 51, 94 and 95.

——O. 38 — Immovable property — Interest of mortgagee — Attachment — Modes of — O. 21, R. 54. 29 PLT 48: 27 Pat 114: AIR (Vol 36) 1949 Pat 170.

——O. 38 — 'Suit' — Application under S. 20, Sch. 2, C. P. Code.

An application under S. 20 of Sch. 2 to C. P. Code to enforce an award, when numbered and registered as a suit, becomes a suit for purposes of O. 38 and Court can direct attachment before judgment. 101 Ind Cas 430: 29 Bom LR 342 : AIR (Vol 14) 1927 Bom 259 (DB).

——O. 38 — Attachment before and after judgment — Distinction.

An attachment before judgment does not rank in the same position as an attachment after judgment, since attachment before judgment will not defeat the right of a co-parcener by survivorship which the former does. 83 Ind Cas 413 : 3 Pat 250 : 5 PLT 135 : AIR (Vol 11) 1924 Pat 465 (DB).

——O. 38 — Simultaneous execution — Powers of.

The power of the Court to issue simultaneously execution for arrest & attachment is entirely discretionary under the Code. It has the same power in matters before judgment, limited however by the provisions of O. 38. 84 Ind Cas 270: 2 Rang 362 : 3 Bur LJ 159: AIR (Vol 11) 1924 Rang 361 (DB).

——O. 38, R. 1.

See also Civil P. C., S. 51 and O. 21, Rr. 37 to 40.

——O. 38, R. 1 — Amount of security — Warrant amount.

Where a warrant has been taken out under O. 38, R. 1, the amount of security that the defendant is required to furnish is the amount mentioned in the warrant. 56 Cal 700 : 120 Ind Cas 815: AIR (Vol 16) 1929 Cal 732 (DB).

——O. 38, R. 1 — Exercise of powers — Considerations.

Before exercising the powers conferred by O. 38 a Court should be satisfied on two points. The first is that the plaintiff's cause of action is prima facie an unimpeachable one subject to his proving the allegations made in the plaint. The second is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court. 50 Mad 27 : 1926 MWN 328: 94 Ind Cas 512: 24 MLW 94 : AIR (Vol 13) 1926 Mad 584 : 50 MLJ 348.

——O. 38, R. 1 — Small Cause Court — Cannot exercise powers.

Under the Code of 1908, Provincial Small Cause Court has no power to attach immoveable property before judgment and to decide a claim case thereon. 80 Ind Cas 300 : 28 CWN 16: AIR (Vol 11) 1924 Cal 193 (DB).

——O. 38, R. 1 — Security of appearance of defendant — Object of — Mode of enforcement.

The object of the surety bond given under O. 38, R. 1 is to secure the rights of the judgment-creditor. The Government are not interested in the proceedings in any way. The bond should be enforced on the application of the judgment-creditor only to the extent of the money payable under the decree. 8 SLR 270 : 28 Ind Cas 92 : AIR (Vol 1) 1914 Sind 144 (DB).

——O. 38, R. 2.

See also Civil P. C., S. 145.

——O. 38, R. 2 — Arrest before judgment — Surety for production of judgment-debtor — Judgement-debtor obtaining exemption from arrest whether amounts to breach of bond.

When a surety under O. 38, R. 2, Civil P. C., has given a bond to produce the defendant when called upon to produce him, the fact that the defendant had previously applied for being adjudicated an insolvent and had obtained exemption from arrest does not amount to a breach of the bond. AIR (Vol 21) 1934 Mad 24: 65 MLJ 793 : 38 MLW 832 : (1933) MWN 1368 : 147 Ind Cas 333.

——O. 38, R. 2 — Surety — Bond — Construction.

Where the surety says in clear terms that his liability extends to paying the amount claimed in the suit in the event of a decree being passed, it cannot be said that the surety bond is only for the appearance of the defendant. 115 Ind Cas 244 : 52 Mad 979: AIR (Vol 16) 1929 Mad 138.

——O. 38, R. 2 — Security — Object of.

The security is, under R. 2, O. 38, for the defendant's appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit. If a decree has been passed, the defendant would be bound to appear when called upon between the date of the decree and the satisfaction thereof. 70 Ind Cas 129: 11 LBR 444: 1 Bur LJ 196: AIR (Vol 10) 1923 Rang 98.

——O. 38, R. 2 — Appearance under protection order.

Where the plaintiff made his application against the surety who produced the defendant in consequence, but his appearance was under a protection order from the Insolvency Court.

Held, that such an appearance is not such as is contemplated under O. 38, R. 2 of the Code and will not discharge the surety. 70 Ind Cas 129: 11 LBR 444: 1 Bur LJ 196: AIR (Vol 10) 1923 Rang 98.

——O. 38, R. 2 — Arrest before judgment — Deposit of money — Lien.

Money paid into Court by a defendant arrested before judgment sufficient to answer the plaintiff's claim, is ear marked for the suit and is subject to the lien of the plaintiff for his decree amount in case he succeeds. The insolvency of the defendant before decree does not vest the money in the Official Receiver. The case is different if security is given for the appearance of the defendant. 41 Mad 1053 · 35 MLJ 355 : 49 Ind Cas 20: AIR (Vol 7) 1920 Mad 607 (DB).

——O. 38, R. 2 — Sureties for appearance — Surety bond providing for performance of decree — Construction — When surety is discharged.

Where a judgment-debtor was released from arrest on surety furnishing security for his appearance on a certain day and the surety executed a bond for the due performance of the decree on failure of the judgment-debtor to satisfy it, the bond was not in accordance with the Court's order and the surety was discharged from his responsibility on the appearance in Court of judgment-debtor on the specified day. 7 Bur LT 5 : 23 Ind Cas 349 : AIR (Vol 1) 1914 Low Bur 54.

——O. 38, R. 3.

——O. 38, Rr. 3, 2, S. 51 — **Arrest order applies even after decree — Proceedings under S. 51 are not necessary.**

When the arrest has been made under O. 38, the proceedings must continue under that order. If the surety is discharged after decree on compliance of R. 3, the Court must call upon the defendant to find fresh security under R. 3 and if he fails to comply with that or any other order under R. 2 or R. 3, the Court has a discretion in committing him to prison. It is incorrect to say that the decree having been passed, O. 38 is no longer applicable, but that something in the nature of proceeding under S. 51, Civil P. C., is necessary. AIR (Vol 30) 1943 Mad 366: (1943) 1 MLJ 87: 56 MLW 33: 1943 MWN 124 : 210 Ind Cas 584.

——O. 38, R. 3 — **Surety — Remedy.**

Where the judgment-debtor has been enabled to go out of the jurisdiction of the Court and evade its processes by virtue of the execution of the surety bond, the only way for the discharge of the surety is an application under O. 38, R. 3. Otherwise he shall be liable on his surety bond. 115 Ind Cas 407 : 31 Bom LR 225 : AIR (Vol 16) 1929 Bom 190 (DB).

——O. 38, R. 3 — **Remedy of.**

A surety in case of arrest before judgment can apply for discharge under O. 38, R. 3. 119 Ind Cas 419: 30 PLR 130: 11 Lah LJ 141: AIR (Vol 16) 1929 Lah 435.

——O. 38, R. 3 — **Illegal detention — Owing to wrong order.**

A Court passed order under O. 38, R. 3 as follows: "Surety is discharged. Judgment-debtor will remain arrested unless he can produce another surety." He was also orally directed not to leave the Court. In defiance to the order he left the Court. On being prosecuted under S. 225-B,

Held, as no order to find fresh security was passed, the order was illegal and the judgment-debtor could not be convicted. 116 Ind Cas 709: 30 PLR 147: 30 Cr. LJ 663 : 13 AI Cr R 94: AIR (Vol 16) 1929 Lah 163 (DB).

——O. 38, R. 3 — **Release of.**

The adjudication of the judgment-debtor as insolvent does not release his surety from his undertaking to produce the judgment-debtor in Court when required. 111 Ind Cas 15 : 6 Rang 241 : AIR (Vol 15) 1928 Rang 184.

——O. 38, R. 3 — **Application for discharge — Withdrawal — No discharge.**

Where the surety, who had undertaken to produce the defendant whenever required until any decree that might be passed against him was satisfied applied to be discharged from his suretyship after a decree had been passed against the defendant & notices were issued to the decree-holder and the judgment-debtor and the latter appeared on several occasions but the decree-holder never appeared at all and the surety finally withdrew his application for discharge.

Held, that the suerty did not get a discharge as he withdrew his application. 111 Ind Cas 15 : 6 Rang 241 : AIR (Vol 15) 1928 Rang 184.

——O. 38, R. 3 — **Compromise — Liability.**

Section 135 of the Contract Act has no application to the case of a surety under O. 38, R. 3, and his obligation continues even though the parties to the suit enteerd into a compromise on the strength of which a decree was passed by the Court. 37 MLJ 435: 10 LW 533: 53 Ind Cas 367: AIR (Vol 7) 1920 Mad 355 (DB).

——O. 38, R. 4.

——O. 38, Rr. 4 and 5 — **Attachment — Joint Hindu family — Money decree against co-parcener — Attachment of his share during his lifetime — Sale after his death — Interest of purchaser.**

Where in execution of a money decree, the share of a Hindu co-parcener in the family property was attached during his lifetime and brought to sale after his death his interest passes to the auction-purchaser and precludes the title arising from survivorship. 16 MLT 123 : (1914) MWN 733 : 24 Ind Cas 667 : AIR (V 1) 1914 Mad 68 (DB).

——O. 38, R. 5.

See also Civil P. C., Ss. 94, 95 and 145.

1. **Appeal.**
2. **Attachment before judgment.**
3. **Conditional attachment.**
4. **Effect of attachment.**
5. **Jurisdiction.**
6. **Legality.**

See also Note 2.

7. **Mortgage suit.**

See also Civil P. C., O. 34, R. 6.

8. **Surety.**

See also Note 9.

9. **Security.**
10. **Scope and applicability.**

1. Appeal.

——O. 38, R. 5 — **Notice under R. 5 — No order of attachment — Order after hearing parties that no action is necessary is not appealable.**

Where Court has issued notice to the opposite party to show cause under O. 38, R. 5 but has not made any order of conditional attachment and after hearing the parties orders that no action is necessary, no appeal lies against such an order. AIR (Vol 31) 1944 Nag 30: 1943 Nag LJ 504: ILR (1943) Nag 794: 211 Ind Cas 479 (DB).

——O. 38, R. 5 — **No appeal lies.**

An order made under the provisions of O. 38, R. 5, is not a "judgment" within the meaning of clause 13 of the Letters Patent, because it is a mere interlocutory order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit and therefore no appeal lies from that order. AIR (Vol 12) 1925 Rang 267: 90 Ind Cas 995: 4 Bur LJ 108: 3 Rang 307 (DB).

——O. 38, R. 5 — **Combined order under — Appealable in part.**

An order ran thus: "It is ordered that the defendant firm do at once give security to the satisfaction of the Registrar of this Court to the extent of the plaintiff firm's claim and costs in this suit and that in default thereof a writ of attachment do issue out of, and under the seal of, this Court commanding the Sheriff of Calcutta to attach until the final determination of this suit or until the further order of this Court the stock-in-trade of the defendant firm lying at No. 55-11, Canning Street.

Held, that where the Court confines its order to a direction that the defendant should give security within a fixed time, there should be no appeal from that order inasmuch as O. 38, R. 5 is omitted from the provisions of O. 43, R. 1. But where the Court makes an order that the defendants' property should be attached before judgment, there should be an appeal inasmuch as O. 38, R. 6 is specifically men-

tioned in O. 43, R. 1. Consequently the above order in so far as it directs the attachment of the property, is a judgment and is appealable, but in so far as it directs security to be furnished, it is not appealable. AIR (Vol 10) 1923 Cal 639: 79 Ind Cas 242: 50 Cal 215 (DB).

——O. 38, R. 5 and O. 43, R. 1, Cl. (q) — Attachment before judgment — Refused after hearing defendant — No appeal lies.

Where an application for attachment before judgment is dismissed by the Court of first instance after hearing the defendants, no appeal lies against that order. AIR (Vol 3) 1916 Cal 287: 23 Cal LJ 392: 33 Ind Cas 689 (DB).

2. Attachment before judgment.

(a) General.
(b) Continuance, termination etc.
(c) Divorce suit.
(d) Wrongful.
(e) Pauper suit.
(b) Conditions necessary.

(a) General.

——O. 38, R. 5, O. 21, R. 54, Appendix F, Form No. V — Attachment under O. 38, R. 5, how to be made — No reference in order sheet to O. 21, R. 54, or to publication of attachment — Presumption under S. 114, Evidence Act, if can be made.

Attachment under O. 38, R. 5, Civil P. C., is to be made in accordance with the manner provided for attachment of properties, in execution of a decree, and the manner for attachment of property in execution of a decree is laid down in O. 21, R. 54.

Proclamation by beat of drum and affixing of a copy of the order in Form No. V, Appendix F do not by themselves constitute valid attachment. Where there is no reference in the order sheet to O. 21, R. 54, or to publication of the order, there can be no presumption under S. 114, Evi. Act, that attachment was properly made. AIR (Vol 24) 1937 Cal 375: 65 CLJ 329: 173 Ind Cas 711.

——O. 38, R. 5 — Application for passing final decree — Subsequent publication for attachment before judgment — Maintainability of.

A mortgagee obtained a preliminary decree for sale against the mortgagors and after the expiry of the usual six months' time allowed for payment, applied for passing of the final decree. Shortly after the mortgagee applied for attachment before judgment of the property of the defendants, basing the application on the ground that it was feared that the defendants who had already encumbered some of their properties would dispose of or encumber their remaining property in order to avoid the payment of the decretal amount that would remain unpaid and unsatisfied even after the sale of the mortgaged property :

Held, that the application for attachment before judgment was maintainable under O. 38, R. 5, Civil P. C. AIR (Vol 20) 1933 All 191: (1933) ALJ 37: 55 All 179: 145 Ind Cas 622 (DB).

——O. 38, R. 5 — Attachment of deposits.

An application praying for a temporary injunction restraining a person from withdrawing certain amount standing at his credit, and the order of Court issued thereon are, in spite of their wording, really for attachment before judgment. AIR (Vol 16) 1929 Rang 94: 116 Ind Cas 473.

——O. 38, R. 5 — The new Code means that an attachment before judgment can be of property within or without the jurisdiction of the Court. AIR (Vol 13) 1926 Lah 330: 27 PLR 144: 8 LLJ 125: 93 Ind Cas 361.

——O. 38, R. 5 — Intention to remove or dispose of property and to delay or obstruct execution is necessary.

The power to attach is not to be exercised lightly or without clear proof of the existence of the mischief aimed at in the rule. To attach a defendant's property before his liability has been established by a decree may have the effect of seriously embarrassing him in the conduct of his defence. This power should be exercised only when the Court is satisfied not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court, but also his object in so doing is to obstruct or delay the execution of any decree that may be passed against him and so deprive the plaintiff, if successful, of the fruits of victory. AIR (Vol 11) 1924 Pat 312 : 73 Ind Cas 721: 5 PLT 124 (DB).

——O. 38, R. 5 — Attaching creditor — Position of.

Schwabe C. J., Obiter : The judgment-debtor has no power of disposing of property attached before judgment for his own benefit and it is doubtful whether such property can be said to belong to him within the meaning of S. 60 or whether it can be taken in execution so long as the Court holds it in its custody pending the decision of the suit before it.

If the prevalent view of law referred to above is correct the result is that a plaintiff, who gets an order to attach before judgment because he satisfies the Court that there is a danger of the property being made away with and that enough ought to be preserved pending his suit to satisfy any decree he may get, may find that the property he has preserved is taken away from him pending his suit by a decree-holder who is lucky enough to get a decree more quickly. Indeed it would be easy for a defendant, who wishes to take his property out of the reach of the attachment creditor, after attachment to get or even create, a friendly creditor for any amount large enough and allow him to take judgment and gets the property attached in execution while he delayed the suit of the original attaching creditor whose fate seems to be entirely with the discretion of the custody Court. AIR (Vol 10) 1923 Mad 505: 44 MLJ 413: 72 Ind Cas 820: 46 Mad 506: 17 MLW 390: 32 MLT 198 (FB).

——O. 38, R. 5 — Order, when proper.

When a party seeks to obtain an order of attachment before judgment, he must have definite evidence to satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole or part of his property with a view to defeating his creditors. It is not sufficient to make only general allegations. AIR (Vol 5) 1918 Pat 387: 44 Ind Cas 240 (DB).

(b) Continuance, termination etc.

——O. 38, R. 5 — Attachment before judgment coming to end with dismissal of suit, if restored, if suit is restored.

An attachment before judgment which has come to an end with the dismissal of the suit is not restored when the suit is restored to file, in spite of an alienation of the property in the meanwhile. AIR

(Vol 26) 1939 Mad 167: 48 MLW 763: (1938) 2 MLJ 1053: 1939 MWN 639: 180 Ind Cas 126 (2) (DB).

——O. 38, R. 5 — Court holding suit not maintainable as framed — Plaintiff acquiescing and amending plaint — Order of attachment before judgment passed, before amendment, if vacated. ..

Where the plaintiff acquiesced and carried out the direction without demur accepting the order that the suit as framed was not maintainable and amended the plaint accordingly :

Held, that any orders passed against the defendants before amendment (e.g., attachment before judgment) were vacated automatically. AIR (Vol 21) 1934 Nag 169 (2): 17 NLJ 5: 150 Ind Cas 1142.

——O. 38, R. 5 — Continuance of attachment.

Attachment before judgment becomes attachment in execution when order is passed for the sale of the attacned property and possibly even on the date when application is made for execution after decree. AIR (Vol 12) 1925 Mad 49: 79 Ind Cas 917: 34 MLT 193 (DB).

——O. 38, Rr. 5 to 11 — Order before judgment — Actual attachment after — Validity — Dismissal of execution — Application — Effect on attachment.

An attachment applied for before judgment but actually effected after decree has still the force of the attachment before judgment under O. 38; O. 21, R. 57 does not apply to attachment before judgment under O. 38 and the dismissal of the subsequent execution application will not put an end to the attachment. AIR (Vol 6) 1919 Mad 752: 42 Mad 1: 24 MLT 346: 35 MLJ 387: (1918) MWN 606: 8 LW 369: 48 Ind Cas 232 (DB).

——O. 38, Rr. 5 and 11 — Passing of decree.

Where property is attached before judgment, the fact that a decree is made in the plaintiff's favour does not determine the attachment, which continues in force. AIR (Vol 6) 1919 Pat 454: (1919) Pat HCC 465 : 53 Ind Cas 20 (DB).

——O. 38, R. 5 — Hindu Law — Death of judgment-debtor — After attachment — Decree — Survivorship — Accrual.

An attachment followed by a decree precludes the accrual of the title by the survivorship where the judgment-debtor dies after attachment of decree but before the order for sale. AIR (Vol 1) 1914 Mad 118: 26 MLJ 517: 24 Ind Cas 320 (DB).

——O. 38, R. 5 — Attachment before judgment — Dismissal of suit — Reversal on appeal.

The Court ought to withdraw attachment before judgment on the dismissal of a suit. Such an attachment is not however revived by reversal of the dismissal on appeal. (1911) 13 CLJ 243: 9 Ind Cas 918 (DB).

(c) Divorce suit.

——O. 38, Rr. 5 and 6 — Attachment before judgment in divorce suit.

Attachment before judgment will not be granted in divorce proceedings. O. 38, Rr. 5 and 6 have no application to divorce proceedings. (1910) 37 Cal 613: 7 Ind Cas 792.

(d) Wrongful.

——O. 38, R. 5 — Wrongful attachment before judgment — If can be impeached in suit for damages — Malicious prosecution.

The rightness or wrongness of an order for attachment before judgment cannot be canvassed in a suit on the question of damages for malicious prosecution.

Where the parties have had their rights determined upon the basis that the order for attachment was right order and the order had been carried out, one cannot, by bringing an action for damages, get another Court to go behind the position as constituted in the original proceedings.

To give rise to a cause of action for damages for wrongful attachment before judgment, the attachment should be withdrawn in the plaintiff's favour. AIR (Vol 19) 1932 Cal 821: 59 Cal 1073: 36 CWN 447: 58 CLJ 243: 141 Ind Cas 253 (DB).

——O. 38, R. 5 — Mistake in.

Where, before the mortgage of the plaintiff, the property was attached before judgment by defendant but the procedure laid down by R. 5 was not followed.

Held, the attachment order was ultra vires, and the plaintiff was bound to succeed on his mortgage. AIR (Vol 9) 1922 Nag 238: 68 Ind Cas 188.

——O. 38, Rr. 5 and 6 — Trustee failing to produce accounts.

The Court did not commit an error of substance by directing the trustee to furnish security before it ordered attachment as provided by Rr. 5 and 6. Where a trustee disobeyed an order of Court to furnish accounts under S. 92, C. P. C AIR (Vol 4) 1917 All 153 : 41 Ind Cas 89 (DB).

——O. 38, R. 5.

An order under S. 483, C. P. C. (1882) on an application made on insufficient grounds must necessarily cause damage to the credit and reputation of the party against whom the order is made and in such cases general damages are recoverable. (1909) 32 Mad 170: 2 Ind Cas 345 (DB).

(e) Pauper suit.

——O. 38, Rr. 5 and 6 and O. 33, R. 8 — Time for attachment.

There is no suit before the Court until the application to sue in forma pauperis has been granted. Consequently the Court has no jurisdiction to attach defendant's property before judgment under O. 38, C. P. C. AIR (Vol 4) 1917 Cal 852: 25 CLJ 159: 21 CWN 870: 38 Ind Cas 600 (DB).

(f) Conditions necessary.

——O. 38, R. 5 — Attachment before judgment — Exercise of power to order — Principles — Vague allegations — Insufficiency.

Attachment of property is a serious proceeding and Courts ought to be careful not to lend themselves as tools of oppression.

An attachment before judgment could not be ordered on mere vague allegations that the opposite party has sold some property and has removed some property outside the jurisdiction of the Court. The Court should demand more particulars before passing any ex parte order and giving immediate effect to it. AIR (Vol 37) 1950 MB 70.

——O. 38, Rr. 5, 6 — Transaction subsequent to institution of suit — Transfer before suit may be evidence of intention after suit — Mode of proving defendant's intention — Intention to obstruct or delay satisfaction of decree.

There is nothing in the plain words of Rr. 5 and 6 of O. 38, which makes a transaction subsequent

to the institution of the suit a condition precedent to the application of Rr. 5 and 6. Rule refers, not to the past, but to the future. Rule 5 refers to a defendant who, with a particular intent, is about to dispose of the whole or part of his property. The fact that he has done so after the institution of the suit may be strong evidence of the future intention provided he has any property left.

But transfers before the institution of a suit may, as evidence of conduct, be evidence of intention after the institution of the suit. That a defendant is about to dispose of his property may be established to the satisfaction of the Court not only by completed transactions of disposal prior to the application, but by such evidence as evidence of intention expressed by the defendant, by evidence of disposals not completed but only negotiated or by evidence of unsuccessful attempts at disposal. That the intention of defendant is to obstruct or delay the satisfaction of any decree which may be passed against him is in general necessarily a matter to be inferred from attending circumstances.

Transfer by defendant prior to the institution of the suit by the plaintiff, held fell within the purview of Rr. 5 and 6, O. 38. AIR (Vol 28) 1941 Sind 178: ILR (1941) Kar 362: 197 Ind Cas 291 (DB).

——O. 38, R. 5 — Provisions of R. 5, when come into play.

Before the provisions of R. 5 of O. 38, Civil P. C., would come into play, the Court has to be satisfied that transfers were going to be made by the defendant after the suit had been filed and that such transfers were with the object of obstruction of the plaintiff if he won the suit in executing the decree, and the mere allegations to this effect are of no avail but the facts must be positively proved by satisfactory evidence. AIR (Vol 25) 1938 Pat 161: 4 BR 363: 17 Pat 89: 19 PLT 372: 173 Ind Cas 928 (DB).

——O. 38, R. 5 — Application for attachment before judgment — Court should be fully satisfied on proper affidavit or other materials before it takes any action under O. 9, Rr. 5 and 6. AIR (Vol 23) 1936 Lah 33: 38 PLR 772.

——O. 38, R. 5, O. 39, R. 1 — Injunction or attachment, when to be granted.

Prima facie case is essential before either injunction or attachment can be granted. Moreover, the Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience which is likely to arise in consequence of withholding the relief will be greater than that from granting it. AIR (Vol 21) 1934 Cal 694: 38 CWN 771: 61 Cal 814: 155 Ind Cas 354 (2).

——O. 38, R. 5 — Present intention of obstruction or delaying execution of decree must be proved.

Where there is nothing in documents filed by way of objections by the defendants to an application under O. 38, R. 5, Civil P. C., to show that the defendants ever had any intention of obstructing or delaying the execution of any dercee which might be passed against them or with such intent, were about to dispose of their property, it cannot be said that the Court could be satisfied "otherwise" within the meaning of R. 5 (1) of O. 38, Civil P. C., and the mere fact that a defendant has in the past mortgaged or disposed of his property is not a sufficient ground for levying attachment. There must be a present intention. AIR (Vol 21) 1934 Cal 694: 38 CWN 771: 61 Cal 814: 155 Ind Cas 354 (2).

——O. 38, R. 5 — Deliberate intention to defeat creditor's claim.

Under O. 38, Civil P. C., in order that a creditor may get an order for attachment before judgment, it must be shown that the sale of the properties of the debtor is being fraudulently and deliberately made with the intention of defeating any decree that the creditor may obtain against him. It is not enough if the creditor shows that the debtor was negotiating for mortgage or sale of properties or that he was disposing of his properties voluntarily or allowing them to be sold in execution of decrees or for arrears of Govt. revenue. An order under O. 38 cannot be made for gross neglect. AIR (Vol 19) 1932 Cal 790: 36 CWN 746: 140 Ind Cas 457 (DB).

——O. 38, R. 5 — Intention to delay execution — Absence of — Test.

The fact that the defendant is running into debts or an attempt to secure debts already incurred by executing a mortgage in respect of them does not necessarily indicate an intention to obstruct or delay the execution of a decree to be passed when the value of the properties far exceeds the amount of such debts as well as the claim in the suit. AIR (Vol 14) 1927 Cal 354: 31 CWN 432: 101 Ind Cas 9 (DB).

——O. 38, R. 5 — Vague allegations are insufficient.

An order under R. 5, O. 38, should not be passed, unless the Court is satisfied that the defendant, with intent to obstruct or delay the execution of decree that may be passed against him has brought himself within the terms of the rule; and it is not sufficient that there are merely vague allegations that the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. AIR (Vol 9) 1922 Bom 276: 64 Ind Cas 580: 46 Bom 431: 23 Bom LR 1228 (DB).

——O. 38, R. 5 — Insufficiency of mortgage security — Mere attempt to sell — No bad intention.

Merely beacuse the defendant attempts to sell some of his immoveable property, while proceedings against him are pending it does not follow that he is disposing of the property with intent to obstruct or delay the execution of any decree that may be passed in the suit. AIR (Vol 8) 1921 Bom 69: 45 Bom 1256: 23 Bom LR 550: 63 Ind Cas 958 (DB).

——O. 38, R. 5 — 'Attempt to alienate'.

Attempt to alienate after the commencement of suit need not be proved to bring a case under S. 483, C. P. C. (1882) the conduct of the parties just before the suit and the surrounding circumstances should be considered to decide whether an attempt was made to dispose of the property and if so with what intention. (1910) 11 CLJ 19: 5 Ind Cas 181 (DB).

——O. 38, R. 5 (S. 483 old Code) — Attachment before judgment — Matters for consideration of Court.

In considering an application for attachment before judgment, the Court is not restricted to the conduct of the defendant subsequent to the commencement of the action. It is open to the Court to look to the conduct of the parties immediately

before the suit and to examine also the surrounding circumstances and from these to draw an inference as to whether the defendant is about to dispose of his property, and, if so, with what intention. (1909) 5 Ind Cas 181 (182): 11 CLJ 19 (DB).

3. Conditional attachment.

——O. 38, R. 5 — An order of attachment before judgment should comply with the provisions of O. 38, R. 5 and it should be conditional order accompanied by a notice to the defendant. Non-compliance of this rule does not make an ex parte order of attachment a nullity but renders it liable to be set aside at the instance of the defendant. AIR (Vol 25) 1938 Lah 49: ILR (1937) Lah 756: 40 PLR 280: 175 Ind Cas 828 (DB).

——O. 38, R. 5 — Where in attachment before judgment proceedings the Court dismisses the plaintiff's petition on accepting an undertaking given by defendant not to do a certain act (e. g., not to draw a cheque amount pending further orders of the Court) the order accepting the undertaking amounts, in substance, to an injunction restraining him from acting on breach of it. AIR (Vol 23) 1936 Mad 651: (1936) MWN 519: 44 MLW 714: 165 Ind Cas 747.

——O. 38, R. 5 (3) — Conditional order for attachment before judgment made absolute — Fresh attachment, if necessary.

Where a conditional order for attachment before judgment has already been issued, it is not necessary to issue or serve a fresh order of attachment before judgment after the conditional order has been made absolute. AIR (Vol 21) 1934 Cal 251: 37 CWN 1164: 149 Ind Cas 1142 (DB).

——O. 38, Rr. 5, 6 — Direction to defendant to give security — Order that on failure to give security action under O. 38, R. 6 would be taken — Appealiability of order.

When the trial Court has already determined the liability of the defendant's property to an attachment before judgment unless security is given, and the Court directs the defendant to give security for the satisfaction of any decree that may be passed in favour of the plaintiff and notes that on failure of security being furnished, further action under O. 38, R. 6 would be taken, the order is no longer one under O. 38, R. 5 and an appeal from the order is competent. AIR (Vol 21) 1934 Lah 594 (2): 148 Ind Cas 719.

——O. 38, R. 5— No conditional attachment under O. 38, R. 5 (3) — Application for attachment before judgment ending in dismissal on the defendant showing cause against it — No appeal lies under O. 43, R. 1 (q). AIR (Vol 20) 1933 All 557: (1933) ALJ 1269: 146 Ind Cas 838 (DB).

——O. 38, R. 5 — There is nothing in S. 95, Civil P. C., which excludes conditional attachments of the class contemplated by O. 38, R. 5 (3) from its operation and the Courts may award compensation even in the case of such attachments. AIR (Vol 19) 1932 Cal 92: 35 CWN 546: 135 Ind Cas 736.

——O. 38, R. 5 (1) and (3) — Simultaneous orders.

Order conditional under R. 5 (3) cannot be made without accompanying order under R. 5 (1) to furnish security or to show cause why it should not be furnished. AIR (Vol 7) 1920 Cal 526: 57 Ind Cas 907 (DB).

——O. 38, R. 5 (3) — What is not a conditional order.

An order directing the defendant not to part in any way with the property sought to be attached by the plaintiff concurrently with issue of notice to the defendant to show cause why an attachment should not issue before judgment, cannot be construed as an order of conditional attachment under O. 38, R. 5 (3). AIR (Vol 3) 1916 Cal 287: 23 CLJ 392: 33 Ind Cas 689 (DB).

——O. 38, R. 5 — Attachment before judgment — Conditional — Scope.

An order of attachment before judgment can only be made after defendant fails to show cause to the contrary or to furnish security and a conditional order of attachment has effect only until the defendant so furnishes security. AIR (Vol 1) 1914 All 511: 23 Ind Cas 107 (DB).

——O. 38, Rr. 5 and 6 and S. 150 — Attachment before judgment — Transfer of case — Pending attachment — Jurisdiction of the latter Court.

When a conditional order of attachment before judgment of certain property within its jurisdiction is passed by a Court and the suit is transferred to another Court before the final order is passed, the latter Court acquires by implication jurisdiction to pass further orders regarding the attachment. (1910) 20 MLJ 980: (1910) MWN 212: 6 Ind Cas 746 (DB).

4. Effect of attachment.

——O. 38, R. 5 (2), O. 21, R. 46 — Debt attached from garnishee before judgment — Amount of debt not specified — Fact that garnishee did not object to attachment is no reason why advantage obtained should thereafter be unduly pressed against him.

Where a debt was attached before judgment from the garnishee, the fact that the garnishee did not object to the attachment before judgment is as much evidence of his good faith as anything else, but that is no reason why thereafter an advantage irregularly obtained should be unduly pressed against him. AIR (Vol 29) 1942 Sind 87: ILR (1942) Kar 173: 202 Ind Cas 329 (DB).

——O. 38, R. 5 — Attachment before judgment or otherwise does not create any interest in favour of the attaching creditor. It merely amounts to the property attached being held by the Court in its own custody. So long as the attachment subsists, the judgment-debtor cannot exercise any disposing power over it except with the leave of the Court. AIR (Vol 24) 1937 All 424: (1937) ALJ 348: 1937 AWR (HC) 284: 169 Ind Cas 836 (DB).

——O. 38, R. 5 — Allegation that defendant is realising his assets to prevent satisfaction of plaintiff's claim — Effect of.

An allegation by the plaintiff in his application that with intent to prevent the satisfaction of his claim the defendants are realizing their assets, is an allegation which must be held to be tantamount to what is required by O. 38, R. 5, Civil P. C., to be established by a plaintiff before he can obtain order for the security or a conditional attachment before judgment. AIR (Vol 21) 1934 Lah 594: 148 Ind Cas 719.

——O. 38, R. 5 — Execution — Effect of.

An attachment made before judgment under R. 5 of O. 38, of the C. P. Code, becomes an attachment made in execution of a decree for all the purposes of O. 21 on the making of an application for execution, and R. 57 of O. 21 applies to such an attachment equally with all the other rules of O. 21, 16 CWN 1097: 26 MLJ 215: 42 Mad 1, Dissented. AIR (Vol 8) 1921 Nag 57: 63 Ind Cas 712: 17 NLR 121.

——O. 38, R. 5 — Attachment before judgment.

Attachment before judgment does not give any interest in the attached property. A person obtain-

ing attachment before judgment cannot restrict the right of the creditor holding previous decree. AIR (Vol 3) 1916 Cal 371: 21 CLJ 614: 30 Ind Cas 38 (DB).

——O. 38, R. 5 — Attachment before judgment — Effect of.

Attachment before judgment confers no right on the party who obtains the order of attachment. AIR (Vol 2) 1915 All 275: 37 All 578: 13 ALJ 732: 29 Ind Cas 622 (DB).

5. Jurisdiction.

——O. 38, R. 5 — Order under — Matter of discretion — Interference by appellate Court.

Where the trial Court passing an order under R. 5 of O. 38, Cri. Pro. Code, makes a mistake as to attachable and non-attachable property and although it attempts to safeguard the interest of the defendant, it does not take similar care of the plaintiff's interest, it would be a fit case for the appellate Court to interfere with the discretion of the trial Court in the matter. AIR (Vol 37) 1950 Ajmer 70.

——O. 38, Rr. 5 and 6 — Non-compliance with provisions — Validity of order — Proper order on appeal.

An order for attachment before judgment passed without complying with Rr. 5 and 6 of O. 38, C. P. Code, is both irregular and objectionable, but not necessarily ultra vires or void ab initio. The appellate Court should set aside such an order, but a conditional attachment should be maintained and the case should be sent back to the Court which levied the attachment to go into the question after issuing a proper notice in accordance with the rules. AIR (Vol 37) 1950 Cal 368 (DB).

——O. 38, R. 5, O. 34, R. 6 — Court if can order attachment before judgment where no personal decree has been passed.

In O. 38, R. 5 (1), Civil P. C., the words "any decree that may be passed" are wide enough to cover a possible decree and in a mortgage suit, the Court has the jurisdiction to order an attachment before judgment under the last clause of O. 38, R. 5, although a personal decree has not been passed under O. 34, R. 6. AIR (Vol 29) 1942 Pesh 17: 199 Ind Cas 209.

——O. 38, R. 5, O. 39, R. 1 — Orders under O. 38, R. 5 and O. 39, R. 1 — Whether discretionary — Interference by Appellate Court.

Orders passed under O. 38, R. 5 and O. 39, R. 1, Civil P. C., are discretionary, and an Appellate Court ought not to interfere with the exercise of a Judge's discretion unless satisfied that it was not judicially exercised, that is to say, that the Judge acted on wrong principles. The mere fact that the Judges of the Appellate Court might have taken a different view is not a sufficient ground for interference. If the Judge rightly appreciates the facts, and applies to those facts the true principles, that is a sound exercise of judicial discretion.

Neither injunction nor attachment ought to be lightly granted. It would be a serious thing if persons in possession were restrained from making use of the property merely because a suit had been instituted about it. It is only where it is essential that property should be kept in its existing condition pending suit that the Court should interfere. AIR (Vol 21) 1934 Cal 694: 38 CWN 771: 61 Cal 814: 155 Ind Cas 354 (2).

——O. 38, R. 5 — Property outside British India — Foreign Jurisdiction Act, 1890, (53 and 54 Vict. C 37).

A Court in British India has no power to attach before judgment movable property situated at Kashgor evene though there is a Consular Court there created by His Majesty under the Foreign Jurisdiction Act, 1890. AIR (Vol 18) 1931 Lah 723: 32 PLR 645: 13 Lah 206: 134 Ind Cas 822 (DB).

——O. 38, R. 5 — Property situate outside local limits.

Court can attach before judgment property situate outside the local limits of its jurisdiction. Similarly, it has power to entertain an application for the removal of the same. AIR (Vol 18) 1931 Rang 279: 9 Rang 561: 135 Ind Cas 326.

——O. 38, R. 5 — Exercise of powers — Sparing use — Notice to opposite party.

The jurisdiction of Courts in attaching property before judgment is of an extraordinary nature and must be very sparingly exercised. In such cases the Court proceeds to attach the property of the defendant before the respective rights of the parties are determined and it is absolutely necessary, that in exercising these powers, Court should strictly adhere to the procedure prescribed by the Code and it should issue notice to the opposite party calling upon him to furnish security for satisfying any decree that may eventually be passed against him or to show cause why he should not furnish security and it is only when he had appeared and failed to furnish the security or, show cause that the Court can under R. 6 pass an order attaching his property.

The provision of R. 5 can only be invoked if the Court is satisfied that the respondent is about to dispose of the whole or any part of the property. AIR (Vol 15) 1928 Lah 376: 106 Ind Cas 808.

——O. 38, R. 5 — A Court can attach before judgment property situate beyond its local limits. AIR (Vol 15) 1928 Lah 376: 106 Ind Cas 808.

——O. 38, R. 5 — Liquidation Court.

Under Section 164, Companies Act, the District Judge is for the purpose of winding up a Company deemed to be the "Court" within the meaning of Act and has, for purposes of such winding up, all the jurisdiction and powers of the High Court and therefore he has power to order attachment before judgment of property situate beyond his jurisdiction. AIR (Vol 15) 1928 Lah 376: 106 Ind Cas 808.

——O. 38, R. 5 — Property outside High Court's jurisdiction.

If the property of the defendant sought to be attached is outside the local limits of the jurisdiction of the High Court, the proper course for the Court to follow is to tansmit the order for attachment before judgment to the Court in whose jurisdiction the property is situated with a request that that Court should levy the attachment; but the practice of appointing a solicitor's clerk a special bailiff for the purpose of levying attachment is entirely wrong. AIR (Vol 13) 1926 Bom 278: 28 Bom LR 380: 94 Ind Cas 116 (DB).

——O. 38, R. 5 — Small Cause Court — Can attach under.

Per Curiem: A Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment.

Sanderson, C. J.: The provisions of Cl. (7) of S. 94 are not excluded by reason of S. 7 and the order for attachment there referred to must mean an order for attachment before judgment; it follows, therefore, that a Prvincial Small Cause Court has jurisdiction to make an order for attachment before judgment of any property including immovable property. There is a distinction between making an order for attachment and making an attachment.

It may be that if Provincial Small Cause Court were to make an order for attachment of immovable property before judgment, it would be necessary for that Court to transmit the order to a Court of ordinary civil jurisdiction for the purpose of the order being carried out and the property attached.

Walmsley, J.: Small Cause Court cannot attach property whether moveable or immoveable.

Mukerji, J.— O. 38 has not been excluded either by S. 7 read with S. 94 or by O. 50 and, therefore, it is applicable to a Provincial Court of Small Causes purported to lay down that a Provincial Small Cause Court can attach immoveble property and not merely make an order of attachment thereof, was not correctly decided, nor was the case in if it meant to lay down that no such order can be passed by a Provincial Court of Small Causes. AIR (Vol 12) 1925 Cal 1: 82 Ind Cas 109: 28 CWN 1056: 40 CLJ 199: 52 Cal 275 (FB).

——O. 38, R. 5 — Land situated in Agency tract.

The Subordinate Judge of Vizagapatam has no jurisdiction in a suit pending before him to attach before judgment properties which admittedly are in the Agency tracts over which his Court has no jurisdiction. AIR (Vol 12) 1925 Mad 1100: 48 MLJ 680: 88 Ind Cas 430 (DB).

——O. 38, R. 5 — A Small Cause Court has power to attach immovable property before judgment under O. 38, R. 5. AIR (Vol 12) 1925 Mad 589: 48 MLJ 405: 87 Ind Cas 399: 1925 MWN 169: 48 Mad 488: 22 MLW 103 (DB).

——O. 38, R. 5 — The Provincial Small Cause Court can attach before judgment any immoveable propety. AIR (Vol 10) 1923 Cal 176: 70 Ind Cas 841: 49 Cal 994 (DB).

——O. 38, R. 5 (3) — Attachment before judgment — Order passed without jurisdiction — Realisation without jurisdiction — Withdrawal by decree-holder — Refusal.

A Court has no power to order attachment of a debt payable to the defendant outside its jurisdiction by a person outside its jurisdiction; such order if passed is illegal and must be set aside. If on such order being passed, the money is realised by the Court and withdrawn by the decree-holder, plaintiff must be made to bring back the money with interest and on his failure, the money should be realised by attachment and sale of his property. AIR (Vol 5) 1918 Cal 911: 24 CLJ 533: 22 CWN 160: 36 Ind Cas 457 (DB).

——O. 38, R. 5 and O. 50, R. 1 — Attachment of immoveable property before judgment — Small Cause Court.

A Small Cause Court has power to attach immoveable property before judgment. The C. P. Code, 1908 has altered the law in this respect. AIR (Vol 4) 1917 Nag 55: 14 NLR 1: 43 Ind Cas 123.

——O. 38, R. 5 — Attachment before judgment — Property outside jurisdiction.

A Civil Court has no power to issue a warrant of attachment before judgment on property situated outside its jurisdiction. AIR (Vol 1) 1914 Upp Bur 17: (1914) II, UBR 16: 25 Ind Cas 771.

——O. 38, R. 5, O. 1, R. 4 (a) — Transfer of case — Pending attachment — Jurisdiction to deal with.

Where in a suit the Court had passed a conditional order of attachment but before passing the final order, the suit was transferred to another court.

Held, the latter Court has got by implication jurisdiction to deal with the pending attachment. (1910) 20 MLJ 980 (981): (1910) MWN 212: 6 Ind Cas 746 (DB).

——O. 38, R. 5 (Ss. 483, 484, 648, old Code) — Property outside jurisdiction.

Under the provisions of Ss. 483, 484, C. P. C., a Court has no power to attach before judgment property outside the limits of its jurisdiction. (1903) 5 Bom LR 570 (573, 574).

——O. 38, R. 5 (Ss. 135, 483, 642 old Code) — Attachment before judgment — Property outside jurisdiction.

A case in which an order was made for attaching before judgment property outside jurisdiction. See (1903) 7 CWN 216 (218).

6. Legality.

See also Note 2.

——O. 38, Rr. 5 and 6 and S. 94 — Jurisdiction is independent of the manner of its exercise — Distinction between the two — Effect of error in the manner of exercise of jurisdiction.

Jurisdiction is entirely independent of the manner of its exercise; the distinction between the two is that error of judgment is reversible by the Appellate Court within a certain fixed time and is, therefore, voidable, whereas the usurpation of power is a mere nullity. The jurisdiction of the Court to attach property before judgment is indicated by the words 'if so prescribed' in S. 94 and that condition is satisfied when rules are made to order attachment of any property of defendant. Rules 5 and 6 of O. 38 bring into effect the jurisdiction that is conferred by S. 94, in so far as they make it clear that the Court has power to order attachment before judgment.

In the absence of words such as used in S. 107 (1), Civil P. C., the other provisions made in Rr. 5 and 6 of O. 38 must be interpreted as laying down the manner in which the Court's jurisdiction is to be exercised and accordingly, regarded as dealing with matters of procedure regulating the mode of exercise of jurisdiction that exists. On this view, any error in the manner of the exercise of jurisdiction conferred by S. 94 would not affect the validity of the Court's act if the Court's jurisdiction is derived from a source independent of the provisions which prescribe the manner of its exercise. AIR (Vol 32) 1945 Nag 97: ILR (1945) Nag 121: 1945 NLJ 62 (DB).

——O. 38, R. 5 — Where there was attachment before judgment, O. 38, R. 5(2) requires, unless the Court otherwise directs, that the property to be attached shall be specified, as also its estimated value. AIR (Vol 29) 1942 Sind 87: ILR (1942) Kar 173: 202 Ind Cas 329 (DB).

——O. 38, R. 5—Decree-holder entitled to personal decree — Attachment order without calling upon defendant to furnish security.

Where the mortgagee-decree-holder is entitled to obtain a personal decree, he can, upon satisfying the Court that he was entitled to such personal decree and that the defendant was disposing of the whole or part of his property or removing the same out of the jurisdiction in order to obstruct or delay the execution of the personal decree, when obtained, ask for an order under O. 38, R. 5, Civil P. C. But the Judge cannot make an order attaching the properties until he has called upon the defendant to furnish security to produce and place at the disposal of the Court the property or call upon the judgment-debtor to show cause why he should not furnish security.

This amounts to a failure to comply with the requirements of O. 38, R. 5, and any order passed attaching the properties cannot stand. AIR (Vol 23) 1936 All 408: 1936 AWR (HC) 362: 58 All 884: 163 Ind Cas 236 (DB).

——O. 38, R. 5, Appendix F, From No. 5, S. 107 (2) — Application for attachment before judgment — Non-compliance with the provisions of O. 38, R. 5

— Whether renders order wholly ultra vires and void ab initio — Power of Appellate Court to pass order for attachment.

Where, on an application for attachment before judgment, the Court ordered for notice to go to the defendant to show cause, if any, against the application, and the office, instead of issuing a notice on Form No. 5, Appendix F, Civil P. C., issued a notice on the general form of notice to show cause:

Held, that the provisions of O. 38, R. 5 were not complied with by the lower Court and that although such non-compliance with the provisions of the rule amounted to an irregularity and the order passed by the Court below was both irregular and objectionable, it was not wholly 'ultra vires' or void 'ab initio'.

Held, further, that the lower Court had jurisdiction under O. 38, R. 5 (3) to direct the conditional attachment of the whole or any portion of the defendant's property, if satisfied that such an attachment was necessary and that the Appellate Court under S. 107 (2) had the same powers and could perform as nearly as may be the same duties as were conferred and imposed by the Code on Courts of original jurisdiction. AIR (Vol 21) 1934 All 456: 148 Ind Cas 509 (DB).

——O. 38 R. 5 — An attachment which does not comply with the provisions of O. 38, R. 5, Civil P. C., is illegal and 'ultra vires' and the attaching plaintiff cannot claim any benefit under it. AIR (Vol 21) 1934 All 165: (1933) ALJ 1501: 147 Ind Cas 509.

——O. 38, R. 5, S. 95 — Attachment before decree — When to be granted — Attachment granted on insufficient grounds — Compensation under S. 95, if to be given.

Where the only ground put forward in the application for attachment before judgment was that unless the attachment is made, the plaintiff, in the event of success, will have difficulty in realising the decretal amount and the application, though it did not mention any of the grounds which justify an application for attachment before judgment under O. 38, R. 5, Civil P. C., was granted:

Held, that the application was made on altogether insufficient grounds and was unjustified. This being so, the case was clearly one in which the defendant was entitled to reasonable compensation against the opposite party. AIR (Vol 21) 1934 Oudh 429(2): 11 OWN (CC) 1135: 10 Luck 199: 151 Ind Cas 283 (DB).

——O. 38, R. 5 — Illegal warrant — Conviction in respect of such warrant.

Where it appears that no legal warrant was issued under O. 38, R. 5, Civil P. C., a conviction under S. 186, Penal Code, cannot be upheld, although the facts proved may otherwise amount to an offence under that section. AIR (Vol 20) 1933 All 759: (1933) ALJ 952: 34 Cri L Jour 1211: 55 All 985: 146 Ind Cas 183 (DB).

——O. 38, R. 5 — Procedure.

Where no prohibitory order, as contemplated by O. 21, R. 54, was given to the peon to publish, but what the peon did was to go to the locality and to proclaim by beat of drum that the property was attached and affixed on the property, which he was directed to attach, a copy of the order, as contemplated under O 38, R. 5, which was made over to him.

Held, that there had been no legal attachment. AIR (Vol 14) 1927 Cal 885: 104 Ind Cas 340 (DB).

7. Mortgage suit.

See also Civil P. C. O. 34 R. 6

——O. 38, R. 5 — Preliminary mortgage-decree passed — Plaintiff can apply for attachment before judgment under O. 38, R. 5, in a proper case.

It is open to a plaintiff after the preliminary mortgage decree to apply for attachment before judgment in a proper case. AIR (Vol 30) 1943 Bom 24: 44 Bom LR 855: 205 Ind Cas 100 (DB).

——O. 38, R. 5 — Attachment before judgment of immovable property — Actual attachment is to be effected in manner prescribed in O. 21, R. 54 for which proper form is Form No. 24, Appendix E.

There cannot be valid or effective attachment before judgment of immovable property unless the requirements of O. 21, R. 54, Civil P. C., are satisfied. Although Form No. 5, Appendix F, is the form in which the order under O. 38, R 5 is to be served ,yet the actual attachment where the property is immovable, is to be effected in the manner provided in O. 21, R. 54, for which the proper form is prescribed in Appendix, E, Form No. 24. An attachment before judgment of immovable property, although issued in the form prescribed in Appendix F, Form No. 5, is not an effective attachment within the meaning of O. 21, R. 54. AIR (Vol 26) 1939 Pat 81: 5 BR 820: 182 Ind Cas 748 (DB).

——O. 38, R. 5 — In a suit to enforce a mortgage, if there is a reasonable probability of the mortgage property not being sufficient to discharge the mortgage debt, the Court can attach before judgment properties not subject to the mortgage, provided the requirements of O. 38, R. 5 are complied with. AIR (Vol 18) 1931 Bom 329: 33 Bom LR 514: 135 Ind Cas 428.

——O. 38, R. 5 — Where mortgage decree for sale of property mortgaged provides also that if the sale proceeds are insufficient to satisfy the decree, the decree-holder shall be at liberty to proceed against the person of his judgment-debtor, Court can order attachment of his other property under O. 38, R. 5 even before the sale takes place and the proceeds are found insufficient. AIR (Vol 16) 1929 Lah 402: 118 Ind Cas 446.

——O. 38, R. 5 — Instance of.

Where an application was made by a mortgagee praying for an attachment before judgment on the allegation that the mortgagors were trying to execute certain transfers of the properties in order to avoid payment and to delay and defraud the plaintiffs. It was also stated that the amount due under the mortgage would not be realized by sale of the mortgaged properties and that the other properties of the mortgagors would have to be proceeded against in order to realize the decree. Whereupon the mortgagors undertook to give an undertaking not to transfer the property before the disposal of the suit, but failed to do so, and the result was that an order of attachment before judgment was passed.

Held, that the failure of the mortgagors to give an undertaking not to transfer the property before decision of the suit is not sufficient. The Judge, before passing such an order, has to consider whether the creditors have made out a sufficient case according to law in order to enable them to have an order for attachment of the other properties of the judgment-debtors before judgment. AIR (Vol 15) 1928 Pat 172: 106 Ind Cas 532 (DB).

——O. 38, R. 5 — Preliminary decree — Right to personal decree — Attachment of other properties.

A mortgagee, may, after preliminary decree, attach under O. 38, R. 5 other properties of the mortgagor, if the hypothecation is insufficient and the mortgagor intends to dispose of his other properties fraudulently. AIR (Vol 6) 1919 Cal 258: 46 Cal 245: 50 Ind Cas 924.

——O. 38, R. 5 and O. 39, R. 1 — Mortgage of malikana — Decree for sale — Order of attachment and injunction, if competent.

Appellant mortgaged to respondent his right to receive 'malikana' dues from a number of villages.

A decree for sale was passed on the mortgage. Before the sale the decree-holder obtained an order restraining the judgment-debtor from receiving the 'malikana' dues.

Held, that the Court had no power either to attach the 'malikana' dues or to prevent the appellant from receiving them. AIR (Vol 2) 1915 All 277: 37 All 423: 13 ALJ 566: 29 Ind Cas 601 (DB).

8. Surety.

See also Note 9.

——O. 38, R. 5, S. 145 — Surety undertaking to pay amount under decree — Decree passed — Property, sought to be attached before judgment, sold in execution — Sale not fetching decretal amount in full — Surety, if can be proceeded against — Court's demanding security for prospective decretal amount is only irregularity.

The appellant instituted a suit on a promissory note against two persons, K and H. He thereafter applied for attachment before judgment of a motor lorry belonging to the said defendants; the Court issued on them a notice to show cause why the said motor lorry should not be attached before judgment or they should not furnish security to the extent of Rs. 860 to cover the decree, if any, that may be passed against them. The said defendants appeared and offered to furnish security.

They proposed the respondent and another person as sureties and the respondent and another person agreed to stand as sureties. They, the proposed sureties, executed in favour of the Court a surety bond. The bond recited the notice issued on the defendants, and the fact that the Court had allowed the defendants to furnish security. Then the bond stated that the executants made themselves personally liable to the extent of Rs. 860, that is, for the amount that might be decreed against the defendants, and the sureties promised to pay the same in case the decretal amount be not realised from the judmgent-debtors.

The Court, on a favourable report from the Sheristadar as to the solvency of the respondent and the other co-executant, accepted them as sureties and withdrew the order for attachment before judgment. The suit was decreed in full against the defendants. The appellant first executed his decree against the principal judgment-debtors and attached the lorry which was sold by the Court in execution. It fetched Rs. 100 only at the Court sale. The appellant could not realize anything more from the principal judgment-debtors who had been adjudicated insolvents on their own application. The appellant then applied for proceeding against the respondent, one of the sureties. The substantial objection raised by the respondent was that the Court went beyond jurisdiction in asking for security for the decretal amount under the provisions of O. 38, R. 5, Civil P. C., and as the bond executed has gone beyond the terms of the said rule, it could not be enforced in execution proceedings:

Held, that O. 38, R. 5, no doubt contemplates security for the production in Court of the property sought to be attached before judgment or its value at a future time when called upon and the amount of the security demanded should ordinarily be commensurate with the value of the property sought to be attached, but the object of the Legislature in providing for attachments before judgment is to secure the prospective decree-holder in matter of realisation of the money that may be eventually found by the Court to be due to him.

Having regard to the object of the provisions for attachment before judgment the Court in making a demand for and in taking security for the prospective decretal amount might have acted at most in an irregular manner in the exercise of its jurisdiction. In that view of the matter the remedy of the defendants was to point out to the Court the irregularity in the notice, which, by its terms, demanded security from them of the decretal amount when they appeared to show cause in pursuance of the same, and if the Court still insisted on the said security to proceed to a higher tribunal.

Held, also that the respondent having executed the surety in the form he had done, could not raise the objection which he has raised in the case in the course of execution proceedings started against him under the provisions of S. 145 of the Code. AIR (Vol 23) 1936 Cal 143: 40 CWN 657: 162 Ind Cas 919.

——O. 38, R. 5 (3) — Security given — Liability of surety, when incurred — Subsequent appeal — Effect of, on liability.

When, in order to obtain removal of attachment before judgment under O. 38, Civil P C., a security is given, as soon as the decree of the Court of first instance is made, the liability of the sureties is fully incurred. This liability having thus been fully incurred, is not extinguished by appeal being made against the decree. If the amount recoverable by the plaintiff should be diminished in appeal, the amount of which payment could be enforced would be diminished to a like extent, and the sureties' engagement being one of idemnity, would diminish in the same proportion.

So, too, if the decree being reversed, the sum recoverable became zero, the sureties' liability would be reduced to nothing. When the decree of the Court of first instance is finally restored, the liability incurred, when it was first passed is also restored. The decreeing of the suit by the Court of first instance has a different effect upon the attachment before judgment from the dismissal of the suit by that Court. AIR (Vol 23) 1936 Rang 342 : 14 Rang 361 : 164 Ind Cas 455.

——O. 38, R. 5 — Discharge of — Compromise of suit.

Where a person stands surety for a debtor called upon under O. 38, R. 5 to furnish security for production of property and the suit is compromised, provided the rights of the surety are prejudiced by the compromise and provided the comproise was not contemplated by the surety when entering into suretyship the passing of the decree in terms of the compromise has the effect of discharging the surety. AIR (Vol 17) 1930 Bom 122 : 31 Bom LR 1442 : 54 Bom 118 (DB).

——O. 38, R. 5 — Enuring for appeals also.

Where the agreement of suretyship ran as follows: "The said defendant would obey the order of the Court and will produce the things mentioned in the inventory in Court or will pay the price thereof. If she failed to do so, I or my lawful heirs or executors will produce Rs. 5,000." and the trial Court dismissed the suit but on appeal it was decreed and the plaintiff appealed to enforce the surety bond.

Held, that the surety undertook on behalf of the defendant that moveables would be produced by her which were mentioned in the inventory, whether the Court requiring her to produce the ornaments ultimately was that very Court or was acting in pursuance of the order made by a superior Court. That circumstance would not and should not make and difference to the liability of the surety. 12 Bom 71 Diss. from. AIR (Vol 14) 1927 Bom 84 : 51 Bom 31 : 28 Bom LR 1516 : 99 Ind Cas 820 (DB).

——O. 38, R. 5 — Surety is liable though suit is once dismissed for default and immediately restored.

AIR (Vol 12) 1925 Oudh 592 : 89 Ind Cas 17 : 12 OLJ 521 : 2 OWN 372.

——O. 38, R. 5 — Obstruction to property attached being left with surety — Discharge of bond.

A surety for the production before the Court of property released from attachment before judgment is entitled to be put in possession of the property. If not put in possession he cannot be proceeded against in the event of decree being passed. On giving surety, the property was released from attachment on the security of the property of the surety. If he is prevented from obtaining possession by the conduct of the plff. at whose instance the order of attachment before judgment was made he is entitled to have the security bond cancelled. AIR (Vol 6) 1919 Low Bur 127 : 12 Bur L T 89 : 52 Ind Cas 930.

——O. 38, R. 5 — Reference to arbitration — Liability of surety.

Where a surety bond has been given for the property attached before judgment, the decree in the suit can be executed against the surety also. The liability of the surety is the same whether the judgment has been arrived at by the Court after a regular trial of the Court pronounces judgment on an award passed by the arbitrators appointed in the suit. Arbitration is an ordinary incident of the suit. AIR (Vol 5) 1918 Sind 53 : 11 S L R 122 : 45 Ind Cas 429 (DB).

——O. 38, Rr. 5 (b) and 6 (b) — Discharge of surety without notice to parties.

An order of discharge of a surety without notice to the parties is rescindable at the instance of any party. A mere notice given by a surety that he intends not to be a surety any longer does not enable him to withdraw from the guarantee at any time. AIR (Vol 4) 1917 Cal 699 : 37 Ind Cas 919 (DB).

——O. 38, R. 5 — Surety's liability — Duration.

A surety's liability ceases as soon as the first Court dismisses the suit. His liability is not revived by the Appellate Court subsequently decreeing the plaintiff's claim. AIR (Vol 2) 1915 Lah 217 : 53 PWR 1915 : 147 PLR 1915 : 29 Ind Cas 271.

9. Security.

——O. 38, R. 5 — Judgment-debtor, if must be asked to furnish security.

Under O. 38, R. 5, the Court cannot order attachment before judgment without first calling upon the judgment-debtor to furnish security. AIR (Vol 29) 1942 Pesh 17: 199 Ind Cas 209.

——O. 38, R. 5 (3) — Notice to defendant to show cause why plaintiff's application for attachment before judgment should not be granted — At the same time, attachment ordered — Defendant objecting but furnishing security — Appellate Court thinking attachment illegal — Security, if can be cancelled.

The trial Judge issued a notice to the defendant to show cause why the application of the plaintiff for attachment before judgment of the property of the defendant be not granted and at the same time, ordered attachment of the same. There was nothing illegal in this procedure. The defendant objected to the attachment but offered to give security pending the disposal of the plaintiff's application for attachment before judgment:

Held, that the security bond could not be cancelled and the surety could not be discharged merely because in the opinion of the Appellate Court there was no ground for applying for attachment before judgment. AIR (Vol 24) 1937 Lah 780 : 40 PLR 666 : 175 Ind Cas 44.

——O. 38, R. 5 — Payment made by defendant merely in lieu of furnishing security to prevent attachment before judgment — Subsequent insolvency — Payment to go to Official Receiver to the credit of insolvent. (1936) 1936 MWN 275.

——O. 38, R. 5 — A security bond executed by the judgment-debtor in order to remove the attachment before judgment can be enforced in execution. AIR (Vol 21) 1934 Cal 64 : 60 Cal 1298: 37 CWN 973: 149 Ind Cas 399 (DB).

——O. 38, R. 5 — Bond — Enuring for appeals — Question of construction.

Where the security bond executed by the defendant to the Court, in pursuance of the latter's order under R. 5, O. 38, recited that the defendant had thereby given as security certain property and that in case the suit was decided in plaintiff's favour, the defendant would be responsible for the suit amount;

Held, that the bond which really took the place of the attachment before judgment was meant to give security only for the purpose of enabling the first Court to execute its decree in case it passed a decree. And as that Court did not pass a decree at all but dismissed the suit' the bond ceased to have any further effect, though the appellate Court decreed the suit. 1924 MWN 495 : 82 Ind Cas 461 : AIR (Vol 12) 1925 Mad 114 : 47 MLJ 523 (DB).

——O. 38, R. 5 (1) (b) — Attachment before judgment — Security — Attaching creditor, whether acquires — Charge on money deposited.

Order 38, R. 5 (1) (b) of the Code does not give a plaintiff a charge on the money paid by a defendant as security for producing and placing his property at the disposal of a Court whenever required. Attachment of the property in default of such security being given does not confer title on the attachment creditor.

Rule 5 (1) (b) of O. 38 gives a control to the Court over the property & not a preferential right to the plaintiff who moves the Court over others who have claims against the debtor. If a creditor desires to obtain a special charge upon some specific part of the property under the writ of attachment he must obtain some order giving him special right or charge on a specific part of the property. AIR (Vol 4) 1917 Mad 743: 39 Mad 903 : 32 Ind Cas 190 (DB).

——O. 38, Rr. 5 and 6 — Attachment before judgment — Duty of Court to afford opportunity to furnish security.

A Court has no power to pass an order of attachment before judgment without the essential elements mentioned in R. 5 and without giving an opportunity to furnish security. (1912) 15 Ind Cas 604 (Cal) (DB).

10. Scope and applicability.

——O. 38, R. 5 — Indore Code — Order under — Particulars to be furnished which would justify an ex parte order.

Attachment of property is a serious proceeding and Courts ought to be careful not to lend themselves as tools of oppression. Where an affidavit in support of an application for attachment vaguely states that the other side had sold some movables and had taken away some outside the jurisdiction of the Court, the Court should demand specific particulars before passing an 'ex parte' order for attachment and giving effect to it. AIR (Vol 37) 1950 M.B. 70.

——O. 38, R. 5 — Applicability — Debt due to defendant — Attachment before judgment — Procedure — Order of attachment headed under O. 38, R. 5, instead of under O. 21, R. 46 but served

on garnishee — Sufficiency for valid attachment. AIR (Vol 36) 1949 Pat 337.

——O. 38, R. 5 (1) — R. 5 (1) does not justify seizure of property in possession of or on person of defendant.

There is nothing in R. 5 (1) of O. 38 which justifies seizure of property even in the possession of the defendant, far less on his person. AIR (Vol 33) 1946 Sind 166: ILR (1946) Kar 57 (DB).

——O. 38, R. 5 (2) — Specification of property — Application asking for attachment of money or other moveable property on person of defendant be pointed out to bailiff not sufficient.

Requirements of R. 5 (2) are not satisfied by a mere application that money or any other movable property on the person of the defendant or in his power or possession be pointed out; nor does the sub-rule justify the grant of an application which asks for the attachment of money or any other movable property on the person of the defendant or in his possession or power to be pointed out to the bailiff. AIR (Vol 33) 1946 Sind 166 : ILR (1946) Kar 57 (DB).

——O. 38, R. 5 does not contemplate deposit in Court of property itself or its equivalent in money.

Rule 5, O. 38, does not comtemplate the deposit in Court of the property itself or its equivalent in money. Reference to forms Nos. 4, 5 and 6 in Appx. F, Civil P. C., indicates that what R. 5 of O. 38 contemplates is an order to furnish security. AIR (Vol 28) 1941 Sind 178: ILR (1941) Kar 362: 197 Ind Cas 291 (DB).

——O. 38, R. 5 — 'Property', meaning of — 'To dispose of property', significance of — Attachment before judgment of moiety of salary of public servant or employee until it has accrued.

"Property" for the purposes of O. 38, R. 5, Civil P. C., includes property of every description, movable or immovable.

To dispose of property means to realize it or alienate it by sale, or other similar disposition of it — pledge, mortgage, or gift and if money, to secrete it perhaps. "Property" must mean property already in existence, belonging to and at the disposal of the defendant. The salary of a public servant or employee not having yet been earned or paid cannot be "disposed" of until it has at least become payable. It is, therefore, clearly illegal to attach before judgment the moiety of the salary of a public servant or of any employee until it has accrued.

In any case the bulk of an officer's or employee's salary is ordinarily meant to be "disposed" of by being spent on his maintenance or that of his family, and strong grounds would have to be shown for believing that he was about to dispose of the remainder of it with the intent specified in R. 5 before the Court passes an order attaching any portion of salary that had accrued. AIR (Vol 24) 1937 Rang 292: 1937 Rang LR 108: 170 Ind Cas 240.

——O. 38, Rr. 5 and 6 — An application from order of attachment before judgment is not restricted to the grounds mentioned in Rr. 5 and 6 of O. 38, Civil P. C. AIR (Vol 20) 1933 Cal 757: 37 CWN 978: 58 CLJ 289: 60 Cal 1351: 147 Ind Cas 924 (DB).

——O. 38, R. 5 — Rule 5 contemplates attachment of property which the defendant is about to dispose of or remove from the jurisdiction of the Court and not of the property already disposed of. It requires the applicant to specify the property to be attached and the estimated value thereof and security can only be taken for producing and placing at the disposal of the Court such property or the value of the same or such portion thereof as may be sufficient to satisfy the decree. The rule contemplates attachment of property belonging to defendant and not of property belonging jointly to parties. 112 Ind Cas 295: AIR (Vol 15) 1928 Lah 772.

——O. 38, R. 6.

1. **Scope.**
2. **Appeal.**
3. **Effect.**
4. **Insolvency.**
5. **Continuance of attachment.**
6. **Mortgage.**

1. Scope.

——O. 38, R. 6 — Applicability to objection by third person.

Order 38, R. 6 might apply to an objection by the defendant but not to an objection by a third person. AIR (Vol 25) 1938 Nag 321 : ILR (1940) Nag 509 : 176 Ind Cas 79.

——O. 38, R. 6 — Application for attachment made before judgment but attachment made after — Effect.

Attachment actually made after judgment cannot be deemed in law to be made before judgment simply because it happens that the application for such attachment was made before the judgment was actually passed. The legal effect of attachment comes into being only when the attachment is actually made, and its nature is defined also by the time when it is made and not when it is ordered. AIR (Vol 24) 1937 Mad 84: 173 Ind Cas 468 (DB).

——O. 38, R. 6 — Exercise of powers.

An unconditional attachment can only be ordered under R. 6, when the defendant fails to comply with an order under R. 5. 107 Ind Cas 276: AIR (Vol 15) 1928 Lah 445.

——O. 38, R. 6 — Failure — Finding necessary.

Where an order is passed to furnish security or to show cause why security should not be furnished within a date fixed and no security is furnished, the Court would have first to determine judicially that there had been a failure before drawing up a writ of attachment. 101 Ind Cas 9 : 31 CWN 432 : AIR (Vol 14) 1927 Cal 354 (DB).

——O. 38, R. 6 — Past conduct.

The mere fact that the defendant in the past mortgaged his property or otherwise disposed of it would not be in itself a sufficient ground for an order under R. 6. The Court must be satisfied that he is at the time of enquiry about to dispose of his property with the intention of delaying and obstructing any decree that the Court might pass against him. 94 Ind Cas 880: AIR (Vol 13) 1926 Cal 855 (DB).

——O. 38, R. 6 — Order under — When to be passed.

Order conditional under R. 6 cannot be passed unless the defendant has failed to furnish security under S. 5 or fails to show cause why such security should not be furnished. AIR (Vol 7) 1920 Cal 526: 57 Ind Cas 907 (DB).

——O. 38, R. 6 (Ss. 483, 505, 196 old Code) — Appointment of Receiver — Affidavits — Contents — Practice.

Section 483 of the Civil Procedure Code provides for the attachment of the property of the judgment-debtor. It does not apply to the joint property of a partnership of which the judgment-debtor is a member. In cases of this kind the pro-

per order to make is the appointment of a Receiver under S. 503 of the Code. (1907) 9 Bom LR 540 (541) (DB).

2. Appeal.

——O. 38, Rr. 6 (2), 5, O. 43, R. 1 (q) — Application for attachment before judgment — Interim attachment ordered — Defendant showing cause — Order rejecting plaintiff's application falls under O. 38, R. 6 (2).

Order 38, R. 6 (2), Civil P. C., applies where on the application of the plaintiff an order for interim or conditional attachment is made, and after hearing both sides the Court withdraws the attachment. Where there is an order of interim attachment, on the plaintiff's application for attachment before judgment and the defendant has shown cause against it, the order of the Judge subsequently rejecting the plaintiff's application amounts to an order withdrawing the attachment made at the instance of the plaintiff when the application was made and consequently, falls under O. 38, R. 6 (2), and is as such appealable under O. 43, R. 1 (q). AIR (Vol 30) 1943 Bom 24 : 44 Bom LR 855 : 205 Ind Cas 100 (DB).

——O. 38, R. 6 — The defendant, instead of furnishing security, brought into Court what was the equivalent of attachment by depositing the value of the goods whose attachment was sought. The Court passed the final order thus: "I confirm the order of attachment. Money deposited in Court to remain as security. No order as to costs. Written statement in a week":

Held, that the final order passed by the Judge was an order of attachment, but that for the convenience of the defendants what was attached was not the goods themselves but their value in money. The order fell under R. 6 and not R. 5 of O. 38 and was, therefore, appealable. AIR (Vol 28) 1941 Sind 178 : ILR (1941) Kar 362 : 197 Ind Cas 291 (DB).

——O. 38, R. 6 — O. 38, R. 5, O. 43, R. 1 (q) — Attachment before judgment — Cause shown by defendant why he should not furnish security — Order accepting defendant's plea — Whether appealable.

Where in response to a notice issued to the defendant under O. 38, R. 5, Civil P. C., the defendant appears in Court and shows cause why no order for furnishing security should be passed against him and why no order should be passed directing the attachment of his property, the order of the Court accepting the contention of the defendant is an order that falls within O. 38, R. 6 (2), and from this order an appeal lies under O. 38, R. 1 (q), Civil P. C. AIR (Vol 19) 1932 All 269: (1932) ALJ 228: 140 Ind Cas 95 (DB).

——O. 38, R. 6 — Order under, wrongly passed under R. 5 — Appeal lies.

An unconditional attachment can be ordered under R. 6, only and where attachment is unconditional it may be taken that the order is under R. 6 even though the Judge passing the order purports to have acted under R. 5, and such an order is appealable under O. 43, R. 1 (q), C. P. Code. 107 Ind Cas 276 : AIR (Vol 15) 1928 Lah 445.

——O. 38, R. 6 — Combined order — Impropriety.

It is not altogether uncommon for Courts to pass one order, in anticipation as it were, combining together what really should be two separate and successive orders, namely, one for security and the other for attachment. By thus combining two orders in one, the procedure is sometimes shortened but only for the time being, for this shortening leads, more often than not, to endless complications. If on a question which relates to the competency of an appeal on a ground, such as that the order appealed against is not one under R. 6, a reasonable doubt arises, the benefit of that doubt should go to the appellant. 101 Ind Cas 9 : 31 CWN 432 : AIR (Vol 14) 1927 Cal 354 (DB).

3. Effect.

——O. 38, R. 6 — Attachment before judgment — Provisional order coming for being made absolute — Court directing defendant to furnish security, and on failure, property would be attached — Effect of.

Where, at the time when the provisional order for attachment before judgment has come before the Court for being made absolute, the Court directs the defendant to give security and says "failing which the property will be attached", all that the Court means is that the attachment on the property will be continued, that is to say, the rule will be made absolute unless the security is furnished within time allowed in which case the attachment will be discontinued. AIR (Vol 26) 1939 Bom 492 : 41 Bom LR 943 : 185 Ind Cas 225.

——O. 38, R. 6 — Surety — Death of principal before decree — Effect.

Where a person stands surety and renders himself liable for any decree that might be passed against his principal, the mere fact that the principal has died before decree is passed does not absolve the surety from the liability. 71 Ind Cas 46 : 14 PWR 1923 : AIR (Vol 11) 1924 Lah 428.

4. Insolvency.

——O. 38, R. 6 — Insolvent defendant — Prior attachment — Cannot prevail.

Where there has been an attachment before judgment but before the decree is passed the defendant is declared insolvent and the property then vests in the Official Receiver the plaintiff gains no right by the attachment and the claim of Official Receiver prevails. 117 Ind Cas 145: AIR (Vol 17) 1930 Sind 127 (DB).

5. Continuance of attachment.

——O. 38, R. 6 — Attachment before judgment — Continuance subsequent to decree — Application for execution within three years of decree — Necessity.

For continuance of an attachment before judgment beyond three years from the date of the decree an application for execution must be filed within that period otherwise the attachment lapses.

An attachment before judgment was effected on 24th January, 1934, in a suit in which a decree was subsequently passed on 19th September, 1934. An execution petition filed on 17th February, 1944, was held to be in time by reason of certain proceedings in insolvency and for scaling down of the debt. When the execution petition was held to be in time by the lower appellate Court, it directed the lower Court to allow the decree-holder an amendment of the execution petition by the insertion of a prayer for sale in pursuance of the attachment before judgment. On a contention that as the attachment before judgment had lapsed, the order allowing the amendment was without jurisdiction.

Held, that as the Full Bench ruling in (1944) 2 MLJ 192; ILR (1945) Mad 80 (FB), had not come into being when the execution petition was filed, it was assumed that no prayer for fresh attachment was necessary and that in the circumstances, the matter need not be interfered with in

revision. AIR (Vol 38) 1951 Mad 668: (1950) 2 MLJ 670.

——**O. 38, R. 6 — Continuance of attachment.**

Attachment before judgment continues in force until it is put an end to by the Court. 90 Ind Cas 545 : 1925 MWN 486 : AIR (Vol 12) 1925 Mad 1041 : 49 MLJ 88.

6. Mortgage.

——**O. 38, R. 6 — Mortgage suit — Other properties of mortgagor.**

Provided that circumstances exist which satisfy the Court as to the desirability of an attachment of properties other than the mortgaged ones, before judgment, in a mortgage suit, such attachment must be ordered when it is apparent that the mortgaged property does not provide a sufficient security for the loan and that the mortgagee will eventually have to claim a personal decree. 85 Ind Cas 94: 3 Pat 966 : 6 PLT 823: 1925 PHCC 63: AIR (Vol 12) 1925 Pat 291 (DB).

——**O. 38, R. 6 — Mortgaged property.**

Mortgaged property may be attached before judgment in a mortgage suit if the circumstances justify it. 84 Ind Cas 270: 2 Rang 362: 2 Bur LJ 159. AIR (Vol 11) 1924 Rang 361 (DB).

——**O. 38, R. 7.**

See also, Civil P. C., O. 21, R. 54.

——**O. 38, R. 7, S. 46 — Whether apply where application for attachment before judgment of property lying outside jurisdiction of Court is made.**

Order 38, R. 7, deals only with the manner of the attachment and it does not provide for the authority which will order the attachment or for the authority which will receive the order of attachment and make the actual attachment and S. 46 only applies for matters which arise after a decree has been made and the precept issued thereunder operates only for two months unless the time is extended by the Court sending the precept.

Hence O. 38, R. 7 and S. 46, Civil P. C., have no application to a case where application for attachment before judgment of property lying outside the jurisdiction of the Court is made and that Court sends the order of attachment for execution. AIR (Vol 28) 1941 All 212: 1941 OWN (HC) 550: 1941 AWR (HC) 135: (1941) ALJ 225: 195 Ind Cas 891.

——O. 38, R. 7 — As S. 46 of Civil P. C., does not deal with the manner of attachment, it is not made applicable to attachment before judgment by O. 38, R. 7. AIR (Vol 28) 1941 All 212: (1941) ALJ 225: 1941 OWN (HC) 550: 1941 AWR (HC) 135 : 195 Ind Cas 891.

——O. 38, R. 7 — When the prohibitory order under O. 21, R. 54 is proclaimed and affixed, the attachment is complete and valid. AIR (Vol 28) 1941 All 41: (1940) ALJ 894: 1940 AWR (HC) 598: ILR (1941) All 39: 192 Ind Cas 787 (DB).

——O. 38, R. 7 — Under O. 38, R. 7, the attachment before judgment must be effected in the same manner as the attachment in execution of a decree. AIR (Vol 26) 1939 Bom 508: 41 Bom LR 1104: 185 Ind Cas 655.

——O. 38, R. 7 — Where property is mentioned in application for attachment before judgment and order for attachment is made in terms of that application but the writ served by the Civil Court peon does not mention the property at all, the property cannot be said to be under attachment. AIR (Vol 26) 1939 Pat 81 : 5 BR 820 : 182 Ind Cas 743 (DB).

——**O. 38, R. 7 — Attachment — Execution of warrant of attachment, if judicial act.**

Quaere.— Whether the execution of warrant of attachment by a process server could be considered a judicial act in respect of which presumption that it took place at the earliest period of the day on which it took place, could be made. AIR (Vol 25) 1938 Nag 309 : ILR (1938) Nag 573 : 177 Ind Cas 971.

——O. 38, R. 7 — The mode of executing attachment before judgment is the same as the mode which is provided for in the statute for attachment after the decree is passed. AIR (Vol 21) 1934 Cal 251 : 37 CWN 1164 : 149 Ind Cas 1142 (DB).

——**O. 38, R. 7 — Scope.**

Rule 7 of O. 38 clearly refers to the mode of attachment and not to the way in which attachment ceases. 80 Ind Cas 106: 22 ALJ 823: 5 LRA Civ 605: 46 All 894 : AIR (Vol 11) 1924 All 860 (DB).

——**O. 38, R. 8.**

See also Civil P. C., O. 21, R. 58.

——**O. 38, R. 8, O. 21, R. 58 — Attachment before judgment — Objection — Investigation of, in accordance with O. 21, R. 58 — Objection by defendant can be investigated in accordance with O. 38, R. 8 — Decision as regards objection — Whether comes under S. 47 — Separate suit to assail decision.**

Where any objection is raised to attachment of certain property before judgment, the objection is to be investigated in accordance with the provisions of O. 21, R. 58, Civil P. C. There is nothing in R. 8, O. 38, to indicate that the Legislature intended to confine the operation of that rule only to claims preferred by persons who are not parties to the suit. Any objection raised by a defendant to attachment before judgment may also be investigated and decided by the Court in accordance with the provisions of R. 8, O. 38, Civil P. C. The decisions of the Court as regards the claim preferred to property attached before judgment is, however, not final and can be assailed by means of a separate suit instituted within the period of limitation. The decision of a claim in accordance with O. 38, R. 8, cannot be treated as a decision under S. 47, Civil P. C., for the simple reason that S. 47 comes into play only when there is an application for execution pending before the Court. AIR (Vol 24) 1937 All 635 : (1937) ALJ 705 : 1937 AWR (HC) 537 : 171 Ind Cas 409 (DB).

——**O. 38, R. 8, O. 21, R. 58 — Attachment before judgment — Claim, if should be preferred before judgment — Objection in execution — Whether can be entertained.**

There is nothing in O. 38, R. 8, Civil P. C., to show that the claim must be made before the decree is passed. Once the right to prefer a claim is recognized, it will evidently be an undue curtailment of that right to hold that it will not be entertained unless it is preferred before the decree is passed. The claimant may prefer to wait until the decree is passed, for the suit may be dismissed and the attachment will then cease ipso facto. Thus the effect of this rule is that the claim will have to be investigated whether it is preferred before or after the decree. It is not necessary for any person who has a claim to property attached before judgment to prefer a claim at that stage though he may do so if he wishes under the provisions of O. 38, R. 8. His failure to do so, however, does not necessarily amount to any negligence which would justify his subsequent claim being dismissed under the proviso to O. 21, R. 58 (1). The objection can be entertained by the Court even if preferred in execution

proceedings. AIR (Vol 24) 1937 Pat 245 : 3 BR 425 : 18 PLT 526 : 168 Ind Cas 364 (DB).

——O. 38, R. 8 — Attachment before judgment — Question whether attached debt is due to judgment-debtor, when to be considered.

When there is an attachment before judgment, the time for the consideration of the question whether anything is due to the judgment-debtor is when the order is about to be enforced. AIR (Vol 20) 1933 All 481 : 146 Ind Cas 457.

——O. 38, Rr. 8, 7 — Garnishee proceedings — Attachment of debt — Investigation into its existence — Procedure.

When a Court has attached a debt either before judgment or in execution of a decree it is not open to the Court to determine whether the debt is actually due or not. After attachment only two courses are open to it, either to sell the debt or to appoint a Receiver for its realisation. AIR (Vol 19) 1932 Mad 169 : 34 MLW 907: 61 MLJ 863: (1932) MWN 280: 136 Ind Cas 337 (1).

——O. 38, R. 8 — Questions to be decided — Possession — Title if necessary.

Although possession is the only question for decision of Court under O. 38, R. 8, if the particular circumstances necessitate the determination of question of title, the Court cannot be held to have exceeded its jurisdiction in going into the question of title. 119 Ind Cas 555 : 11 PLT 59 : AIR (Vol 16) 1929 Pat 747.

——O. 38, R. 8 — Question of fact and incidentally title.

Though it is certainly objectionable in summary proceedings such as are contemplated in Rr. 58 to 62 of O. 21 to decide intricate questions of law, there is nothing to prevent the Court from deciding a plain question of fact even though the decision thereof involves to some extent an enquiry into the title of the applicant. 98 Ind Cas 888: AIR (Vol 14) 1927 Sind 114.

——O. 38, R. 8 and O. 21, R. 63 — Order passed under O. 38, R. 8, does not govern O. 21, R. 63.

Order 38 only provides the mode of investigation into claims to property sought to be attached before judgment and an order passed under it cannot be said to determine the ownership of the property in dispute even for the purpose of the suit in connection with which it is made. The rule does not incorporate all the provisions of O. 21, and amongst them R. 63. 41 Mad 23: 5 LW 704: 39 Ind Cas 863: AIR (Vol 5) 1918 Mad 640 (DB).

——O. 38, R. 8 — Limitation Act, Arts. 11 and 13.

A suit to recover property released from attachment under O. 38, R. 8 does not fall under Arts. 11 and 13, Limitation Act. The suit is not one to set aside an order of a Civil Court within Art. 13 and the existence of the order releasing the attachment before judgment is no bar to it. 41 Mad 23: 5 LW 704: 39 Ind Cas 863 : AIR (Vol 5) 1918 Mad 640 (DB).

——O. 38, R. 9.

——O. 38, R. 9, O. 21, R. 55 — O. 38, R. 9, if exhaustive — If provides for what happens when suit is decreed — O. 21 R. 55, deals with what happens when decree in suit in which attachment before judgment was obtained is satisfied.

Order 38, R. 9, Civil P. C., is in fact not exhaustive. It provides for what is to happen upon two events, when the defendant furnishes the security or when the suit is dismissed. It does not provide and is not intended to provide for what happens when the suit is decreed. Order 38, R. 11 provides for that, so far as the actual attachment is concerned, and O. 21, R. 55 provides for what O. 38, R. 9 does not provide, namely, for what is to happen when the decree in a suit in which attachment before judgment was obtained is satisfied. AIR (Vol 28) 1941 Sind 13: ILR (1940) Kar 454: 192 Ind Cas 576 (DB).

——O. 38, R. 9 — Attachment before judgment, whether ceases on dismissal of suit by trial Court.

An attachment before judgment ceases once the suit is dismissed by the trial Court. AIR (Vol 24) 1937 All 682 : (1937) ALJ 761: 1937 AWR (HC) 675: 171 Ind Cas 765.

——O. 38, Rr. 9, 5 — Applicability and scope of O. 38, R. 9 — Surety bond falling under R. 5 — Suit dismissed by trial Court — Appellate Court decreeing it — Surety, whether discharged.

Order 38, R. 9, Civil P. C., does not say that the surety shall be relieved from his liability when the suit is dismissed, but it says that the attachment shall be withdrawn under two circumstances: (1) when the surety furnishes the security required or (2) when the suit is dismissed, and, therefore, the liability of the surety depends upon the terms of the bond.

It is not reasonable to suppose that the surety executing a bond under O. 38, R. 5, should be released merely because the lower Court in the first instance made a mistake which was corrected by the higher Court, although he would be bound if the lower Court in the first instance had not made a mistake and there was no need for the higher Court to correct it. AIR (Vol 24) 1937 Sind 272: 31 SLR 165: 171 Ind Cas 606 (DB).

——O. 38, R. 9, O. 9, R. 9 — Attachment before judgment — Dismissal of suit for default — Whether terminates attachment — Restoration of suit —Security bond given before dismissal, whether can be enforced in execution of final decree.

In a suit on a promissory note an attachment before judgment of some money was obtained. A person gave security and the attachment was raised. The suit was subsequently dismissed for default but was afterwards restored to the file and decreed in favour of the plaintiff:

Held, that when the suit was restored all ancillary orders including the proceedings for attachment before judgment must be deemed to have been also restored, and the decree-holder was entitled to enforce the provisions of the security bond against the surety in execution of the decree passed in the suit after restoration. AIR (Vol 22) 1935 Mad 365: 41 MLW 479: (1935) MWN 205: 68 MLJ 444: 58 Mad 721: 157 Ind Cas 528 (FB).

——O. 38, R. 9 — Attachment before judgment — Duration — Dismissal of suit for default and subsequent restoration — Attachment, whether subsists.

An attachment before judgment ceases to exist when the suit is dismissed for default and does not revive on the suit being restored to the file. It matters not whether the suit is restored on the same date or at a later date.

The last words of O. 38, R. 9, Civil P. C., are not so imperative as to render an attachment before judgment a perpetual attachment in the absence of an order removing the same. The object of the rule is to provide that when a suit is dismissed, the Court suo motu or on application, should at the same time pass an order that the attachment be withdrawn, but, it was never intended by the rule to provide or effect, that when a suit dies, interlocutory proceedings that are ancillary to the main purpose of the suit should not die with it. AIR (Vol 18) 1931 Rang 281 : 9 Rang 472 : 134 Ind Cas 748 (DB).

——O. 38, R. 9 — Continuance of attachment — Dismissal of suit.

Upon the dismissal of a suit, the attachment before judgment necessarily ceases under O. 38, R. 9, even though the Court did not pass an order withdrawing it. AIR 1928 Mad 940: 111 Ind Cas 887, Overruled. 53 Mad 334 : 31 MLW 643 : AIR (Vol 17) 1930 Mad 514 : 58 MLJ 675 (FB).

——O. 38, R. 9 — Security bond — Cessation of liability.

Liability on a bond executed in pursuance of the provisions of O. 38, R. 9, ceases as soon as the suit is dismissed by trial Court. 116 Ind Cas 473: AIR (Vol 16) 1929 Rang 94.

——O. 38, R. 9 — Abatement of suit.

When a suit abates and comes to an end on the death of a party, the attachment before judgment dies with it. 109 Ind Cas 164 : 47 CLJ 282 : AIR (Vol 15) 1928 Cal 234 (DB).

——O. 38, R. 9 — Dismissal of suit.

When a suit is dismissed the attachment before judgment necessarily comes to an end with the dismissal of the suit. 113 Ind Cas 63 : 1928 MWN 710: AIR (Vol 15) 1928 Mad 976 (DB).

——O. 38, R. 9 — Dismissal for default.

The dismissal of the suit for default does not necessarily entail the withdrawal of the attachment before judgment without a specific order of the Court for the purpose. R. 9, O. 38, makes it obligatory on the Court to pass an order withdrawing the attachment when security is furnished or when the suit is dismissed. As soon as a suit is dismissed the persons against whom an order for attachment was made has simply to apply to the Court for withdrawing the order. The application may be oral or in writing and the Court, when such an application is made, is bound to grant it unless there are circumstances which justify postponing the granting of the prayer or refusing it, but if this is not done the dismissal of a suit does not amount to the withdrawal of the attachment before judgment and, if the order of dismissal is set aside on appeal or by restoration and a decree is passed in favour of the plaintiff, the attachment before judgment would enure for his benefit. The argument founded on the analogy of R. 57, O. 21, has no application, its provisions being different. 10 All 506, Diss. from. 111 Ind Cas 887 : 1928 MWN 466 : 28 MLW 565: AIR (Vol 15) 1928 Mad 940 : 56 MLJ 70 (DB).

——O. 38, R. 9 — Surety — Dismissal — Reversal — No revival.

Liability of surety for removal of attachment before judgment in a suit ceases on dismissal of the suit. The surety is not liable if the suit is decreed in appeal. The word "suit" does not include appellate proceedings in such a case: 5 Rang 492: 105 Ind Cas 540: AIR (Vol 14) 1927 Rang 310 (DB).

——O. 38, R. 9 — Limitation.

It is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of the suit and the reversal of the dismissal on appeal does not operate to revive the attachment which has been cancelled. When, therefore, in execution proceedings a fresh attachment is effected, objector has a right to prefer a fresh claim and the period of one year should be counted from the date when his fresh claim is rejected. 87 Ind Cas 756: AIR (Vol 12) 1925 Cal 1147 (DB).

——O. 38, R. 9 — Continuance of attachment.

Held by the majority of the Full Bench (Schwabe C. J. and Wallace J., dissenting). An attachment before judgment becomes an attachment in execution when an application for execution of the decree is admitted.

(Per Wallace J. Attachment before judgment ceases only by a formal order withdrawing it.) But if the execution petition is dismissed for want of due diligence in presenting the necessary papers to the Court the attachment of the property comes to an end. (42 Mad 1, Overruled.) 79 Ind Cas 144 : 34 MLT 118 : 1924 MWN 392: 47 Mad 483 : AIR (Vol 11) 1924 Mad 494 : 46 MLJ 415 (FB).

——O. 38, Rr. 9 and 11 — Attachment before judgment — Dismissal of suit — Appeal — Revival of attachment.

On the dismissal of a suit, an attachment before judgment ipso facto comes to an end and does not revive when an appeal is lodged. 45 Cal 780: 22 CWN 927: 44 Ind Cas 229: AIR (Vol 5) 1918 Cal 39 (DB).

——O. 38, R. 10.

1. Scope and applicability.
2. Effect on rights of third persons.
3. Effect on right of other decree-holders.
4. Death of judgment-debtor.

1. Scope and applicability.

——O. 38, R. 10 — The principle laid down in O. 38, R. 10, is not limited to attachment before judgment. It would apply to all attachments whether before judgment or in course of execution. AIR (Vol 30) 1943 Bom 45: 45 Bom LR 208: 206 Ind Cas 567.

——O. 38, R. 10 — Alienation after attachment — S. 64.

Section 64 makes no distinction between attachment before or after judgment. AIR (Vol 16) 1929 Cal 494: 33 CWN 805 (DB).

——O. 38, R. 10 — Applicability.

The procedure to be followed in investigation of claims under the provisions of O. 38, is the same as the procedure to be followed under O. 21, R. 58. So when at the date of attachment a person had no interest in nor was possessed of the properties attached, he cannot proceed under O. 38, R. 10. AIR (Vol 16) 1929 Cal 162: 48 CLJ 594: 115 Ind Cas 268.

——O. 38, R. 10 — Effect.

An attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal right in the attaching creditor to have the property earmarked for the satisfaction of any decree he has obtained or may obtain and it is in no sense to be regarded as the inception of execution on behalf of the attacher. Much less does it enure to create any such right for the benefit of other creditors seeking for decrees or for execution of decrees or for rateable distribution under Section 73. And it then can be used for one purpose only, viz., to defeat and render void any private alienation made during its continuance. AIR (Vol 10) 1923 Mad 505 : 44 MLJ 413 : 46 Mad 506: 17 MLW 390: 32 MLT 198: 72 Ind Cas 820 (FB).

2. Effect on rights of third persons.

——O. 38, R. 10 — Scope — Order for attachment before judgment — Sale-deed executed prior to but registered after — Title of purchaser — Priority over that of purchaser in execution.

An attachment of property before judgment cannot prevail against a sale-deed in respect of that property executed before the order for attachment, though the deed is registered only after such order for attachment. A sale in execution in pursuance of such attachment cannot confer on the purchaser in execution any title which can prevail over the title of the purchaser under the deed of sale executed before the attachment order, as the latter

gets a perfectly valid title to the property which cannot be displaced by the attachment. AIR (Vol 37) 1950 Pat 166 (DB).

——O. 38, R. 10 — Order 38, R. 10 is to be read together with S. 64, Civil P. C. An attachment order under O. 38, R. 10, before judgment is not effective as against rights subsisting at the date of the attachment. AIR (Vol 30) 1943 Bom 27: 44 Bom LR 874: 204 Ind Cas 340.

——O. 38, R. 10, S. 64 — Attachment after execution of sale deed — Subsequent registration — Attachment, if affects operation of sale-deed — S. 64, construction of.

Where, after a property was sold by a duly executed sale-deed, it was attached in a suit by a creditor of the vendor and subsequent to the attachment, the sale-deed was registered:

Held, that the sale-deed operated from date of its execution and not of its registration and the attachment before registration did not affect it and that registration being only a necessary solemnity only for enforcement of the sale, it did not suspend the operation of the sale.

Held, further, that O. 38, R. 10, Civil P. C., in any event prevented S. 64 avoiding this transfer because even assuming that the transfer was not complete until registration, the deed of sale conferred rights, one right being to have the deed registered, and an attachment before judgment could not, under R. 10, affect those rights, and consequently, S. 64 could not be so construed as to make the registration, and thereby the perfecting of the transfer void, because so to read S. 64 would be to violate R. 10, because thereby one would be affecting the rights springing from the sale-deed by preventing the registration of that sale-deed. AIR (Vol 24) 1937 Nag 143: ILR (1939) Nag 266: 174 Ind Cas 321.

——O. 38, R. 10 — The attachment before judgment is made in the interests of the decree-holder in order to prevent the judgment-debtor from disposing of the property before the sale. It does not operate against any other creditor of the judgment-debtor. AIR (Vol 23) 1936 Cal 112: 167 Ind Cas 455.

——O. 38, R. 10 — Contract of sale before attachment — Subsequent sale in pursuance of contract — Validity.

The word "rights' in O. 38, R. 10, Civil P. C., is not restricted to rights in property. The general rule laid down in S. 64, must be read subject to the special rule laid down in O. 38, R. 10. Where a contract of sale between the parties is entered into before attachment, the right to enforce the contract is unaffected by the attachment and the subsequent sale in pursuance of the contract is not void under S. 64. AIR (Vol 23) 1936 Nag 163: ILR (1936) Nag 172: 166 Ind Cas 950 (2).

——O. 38, R. 10 — Order of attachment of moveables — Right of mortgagee — If affected.

An attachment before judgment does not affect the rights of a mortgagee of immoveables. AIR (Vol 18) 1931 Rang 49: 8 Rang 494 (DB).

——O. 38, R. 10 — Transactions prior to attachment.

According to O. 38, R. 10 attachment before judgment does not affect the rights existing prior to the attachment of persons not parties to the suit. Therefore property transferred to stranger few days before the actual attachment before judgment in a suit would not be affected by the attachment. Such a transfer cannot be said to be contrary to such attachment. AIR (Vol 15) 1928 Bom 545: 30 Bom LR 1488: 115 Ind Cas 414 (DB).

——O. 38, R. 10 — Agreement to sell.

An attachment before judgment shall not affect the rights existing prior to the attachment of persons not parties to the suit. Thus, where an agreement for sale was entered into before the attachment took place, the attachment cannot affect the purchaser's right to a conveyance under the agreement. AIR (Vol 15) 1928 Pat 199: 9 PLT 5: 106 Ind Cas 356 (DB).

——O. 38, R. 10 — Scope — Rights in rem.

Order 38, R. 10 is not limited to rights in rem. AIR (Vol 3) 1916 Cal 927: 23 CLJ 115: 21 CWN 158: 34 Ind Cas 953 (DB).

3. Effect on right of other decree-holders.

——O. 38, R. 10 — Applicability, where property attached before judgment is cash — Attachment before judgment — Priority.

The principle of O. 38, R. 10, Civil P. C., also applies to a case where property attached before judgment is cash. Where, therefore, a sum of money is attached before judgment by a person in his suit and another decree-holder attaches the same sum in execution of his decree, the person who has obtained attachment before judgment cannot claim priority after his suit is decreed. AIR (Vol 27) 1940 Oudh 80: 15 Luck 287: 1939 OWN (CC) 1107: 1939 AWR (HC) 320: 185 Ind Cas 301.

——O. 38, R. 10, O. 34, R. 6 — Attachment before judgment — Attachment in execution by another subsequently — Former, if prevails over latter.

Under O. 38, R. 10, Civil P. C. attachment before judgment shall not bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree. The order, therefore, to the effect that attachment before judgment shall prevail over attachment in execution of the decree obtained by the petitioner is contrary to law. The effect of attachment before judgment is to prevent alienation of the property by the judgment-debtor and does not confer any priority of title on the attaching creditor. AIR (Vol 21) 1934 Cal 426: 59 CLJ 18: 151 Ind Cas 317 (DB).

——O. 38, R. 10 — Attaching creditor consenting to sale of property — Agreement, if should be registered.

An attachment before judgment does not create any title but merely prevents any alienation to the prejudice of the attaching creditor. Consequently, an agreement by the attaching creditor agreeing to sale of the property need not be registered. AIR (Vol 21) 1934 Pat 413: 13 Pat 735: 151 Ind Cas 683 (DB).

——O. 38, R. 10 — Where the judgment-debtor deposits certain amount in Court to satisfy the decree of one decree-holder, and another creditor of the same judgment-debtor attaches the money before judgment and obtains a decree, latter's remedy to obtain the money in satisfaction of his own decree is to apply for execution of his own decree and ask for transfer of the amounts to his own suit and for payment to him. He has no right to apply for execution in the suit of the first decree-holder and claim the money towards his own decree. AIR (Vol 13) 1926 Mad 1104: 51 MLJ 436: 1926 MWN 683: 97 Ind Cas 1020.

——O. 38, R. 10 — Attachment of debt — Attached debt ripening into a decree — Attaching creditor can execute that decree and realise the amount of the debt attached.

A attached before judgment a debt due from C to B and got a decree against B. Then B sued C and obtained a decree under which C paid up the amount to B;

Held, that A's right to recover the debt was not destroyed and he could recover it by executing the decree passed in B's favour.

Venkatasubba Rao, J.— The attachment before judgment attached to be B's decree and A could execute it as assignee.

The attachment placed on the debt fastens itself on the decree without any further act on the part of the attaching creditor.

Reilly, J.— A must attach B's decree before executing it.

Attachments in execution or before judgment are in their nature merely means of getting the property concerned into the control of the Court and of restraining the party against whom they are directed from transferring, delivering or destroying the property. By special provisions in R. 53 of O. 21 an attachment in execution of any of certain special classes of decrees — not all decrees— carries with it a special privilege, namely, the right to execute the decree attached. This is a peculiar privilege, in itself quite foreign to the idea of attachment and given only by special provisions. Unless those special provisions are complied with, that special privilege cannot be acquired. AIR (Vol 13) 1926 Mad 371: 50 MLJ 79: 92 Ind Cas 1021 (DB).

——O. 38, R. 10 — Rights under attachment — Decree-holder not affected.

A person obtained an attachment before judgment of some property belonging to the person he was suing and got that money paid into Court. The news of money having been paid into Court came to the ears of a Small Cause Court decree-holder and he put in his attachment for that money.

Held, that the decree of the Small Cause Court decree-holder should be satisfied in full and the remaining should go to the other person who got his decree subsequently. A mere attachment does not invest the person making the attachment with a preferential right. AIR (Vol 13) 1926 Rang 85: 91 Ind Cas 93.

——O. 38, R. 10 — Attachment before judgment — No fresh attachment on passing of decree — Attachment by another decree-holder — Payment.

Pending a suit, plaintiff obtained attachment before judgment of certain perishable property which was sold and the sale proceeds set to the credit of the suit. The suit ended in a decree in April 1916. Before plaintiff could execute the decree, defendant, who had already obtained a decree against the judgment-debtor in another suit, attached the amount and took away the money in execution of his decree. Plaintiff having sued to recover the amount that would have been paid to him had the sum attached to be rateably distributed, the Court dismissed the suit.

Held, rejecting the application in revision that there was no material irregularity in the proceedings of the lower Court in dismissing the suit, since the plaintiff omitted to confirm the previous attachment by speedily applying to execute the decree. AIR (Vol 8) 1921 Bom 219: 22 Bom LR 1407 (DB).

——O. 38, R. 10 — Attachment by another decree-holder.

Where property attached before judgment was in Court and decree was passed in the suit but the decree-holder did not apply for execution of his decree, and the holder of another decree applied for attachment of the property.

Held, that the Court was entitled to order the attachment and although in equity it ought to have given notice to the other decree-holder at whose instance the property had been attached before judgment, there is nothing in the Code requiring such notice and the failure to give such notice does not merit revision under C. P. C., S. 115. AIR (Vol 8) 1921 Bom 219: 45 Bom 360: 59 Ind Cas 713 (DB).

——O. 38, R. 10 — Execution sale — Not affected.

Where subsequent to an attachment before judgment the property is sold in execution of a decree held by another person, the sale confers a fully valid title on the purchaser notwithstanding that only symbolical possession is given to him. AIR (Vol 8) 1921 Pat 409: 2 PLT 240: 1921 PHCC 205: 61 Ind Cas 922 (DB).

4. Death of Judgment-debtor.

——O. 38, R. 10 — Co-parcener's interest — Attachment and decree — Operation of survivorship modified.

An attachment before judgment followed by a decree prior to the judgment-debtor's death has the effect of precluding the accrual of title by survivorship as against the attaching creditor in the same way as an attachment after decree. The operation of survivorship is not, however, altogether stopped by reason of the attachment, whether before or after decree, for if the attaching creditor does not execute his decree or if the entire property is not needed to satisfy the decree, then the property or the surplus, as the case may be, will go to the other co-parceners. 38 Bom 105, Dissented from.

Wallace, J.— The accrual of survivorship is not prevented but operates subject to the prior rights of the attaching decree-holder and other decree-holders who are entitled to take advantage of the attachment to have their decree debts satisfied in execution proceedings against what was the share of the deceased judgment-debtor co-parcener. AIR (Vol 13) 1926 Mad 72: 1925 MWN 832: 92 Ind Cas 504: 49 MLJ 616 (DB).

——O. 38, R. 11.

——O. 38, R. 11 — Order 38, Rule 9 is not intended to provide for what happens to the attachment before judgment where the suit is decreed. Order 38, R. 11 provides for that so far as the actual attachment is concerned. AIR (Vol 28) 1941 Sind 13: ILR (1940) Kar 454: 192 Ind Cas 576 (DB).

——O. 38, R. 11, S. 73 — Decree-holder attaching monies belonging to judgment-debtor before judgment but not taking steps to realise decree after obtaining decree — Another decree-holder also attaching same monies in suit against same judgment-debtor and applying to Court after obtaining decree to direct person having such monies to bring amount into Court — Amount paid in Court — First decree-holder, held not entitled to rateable distribution.

Order 38, R. 11, Civil P. C., does not excuse an application for execution in any circumstances whatever: it only says that, upon an application for execution, re-attachment of the property need not be applied for if the property has already been attached under the order.

Where a decree-holder A attaches before judgment certain monies of the judgment-debtor lying in the hands of C but takes no steps after the decree is passed to realize the decree and a subsequent decree-holder B who also had attached the same amount before judgment in his suit against the same judgment-debtor applies after obtaining his decree for directing C to bring the amount into the Court, and in pursuance of the Court's order, C does so, A is not entitled to rateable distribution of the amount as he had not applied for execution of his money decree before the amount was paid into the Court. AIR (Vol 26) 1939 Rang 20: ILR (1938) Rang 565: 179 Ind Cas 987.

——O. 38, R. 11 — When the bankruptcy of a judgment-debtor supervenes after seizure of his goods but before their sale, the Sheriff must hand over the property to the Official Assignee and he is not

entitled to poundage. (1937) ILR (1937) 2 Cal 1: 40 CWN 1317.

——O. 38, R. 11 — Attachment before judgment — Declaration of intention to execute attached decree — Necessity of — Intention, how can be inferred.

There must be some unmistakable declaration of the decree-holder's intention to execute the decree, before an attachment before judgment can become an attachment in execution of the decree. No doubt in ordinary cases such an election or declaration of intention would be made by presenting an execution application. But it is not necessary that in every case without exception it should be done in this manner and in no other. If intention to execute can be inferred from other circumstances, it is sufficient. AIR (Vol 24) 1937 Mad 84: 173 Ind Cas 468.

——O. 38, R. 11 — There is nothing in R. 11, O. 38, Civil P. C., to give colour to the view that for the purposes of O. 21, R. 57, "attached in execution" is a phrase that covers "attachment before judgment". AIR (Vol 24) 1937 Pat 626: 18 PLT 585: 16 Pat 589: 4 BR 123: 172 Ind Cas 193 (DB).

——O. 38, R. 11 — Decree in suit — Attachment, if continues.

An appeal from an order of attachment before judgment does not become infructuous on the passing of a decree in the suit inasmuch as under O. 38, R. 11, Civil P. C., the attachment continues to exist even after the passing of the decree. AIR (Vol 20) 1933 Cal 757: 37 CWN 978: 58 CLJ 289: 60 Cal 1351: 147 Ind Cas 924 (DB).

——O. 38, R. 11 — Re-attachment.

An attachment before judgment enures even after the decree. Where the property is under attachment before judgment under Order 38, Rule 11, it is not necessary upon an application for execution to apply for re-attachment. The property can be sold without such an attachment. AIR (Vol 16) 1929 Bom 455: 31 Bom LR 1101.

——O. 38, R. 11 — Continuation of attachment — O. 21, R. 57 — Attachment before judgment — Decree — Execution application — Dismissal — Effect of.

The attachment before judgment is converted after decree into an attachment in execution and the provisions of Order 21, Rule 57 will apply. But in order that the attachment before judgment should come to an end under O. 21, R. 57, it is necessary that the decree-holder should apply for execution by sale of the attached property and his application should be dismissed for default. Where the decree-holder endeavoured to execute the decree by sale of moveable property only and not of the immovable property attached, and though he asked for a share in the proceeds of the sale of the immovable property in execution of the decree got by another decree-holder, he had not himself asked for sale of the immovable property attached, and the applications were disposed of.

Held, that the facts did not satisfy the conditions laid down by O. 21, R. 57 as there had been no default on the part of the decree-holder so far as the execution in regard to the immovable property was concerned, and the decree-holder's request that he should share rateably in the proceeds of the sale of the property already under attachment could not be regarded as amounting to an application for sale of the property attached before judgment in his own suit. AIR (Vol 16) 1929 Bom 321: 119 Ind Cas 769: 53 Bom 543: 31 Bom LR 652.

——O. 38, R. 11 — Attachment before judgment — Decree — Execution application — Dismissal — Effect of.

Order 21, Rule 57 was intended to provide a remedy for the grievance or inconvenience which is apt to arise, where, after an attachment in execution, the application for execution cannot further be proceeded with by reason of the decree-holder's default. And it is no part of the intention of this rule to say that an attachment before judgment, which existed before any application could be made in execution, and which prima facie would continue to have effect if no application for execution had been made should fall to the ground merely because a subsequent application for execution has come to nothing. AIR 1924 Mad 494, not Foll. AIR (Vol 16) 1929 Cal 465: 119 Ind Cas 113: 56 Cal 416 (DB).

——O. 38, R. 11 — A re-attachment in execution is not of itself a waiver or abandonment of attachment before judgment. AIR (Vol 16) 1929 Cal 465: 119 Ind Cas 113: 56 Cal 416 (DB).

——O. 38, R. 11 — No merger.

The attachment before judgment does not merge in the subsequent attachment and become subject to all the infirmities of the subsequent attachment. The effect of two attachments on the same property is that the property is under attachment but a person entitled to the benefit either of the attachments, remains, in the absence of abandonment entitled to it. No doctrine of merger is applicable. AIR 1924 Mad 494, Diss. from. AIR (Vol 16) 1929 Cal 465: 56 Cal 416: 119 Ind Cas 113 (DB).

——O. 38, R. 11 — Revival.

Where a person obtains attachment before judgment and a decree is passed subsequently and another person in execution of his decree attaches the same property and sells it, but the sale is not confirmed, the attachment before judgment again revives and it is not necessary to re-attach the property over again in execution of the decree passed. AIR (Vol 14) 1927 Cal 240: 44 CLJ 553: 99 Ind Cas 895 (DB).

——O. 38, R. 11 — Rateable distribution — Single fund — Attachment by several.

Moneys attached before judgment by a number of creditors, and realised before any of them obtained decrees, should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees if they have obtained decrees before any of the others apply for payment. Priority of attachment by itself confers no prior right. AIR (Vol 9) 1922 Mad 236: 15 MLW 531: 1922 MWN 262: 31 MLT 70: 68 Ind Cas 714.

——O. 38, R. 11 — Scope and effect of.

Property attached before judgment is not always property attached "in execution of a decree", within the meaning of Article 11. O. 38, R. 11, does not mean that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree for the plaintiff either within the meaning of Art. 11 of the Limitation Act or of O. 21, R. 57, as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached property without a fresh attachment. Where, however, there is an order in execution for the sale of the attached property, that order proceeds upon the footing that the property is to be considered as attached in execution by virtue of R. 11, and a claim put in after that order may properly be regarded as

a claim to property attached in execution of a decree within the meaning of Art. 11. Cases not governed by Art. 11 must be governed by Art. 120. AIR (Vol 8) 1921 Mad 163: 41 MLJ 252: 70 Ind Cas 439: 44 Mad 902: 14 MLW 645: 1921 MWN 569 (FB).

——O. 38, R. 11 — Effect.

The effect of Rule 11 is to give the same operation to an attachment before judgment after decree is passed to an attachment after judgment. AIR (Vol 8) 1921 Pat 140: 62 Ind Cas 33: 2 PLT 719: 6 PLJ 332 (DB).

——O. 38, R. 11 — Effect of order of attachment.

An attachment before judgment is not application for execution and an attaching creditor has therefore no right to claim rateable distribution nor the attachment implies that it was made on an application for execution; it simply prevents alienation. (1910) 34 Mad 25: 8 MLT 226: (1910) MWN 688: 7 Ind Cas 856 (DB).

——O. 38, R. 11 — (Ss. 63, 490, 285 old Code) — Attachment before judgment — Effect of — Sale by inferior Court — Nullity — Where the property is placed under attachment before judgment it is not necessary to re-attach it after the passing of the decree.

Where property had been attached before judgment by the Subordinate Judge the decree being passed afterwards, and the property was sold in execution of a Small Cause Court decree by the Munsif to whom the decree had been transferred, held that a re-attachment by the Subordinate Judge being unnecessary the Munsif had no jurisdiction to sell the property pending attachment by a higher Court and the sale was a nullity. (1909) 6 ALJ 703: 3 Ind Cas 31: 31 All 527 (529) (DB).

——O. 38, Rr. 11, 12 (Ss. 489, 490, 425 old Code) — Attachment before judgment effect of — Realization in execution — S. 490, effect of — No priority to the decree-holder who had attached before judgment.

The object and effect of an attachment before judgment is simply to safeguard the property attached so as to enable the plaintiff to realize the amount of his decree if he should get one. Though he has a security he has no charge on the property which remains that of the defendant available for other decree-holders. Nor does a decree following such attachment constitute a plaintiff a secured creditor; but the latter must, as any other creditor, apply for execution from which application he is not exempted by Section 490 of the C. P. C. In short a plaintiff decree-holder who has attached before judgment has not, by reason of such attachment or process incidental thereto, any right to be treated preferentially to other judgment-creditors. There must be realization in execution to give right of priority. (1906) 10 CWN 634: 33 Cal 639 (643).

——O. 38, R. 12.

——O. 38, R. 12 — 'Agriculturists', meaning of — Persons possessing large extents of land cultivated by tenants, whether 'agriculturists'.

The word 'agriculturist' in O. 38, R. 12, Civil P. C., must be interpreted in the same sense in which it is used in Ss. 60 and 61, and it means a tiller of the soil who is unable to maintain himself otherwise.

Where, therefore, a person possesses large extents of land most of which is cultivated by tenants, he cannot be deemed to be an agriculturist. AIR (Vol 25) 1938 Mad 922: 48 MLW 380: (1938) 2 MLJ 487: (1938) MWN 1139 (2): 178 Ind Cas 679.

——O. 38, R. 12 (S. 490 old Code) — Attachment order — How far continues.

An attachment before judgment continues in force even if after the decree is passed, unless the plaintiffs intention of its abandonment is proved or can be gathered. Re-attachment after judgment being superfluous is not the proof of the abandonment. (1912) 16 Ind Cas 387 (Mad) (DB).

——O. 38, R. 13.

——O. 38, R. 13 — Retrospective effect.

Act 1 of 1926 by which Rule 13 was added to O. 38, being a declaratory Act, the usual presumption that an Act is not retrospective does not apply. AIR 1925 Mad 589, held no longer good law. AIR (Vol 15) 1928 Mad 1173: 55 MLJ 382: 28 MLW 344: 113 Ind Cas 416.

——O. 39.

See also, Civil P. C., Ss. 94, 95 and 151.

——O. 39 — Applicability — Conditions.

For the applicability of O. 39, C. P. Code, the damage suggested or alleged must be to the property which is the subject-matter of the dispute in the suit in which the application for injunction is made. AIR (Vol 37) 1950 All 444 : 1950 AWR 338.

——O. 39 — Inherent jurisdiction to grant injunction apart from provisions of. AIR (Vol 36) 1949 Mad 104 : (1948) 2 MLJ 188.

——O. 39 and S. 151 — Temporary injunction — Power of Subordinate Courts to grant ex debito justitiae.

The Subordinate Courts have no inherent jurisdiction to grant a temporary injunction ex debito justitiae. When a case cannot be brought within the four corners of O. 39, C. P. Code, which expressly deals with injunctions, the inherent jurisdiction of the Court cannot be invoked to add to the powers thus conferred. AIR (Vol 35) 1948 Mad 528: (1948) 1 MLJ 355 : 61 LW 358 : 1948 MWN 329.

——O. 39 — An order under O. 39, Civil P. C., granting or refusing a temporary injunction, which does not bar a party from having resort to procedure prescribed by law is not a final order within the meaning of Cl. 30, Letters Patent (All). AIR (Vol 28) 1941 All 367 : (1941) ALJ 508 : 1941 AWR (H C) 258 : 1941 RD 769 : ILR (1941) All 666 : 197 Ind Cas 289 (DB).

——O. 39 — Injunction — X and Y agreeing in case of dispute to bring suit at A — X filing suit at B — Y then filing suit at A.

Held, that an injunction in such a case does not come within the four corners of O. 39. The Court can, however, issue an injunction under the inherent powers. AIR (Vol 27) 1940 All 241 : (1940) ALJ 188 : ILR (1940) All 232 : 1940 AWR (H C) 178 : 189 Ind Cas 268 (DB).

——O. 39 — Connected suits — Same question in issue — Appeal in one suit only — Stay:

Held, that the Court had no power to grant an injunction staying execution of the mortgage decree under Ss. 94 or 151 or under O. 39 or 41, R. 5, Civil P. C. AIR (Vol 23) 1936 Mad 276: (1936) MWN 51: 70 MLJ 257: 43 MLW 383: 59 Mad 744: 161 Ind Cas 721 (DB).

——O. 39 — Wrongful injunction — Suit for damages, when maintainable.

Where an injunction is issued against a person and it is afterwards discharged, he must, in order that he may get damages, prove that he has suffered loss by his inability to do one or more things which he was restrained to do by the injunction. The fact that an injunction if made against a person damages his character and his business is not enough.

The discretion of the Court both in giving damages and in ordering an enquiry is wide, but it is controlled by the ordinary principles applicable to

the award of damage. AIR (Vol 49) 1932 Cal 695: 36 CWN 320: 59 Cal 1082: 139 Ind Cas 515 (DB).

——O. 39 — A Court is not powerless to issue an injunction restraining a defendant from proceeding with a suit in another Court, merely because that defendant is not within the jurisdiction. AIR (Vol 18) 1931 Cal 279: 57 Cal 1280: 130 Ind Cas 252.

——O. 39 — Execution of decree — Cannot be restrained.

A Court is not competent to grant a temporary injunction restraining the execution of a decree passed by a competent Court either under O. 39 or S. 151 and if such injunction has been granted, the remedy of the aggrieved party is not by appeal but by revision. AIR (Vol 14) 1927 Mad 687: 38 MLT 358: 102 Ind Cas 700: 26 MLW 899.

——O. 39 — Liquidation proceedings — Applicability.

O. 39 is applicable to proceedings in liquidation, but the mere fact that liquidation proceedings are pending would not give a liquidation Court jurisdiction to act under O. 39, unless the subject-matter is in dispute. AIR (Vol 13) 1926 Lah 525: 26 PLR 803: 98 Ind Cas 310 (DB).

——O. 39 — Scope.

S. 94 is governed by O. 39. AIR (Vol 13) 1926 Mad 258: 23 MLW 85: 1925 MWN 886: 92 Ind Cas 615.

——O. 39 — A Sub-Judge could issue a temporary injunction staying the execution of a decree proceeding in a Munsif's Court. The C. P. Code is not exhaustive and the Court has inherent jurisdiction to act ex debito justitiae, in order to do that real and substantial justice for the administration of which alone it exists. AIR (Vol 10) 1923 Lah 144: 73 Ind Cas 909 (DB).

——O. 39, R. 1.

See also Civil P. C., S. 151 and O. 39, R. 2.

1. Appeal.
2. Applicability and scope.

See also N. 12.

2A Arbitration.
3. Discretion of Court.
4. Duty of Court.
5. Disobedience.
6. Duration.
7. Execution proceedings.

See also N. 7A.

7A. Interpretation.
8. Persons beyond jurisdiction.
9. Power of High Court.
10. Revision.
11. Specific performance.
12. When granted.

See also Note 2.

1. Appeal.

——O. 39, R. 1 — Suit for specific performance of contract of sale — Plaintiff in possession — Trial Court granting temporary injunction restraining defendant from interfering with plaintiff's possession — Interference in appeal.

The plaintiff brought a suit for enforcement of his contract of sale dated January 25, 1941, against the defendant and for an injunction restraining him from interfering with his possession. He also, by way of a separate petition, prayed for a temporary injunction. The trial Court having found that the plaintiff was in possession in part performance of the agreement to sell on January 25, 1941 passed an order of temporary injunction in his favour :

Held, that as the plaintiff was in possession and it was not certain that he will not succeed in obtaining permanent injunction and as the suit was likely to be disposed of soon, it was not necessary to interfere with the order passed by the lower Court. AIR (Vol 31) 1944 Mad 254: (1944) 1 MLJ 51: 1944 MWN 71: 57 MLW 150 (1): 220 Ind Cas 174.

——O. 39, R. 1 — Judge (Original Side) refusing interim injunction — Appeal.

An appeal lies from the refusal of a Judge of the High Court (Original Side) to grant an interim injunction. But what the Court of Appeal has to consider is simply whether or not the Judge who dealt with the matter properly exercised the discretion which he undoubtedly possessed. AIR (Vol 21) 1934 Cal 713: 60 CLJ 1: 152 Ind Cas 563 (DB).

——O. 39, R. 1 — Appeal pending — Bona fide contention regarding title to land — One party getting order to sell in execution of decree — Sale, whether should be stayed and status quo ante maintained — Security.

Where an appeal was pending in which there was a bona fide contention between the parties as to the title to the lands, and decree-holder, one of the parties, had got an order to sell the property in execution of his decree :

Held, that the status quo ante should not be disturbed and the sale should be stayed till the disposal of appeal.

In a case falling under O. 39, R. 1, Civil P. C., it is not necessary that the Courts should order the petitioner to furnish security to compensate the decree-holder for any loss that may be caused by a temporary injunction against him being granted. AIR (Vol 21) 1934 Lah 26 (2): 154 Ind Cas 421.

——O. 39, Rr. 1, 3, O. 43, R. 1 (r) — Order granting injunction — Appealability of — Notice to show cause against injunction, competency of appeal.

When an injunction has been granted and would remain in force till it is cancelled, an appeal is competent from the order granting the injunction, the fact that consequent upon the order notice to show cause has been issued is immaterial. AIR (Vol 20) 1933 Lah 282: 149 Ind Cas 642.

——O. 39, R. 1 — Appeal — Interference in.

Where a Court, in granting or refusing to grant an ad interim injunction, has exercised its discretion judicially, the mere fact that the Judge of the appellate Court might have come to a different conclusion, is not sufficient ground for interference. AIR (Vol 17) 1930 Sind 287 (DB).

——O. 39, R. 1 — An order staying delivery of property in execution under O. 39, R. 1 was passed after notice. The non-applicant without filing an appeal applied for dissolution of the order under O. 39, R. 4 and the Court appointed a Receiver. The non-applicant appealed from that order.

Held, that the lower Court had not really varied his original injunction staying delivery though he purported to do so by appointing a Receiver. The original order staying delivery remained in full force and was reiterated in the revised order. Whatever be the scope of O. 39, R. 4, it cannot be that a party can appeal against a mere reiteration of the original order of injunction when he has failed to appeal against the original order. AIR (Vol 16) 1929 Mad 803: 120 Ind Cas 862 (DB).

——O. 39, R. 1 — An appeal lies from an order granting an injunction as well as from an order re-

fusing an injunction. An order refusing an application for a temporary injunction until the disposal of the main application for injunction pending the disposal of the suit is an order under O. 39, R. 1 and is appealable under O. 43, R. 1 (r). AIR (Vol 11) 1924 Pat 713: 83 Ind Cas 48: 1924 PCHC 169: 6 PLT 201 (DB).

——O. 39, R. 1 and O. 43 (1) (r) — Appeal — Injunction purely discretionary — Appeal — Appellant to show that Court exercised jurisdiction wrongly.

An order of injunction is purely discretionary and a party appealing against it should prove that the Court against whose judgment the appeal is preferred acted wrongly in the exercise of its jurisdiction. AIR (Vol 1) 1914 Cal 531: 19 CLJ 305: 22 Ind Cas 710 (DB).

——O. 39, R. 1 and O. 43, R. (1) (r) — Appeal.

Order refusing to grant a temporary injunction is appealable. (1913) **18 CLJ 39: 17 CWN 996: 19** Ind Cas 553 (DB).

——O. 39, R. 1 (S. 492 old Code)—Temporary injunction — Application — Second appeal — Practice — Procedure.

No second appeal lies from an application under S. 492. (1902) 4 Bom LR 138 (139) (DB).

2. Applicability and scope.

——O. 39, Rr. 1 and 2 and S. 151 — Applicability of O. 39 — Appeal against decree granting probate — Application for injunction restraining respondent from taking possession of properties of the estate pending appeal against decree granting probate — Maintainability.

Pending an appeal against a decree granting probate to the respondent, the appellant applied under O. 39, Rr. 1 and 2 and S. 151, C. P. Code, for an injunction restraining the respondent from taking possession of the properties forming part of the estate and collecting the outstanding. On a question as to the maintainability of such an application,

Held, that as the appeal was against a decree granting probate the provisions of O. 9, R. 1 would have no application. In probate proceedings it is not correct to say that any property is in dispute. O. 39, R. 2 has obviously no application. As the application was filed pending an appeal, it was not permissible to rely on any inherent powers the High Court may possess on its original side. Hence the application was not sustainable. AIR (Vol 36) 1949 Mad 45: ILR (1948) Mad 494: 60 LW 697: 1947 MWN 650 (2): (1947) 2 MLJ 364.

——O. 39, R. 1 — Suit for declaration — There is no property in dispute.

Order 39, R. 1 applies only when any property in dispute in is danger. In a suit for declaration simpliciter there is no property in dispute. Only an incorporeal right is litigated; the fight is not about the property but about the right to the property. The property is only indirectly affected. If the property is in danger, the proper course is to seek appropriate relief and pay Court-fees on it. AIR (Vol 33) 1946 Nag 428.

——O. 39, R. 1 and O. 21, R. 92 — Confirmation of execution sale — Decree-holder or Court — If may be restrained.

Where property has been purchased in execution of a decree, the rights of the decree-holders cease except as regards the purchase price. Thereafter, the rights reside in the auction-purchasers and no one can resist them unless an application is made under O. 21, R. 89, 90 or 91, C. P. Code. If there is no such application, the Court is bound to confirm the sale. O. 21, R. 92 is mandatory and leaves no room for discretion. Therefore, an injunction against the decree-holder would be useless. Nor can an injunction be issued against a Court, as no injunction can be granted to restrain a judicial officer from doing that which a statute mandatorily directs him to do. AIR (Vol 33) 1946 Nag 428: 1947 NLJ 43: ILR (1946) Nag 908: 224 Ind Cas 562.

——O. 39, R. 1 — Applicability — Stranger auction-purchasers — Temporary injunction — If may be passed against them.

No temporary injunction can be passed against a person who is not a party to the suit unless he claims by or under a party under a title acquired subsequent to the suit, or unless he is a servant or agent of a party, or otherwise represents him. Stranger auction-purchasers who purchase property in execution of a simple money decree, are not parties to the suit and cannot be regarded as claiming by or under the judgment-debtor. There can, therefore, be no temporary injunction against them. AIR (Vol 33) 1946 Nag 428: 1947 NLJ 43: ILR (1946) Nag 908: 224 Ind Cas 562.

——O. 39, R. 1 and O. 41, R. 5 — Principle underlying stated.

The underlying principle on which the Court should act whether under O. 39, R. 1 or under O. 41, R. 5 is the same. It is fundamental in all these cases that the Court should not step in temporarily except to prevent a party from being permanently deprived of a relief which he seeks in the suit. On the other hand, if there is likelihood of permanent injury or loss, the Court should step in, provided the party applying has been diligent and so forth and do that which is fairest all-round during the pendency of the suit. Unless this is done, litigation would become meaningless and a mockery in many cases. But unless something approaching irreparable loss is shown to be likely, the rule is that the Courts should not interfere and should allow the law to take its course. AIR (Vol 33) 1946 Nag 428.

——O. 39, R. 1 — Injunction.

Injunctions can be granted in suitable cases but no permanent injunction can be granted restraining a party from moving a Court for the redress of his grievance. AIR (Vol 31) 1944 All 220: (1944) ALJ 248: 1944 AWR (HC) 118 (2): ILR (1944) All 255 (DB).

——O. 39, R. 1 — The provisions of Sub-Rule (3) of R. 2, O. 39, Civil P. C. must have been intended to apply to injunctions issued under that rule and does not apply to injunctions issued under R. 1, O. 39. AIR (Vol 28) 1941 All 140: (1941) ALJ 46: 1941 OWN (CC) 48: 1941 AWR (HC) 51: ILR (1941) All 295: 194 Ind Cas 166 (DB).

——O. 39, R. 1 — Administration suit.

Where a preliminary decree is made in an administrative suit, a creditor who has obtained attachment on the judgment-debtor's property prior to the decree is not entitled to proprity cver other creditors. All the creditors stand on the same footing. The orders that the Court will pass will be in the form of orders staying the further execution of his decree by the attaching decree-holder or orders in the nature of injunctions restraining him from executing it. It is not, strictly speaking, correct to call them injunction orders in the strict sense as used in the Civil P. C. and

then to agree that they do not fall under O. 39, Rr. 1 and 2 and that the Court has no jurisdiction to pass such orders under any other provisions of the Code. (Nature of the orders further discussed). AIR (Vol 26) 1939 Mad 204: (1938) MWN 1127: 48 MLW 849: 182 Ind Cas 254.

——O. 39, R. 1 — Temporary injunction, nature of.

Per Baguley, J.— A temporary injunction like an attachment order is not final but is merely an action which delays something being done which may cheat the plaintiff of his lawful rights. AIR (Vol 26) 1939 Rang 321: 1939 Rang LR 403: 183 Ind Cas 728 (FB).

——O. 39, R. 1 — Grant of injunction, if depends on validity of suit.

The grant of an interlocutory injunction does not depend on the validity of the suit in which the application is made. AIR (Vol 24) 1937 Cal 172: 171 Ind Cas 652.

——O. 39, R. 1 — An order under S. 151, for production of account books not related with suit and that on failure to make a complaint against the party cannot be justified either under O. 16, Rr. 10 and 16, or under O. 39, R. 1, or under Section 165, Evi. Act or under any other provision of law. Order 21, Rule 41, which definitely restricts the rights of the party to call for such accounts till after a decree is obtained will, on the principle that a more particular provision overrides a more general provision, limit the application of O. 39, R. 1 (b), even if the latter were in its terms applicable, nor can the inherent powers of the Court be invoked to justify the issue of such an order at an earlier stage and thereby completely nullify the restriction laid down in O. 21, R. 41. Such an order would be clearly ultra vires. AIR (Vol 21) 1934 Mad 199 (2): 39 MLW 179: 66 MLJ 498: 57 Mad 635: 148 Ind Cas 79.

——O. 39, R. 1 — An applicant for interim injunction for postponement of sale cannot be put on terms by making the grant of the injunction conditional on furnishing security on principles analogous to O. 21, R. 29, Civil P. C. which has no application to the granting of an injunction to which the applicant is entitled, independent of the considerations in O. 21, R. 29. AIR (Vol 20) 1933 Nag 153: 146 Ind Cas 727.

——O. 39, R. 1 — Stranger to suit.

An injunction under O. 39, R. 1, cannot be granted against a person who is not a party to the suit, and Rule 2 applies to defendants only. AIR (Vol 13) 1926 Lah 284: 96 Ind Cas 540: 27 PLR 11.

——O. 39, R. 1 — Ultimate refusal in suit.

There is nothing in law or principle which justifies the refusal of a temporary injunction on the sole ground that the relief prayed for in the suit may be eventually refused. AIR (Vol 12) 1925 Lah 628: 89 Ind Cas 678 (DB).

——O. 39, R. 1 — A Court cannot grant a temporary injunction in a suit which has been dismissed for default but for the restoration of which an application is pending. AIR (Vol 11) 1924 Oudh 345 : 77 Ind Cas 238 : 25 Cr LJ 350.

——O. 39, R. 1 — It is a general principle restricting the grant of temporary injunctions that equally efficacious relief should not be obtainable by any other usual remedy. AIR (Vol 8) 1921 Nag 90: 4 NLJ 207 (DB).

——O. 39, R. 1 — Strangers to suit — Injunction — Person not party to suit — Property not in dispute — Effect.

An order for an injunction can be issued only under the conditions specified in O. 39, R. 1 and when the conditions do not exist the injunction has no legal force. An injunction issued against a person who is not a party or respecting property which is not the subject-matter of the case, is illegal. AIR (Vol 6) 1919 Lah 144: 46 PLR 1919: 51 Ind Cas 108.

——O. 39, R. 1 — Strangers to suit — Injunction against person not a party.

A Court has no jurisdiction under O. 39, R. 1, to issue an injunction upon a person who is not a party before it. AIR (Vol 5) 1918 Pat 214: 3 PLJ 456: (1918) Pat HCC 302: 5 PLW 250: 46 Ind Cas 224 (DB).

——O. 39, Rr. 1 and 2 — Principles — Interlocutory application for mandatory injunction — Procedure.

Upon grounds of general expediency, the proper course when applications for mandatory injunctions are made would be to expedite the proceedings rather than to grant an injunction and if the matter is really urgent, something like the procedure in England might be adopted by treating the order on the interlocutory application as a decree in the suit. AIR (Vol 1) 1914 Bom 42: 16 Bom LR 288: 38 Bom 381: 24 Ind Cas 625 (DB).

——O. 39, Rr. 1, 2 (Ss. 492, 493, 622 old Code) — Injunction — Trespass to property — Defendant in possession and plaintiff out of possession — Jurisdiction — Revision.

Section 493, C. P. C., has no application when the defendant is in possession and the plaintiff out of possession, and a Court will be acting without jurisdiction if it grants an injunction in favour of plaintiff out of possession of the property in dispute. Section 492, C. P. C., has no application when the case is not such a one as is described in the section, viz., waste, removal, etc., (1907) 18 MLJ 302 (304): 4 MLT 91.

2A. Arbitration.

——O. 39, R. 1 — Arbitration proceedings under Bombay Co-operative Societies Act.

Where the plaintiff in a suit has, apart from the suit, a remedy against and a right to challenge any award which may be made in arbitration proceedings, the Court should withhold assistance at an interlocutory stage from the plaintiff who is seeking to obtain a temporary injunction to restrain the arbitration proceedings. And where the plaintiff will have no opportunity of attacking any award that may be made (as in the case of an award under the Bom. Co-operative Societies Act) in a Court of Law, because the award will never come before a Court of Law except in execution proceedings, the plaintiff may be granted the temporary injunction as the law generally is that an executing Court will not question the validity of an award or of a decree which it is asked to execute. AIR (Vol 31) 1944 Sind 107: ILR (1943) Kar 504: 212 Ind Cas 545 (DB).

——O. 39, R. 1 — Balance of convenience.

In dealing with an interlocutory application for injunction restraining a party to refer to arbitration, Court must be governed by consideration as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction and the burden lies upon the plaintiffs as the persons applying for the injunction, of showing that their inconvenience exceeds that of the defendants. AIR (Vol 8) 1921 Sind 114: 70 Ind Cas 864: 15 SLR 5.

——O. 39, R. 1 — Arbitration proceedings — Injunction.

It is a matter of procedure and not of substance that the party complaining of the invalidity of an

award would have to apply to the Court to have the document taken off the file. It is in the discretion of the High Court to grant or refuse an injunction restraining a reference to the tribunal of arbitration in respect of a commercial contract. An interlocutory injunction should not be granted upon novel considerations interfering with arbitrators. AIR (Vol 7) 1920 Cal 906: 31 Cal LJ 167: 24 CWN 612: 55 Ind Cas 778 (FB).

——**O. 39, Rr. 1 and 2 — Arbitration proceedings — Temporary injunction — Principles governing — Injunction — Restraining arbitration.**

A temporary injunction should not be granted unless the applicant satisfied the Court that its interference is necessary to protect him from irreparable or at least serious injury before the legal right can be established at the trial. If there is any other remedy open to the applicant by which he can protect himself from the consequences of the injury apprehended, a temporary injunction will not be granted. If a party to contract alleges a breach and refers the matter to arbitration and the other party brings a suit for a declaration that he is not liable upon contract, then if the existence of the contract itself is denied, no temporary injunction should be granted restraining the arbitration poceedings but if the contract is impeached on grounds of equity such as fraud or misrepresentation, a temporary injunction should ordinarily be granted. AIR (Vol 7) 1920 Lah 97: 2 UPLR (L) 30: 54 Ind Cas 546.

3. Discretion of Court.

——**O. 39, R. 1 — Relief is discretionary — Plaintiff admitting breach on his part — Injunction restraining defendant from enforcing contract, if should be granted.**

The relief by way of injunction is always discretionary and the Court will be slow to grant such a relief to a party who admits that he has committed a breach of the contract and at the same time wants to prevent the opposite party from enforcing his rights under the contract, particularly so when the parties have stipulated that in the event of an improper irregular or unnecessary exercise of the power of sale under the contract (mortgage), the remedy of the aggrieved party was to be only in damages. AIR (Vol 29) 1942 Bom 46: 43 Bom LR 890: ILR (1942) Bom 83: 198 Ind Cas 646.

——**O. 39, R. 1 — Defendant assuring that he would take no action to the prejudice of plaintiff — Injunction — Discretion.**

The granting of an injunction is a discretionary matter and the Court would be loath to consider that circumstances could make it desirable to grant one in a case where the defendant has given an assurance that he would refrain from any action to the prejudice of the defendant. AIR (Vol 28) 1941 Rang 49: 1941 Rang LR 101: 193 Ind Cas 114 (DB).

——**O. 39, R. 1 — Applicability — Stay of execution — Property alleged to be judgment-debtor's sought to be sold — Injunction for stay, at instance of person filing suit after dismissal of claim — Inherent powers — Discretion — Inference by High Court, propriety of.**

Provisions of O. 39, R. 1, Civil P. C. cannot be applied to a case where the decree-holder has a good decree against his judgment-debtor which he is executing against that judgment-debtor in a proper proceeding and somebody institutes a suit, after being defeated in his claim case, that the property is his and not that of the judgment-debtor and then asks for a temporary injunction on the ground that his property is being "wrongfully" sold in execution of a decree.

The Court will invoke its inherent powers to stay the execution of the decree if the circumstances are so coercive that the balance of convenience is in favour of such person or that a stay is necessary to prevent an abuse of the process of the Court.

The High Court will not interfere in the exercise of a discretion by a Court in a matter under O. 39, R. 1, so long as the discretion is exercised judicially. But when the Judge has not exercised his discretion rightly it will interfere. AIR (Vol 25) 1938 Pat 228 : 19 PLT 256 : 16 Pat 738 : 4 BR 617 : 175 Ind Cas 629 (DB).

——O. 39, R. 1 — In every case the grant of an injunction is a matter of discretion to be decided in accordance with equity and good conscience. AIR (Vol 24) 1937 Lah 186 : 39 PLR 317: 172 Ind Cas 553 (DB).

——**O. 39, R. 1 — Temporary injunction — Discretion exercised by lower Court — Interference by Appellate Court.**

The Appellate Court should be very reluctant in interfering in the exercise of its discretion by the lower Court in granting a temporary injunction. AIR (Vol 23) 1936 Pesh 11 : 160 Ind Cas 539.

——O. 39, R. 1 — Orders passed under O. 39, R. 1, are discretionary and an Appellate Court ought not to interfere with the exercise of Judge's discretion unless satisfied that the Judge acted on wrong principles. AIR (Vol 21) 1934 Cal 694 : 38 CWN 771 : 61 Cal 814 : 155 Ind Cas 354(2).

4. Duty of Court.

——**O. 39, R. 1 — Scope of inquiry — What the Court has to consider.**

The powers of the Court in a proceeding under O. 39, R. 1, C. P. Code, are limited. When the point raised in such an application is one that will properly form an issue for decision in the trial of the suit, the Court is not concerned to decide what is the correct answer to be given to the question in the hearing of the suit, but merely whether there is a fair point for trial. AIR (Vol 37) 1950 Pat 365 : 31 PLT 93 (DB).

——**O. 39, R. 1 — Applicability — Relief of permanent injunction not asked for in suit — Temporary injunction — If may be granted.**

If A obtains a decree against B and attaches certain property, and C claims that the property is his, and A without raising any objection in execution straightway files a suit for a declaration and does not seek the consequential relief of injunction, the plaintiff cannot be afforded temporarily a relief which he does not trouble to seek permanently. For this purpose it does not matter whether the stay provisions of O. 41, R. 5, C. P. Code, or the remedy afforded by the provisions for temporary injunction in O. 39, R. 1, C. P. Code, are attracted or not because one of the underlying principles on which Courts should act in either case is the same; and that applies as well to the inherent powers under S. 151, C. P. Code. It is fundamental in all these cases that the Court should not step in temporarily except to prevent a party from being permanently deprived of a relief which he seeks in the suit. AIR (Vol 36) 1946 Nag 428 : ILR (1946) Nag 908 : 1947 NLJ 43 : 224 Ind Cas 562.

——**O. 39, R. 1 — Injunction — Mandatory interlocutory injunction — Delay — Infructuous injunction.**

An interlocutory mandatory injunction is an exceptional remedy and it is essential for aggrieved party to come to Court as early as possible.

Court will not grant an infructuous injunction. AIR (Vol 32) 1945 Cal 44: ILR (1944) 1 Cal 181.

——O. 39, R. 1 — Suit for declaration and application for injunction for stay of execution — Duty of Court.

Where a suit is filed for declaration that a decree is not executable and that the plaintiff had paid part of the decretal amount and, in the alternative, for damages and the plaintiff applies also for an ad interim injunction for stay of execution proceedings, the Court should determine that preliminary issue before assuming that it has got jurisdiction, for if the suit proceeds as a suit for damages only, the execution must also proceed as an independent matter. AIR (Vol 23) 1936 Pesh 184 : 165 Ind Cas 112.

——O. 39, R. 1 — Decree for sale — Injunction by another Court restraining confirmation of sale.

Where A obtained a decree against B for sale and C instituted a suit in another Court impleading A as a party claiming title to the property and obtained an injunction directing the Court which had passed the decree against B to the effect that the sale should not be confirmed:

Held, that the latter Court was bound to give effect to the injunction and had no jurisdiction to disregard it. AIR (Vol 19) 1932 Lah 515 : 33 PLR 667 : 139 Ind Cas 342.

——O. 39, R. 1 — In the matter of an interlocutory order where a breach of right of plaintiff is threatened, the proper course for a Court is to maintain the status quo until the disposal of the suit. AIR (Vol 13) 1926 Mad 166 : 22 MLW 837 : 91 Ind Cas 651.

——O. 39, R. 1 — Interim mandatory injunction — Exceptional cases.

A Court has the power to grant an interim mandatory injunction, but the power is to be used only in very exceptional circumstances, and each case is to be considered on its own merits for this purpose. AIR (Vol 13) 1926 Sind 201 : 94 Ind Cas 840.

5. Disobedience.

——O. 39, Rr. 1 and 2(3) — Injunction issued under R. 1 disobeyed — R. 2(3) applies — S. 36 or O. 21, R. 32 has no application.

Order 39, Rr. 1 and 2 must be read together. Hence R. 2(3) applies to disobedience generally if an injunction is granted by the Court. The words "in case of disobedience" of that clause are wide enough to cover breaches of injunctions issued under O. 39, R. 1. Neither S. 36 nor O. 21 R. 32 applies. AIR (Vol 33) 1946 Pat 47 : 24 Pat 606 : 227 Ind Cas 619 (DB).

——O. 39, R. 1 — Disobedience of injunction issued under O. 39, R. 1 is punishable under O. 21, R. 32 read with Ss. 36 and 58.

Disobedience of an injunction issued under O. 39, R. 1 is not punishable under O. 39, R. 2(3), but can be dealt with under O. 21, R. 32 read with Ss. 36 and 58, Civil P. C. There is nothing in O. 21, R. 32 read with S. 58, Civil P. C., which would prevent the Court from passing a conditional order of detention. AIR (Vol 32) 1945 Nag 134 : 1945 NLJ 150 : ILR (1945) Nag 336 (DB).

——O. 39, R. 1 — Effect of disobedience — Notice of injunction to agent is notice to firm.

A case was throughout conducted by S as an agent of the firm of which P was a partner. The power-of-attorney was also signed by P. The agent S was present on the date of which the Court issued an injunction restraining the firm from alienating certain property. The property was alienated and P contended that the firm had no knowledge of the restraint order passed by the Court:

Held, that the notice to the agent S was sufficient for the firm to know that restraint order had been passed. AIR (Vol 32) 1945 Nag 134: 1945 NLJ 150: ILR (1945) Nag 336 (DB).

——O. 39, Rr. 1, 2(3) — Proceedings to enforce injunction, whether proceedings for contempt.

It is doubtless convenient to speak of the proceedings to enforce the injunction as proceedings for contempt, but the terminology is not strictly accurate. There is doubtless an element of punishment in the provisions for the enforcement of an injunction, but the main object surely is to see that the order of the Court is carried into effect. AIR (Vol 28) 1941 All 140 (141) : (1941) ALJ 46 : 1941 OWN (CC) 48 : 1941 AWR (HC) 51 : ILR (1941) All 295 : 194 Ind Cas 166 (DB).

——O. 39, R. 1 — Temporary injunction under and stay of execution — Distinction — Sale in contravention of injunction, whether nullity.

A temporary injunction under the provisions of R. 1, O. 39 is not a stay order issued by a Court competent to stay execution proceedings under any provision of the Code authorising such an order. Such an order can be passed, for example, by the executing Court (O. 21, Rr. 29 and 83) or by an Appellate Court (O. 40, R. 5), or perhaps by a High Court in exercise of its inherent powers. The effect of non-compliance with an injunction issued under O. 39 is to make the offender liable to the punishment prescribed in sub-r. (3) of R. 2 of that Order and that is the only effect and there is no statutory authority for the proposition that a completed sale in contravention of an injunction under O. 39, R. 1, is a nullity. A temporary injunction under O. 39, is not a mandatory direction to a Court, as is a stay order of the kind provided for by the Procedure Code, but is an order directed against a particular person which can be issued only in the circumstances described in R. 1. AIR (Vol 25) 1938 Lah 220 : 40 PLR 518 : 179 Ind Cas 123.

——O. 39, R. 1; O. 38, R. 5 — Application for attachment before judgment — Dismissal of, on undertaking by defendant — Effect of — Order, if amounts to injunction — Breach of undertaking — Power of Court.

When a Court accepts an undertaking given by a party, its order amounts, in substance, to an injunction restraining him from acting in breach thereof.

Where in attachment before judgment proceedings, the Court dismisses the plaintiff's petition on accepting an undertaking given by the defendant not to do a certain act (e.g., not to draw a cheque amount pending further orders of the Court), the order accepting the undertaking amounts, in substance, to an injunction restraining him from acting on breach of it and it does not come with any grace from the mouth of a person who has given such an undertaking to say that because the Court was good enough to accept that undertaking and did not pass an order of its own, he is not in the position of a person bound by an order of the Court. The Court has power to deal with such breach. AIR (Vol 23) 1936 Mad 651 : (1936) MWN 519 : 44 MLW 714 : 165 Ind Cas 747.

——O. 39, Rr. 1, 2; O. 21, R. 32 — Decree for injunction — Mode of execution — Judgment-debtor by his own act making it impossible to obey decree — Compensation.

Order 21, R. 32, Civil P. C., specifically provides for the execution of a decree for injunction. It is wrong to say that the only remedy of the decree-holder is to bring a separate suit for damages.

Where the injunction is for the doing of an act, and the judgment-debtor has failed to do the act, the attachment can continue for three months and if, in the meantime, the judgment-debtor carries out the directions contained in the decree and in

that way obeys the decree, his property cannot be sold. But where the injunction is for restraining him from doing an act and the judgment-debtor has already done the act in disobedience of the injunction he has made it impossible for himself to obey the decree. Although the property cannot be sold until three months have expired after the attachment, yet after the expiry of this period it will be impossible for the judgment-debtor to show that he has obeyed the decree inasmuch as he has really irrevocably disobeyed it. Where the judgment-debtor has, by his own act, made it impossible for himself to obey the decree, he cannot escape from the liability to pay compensation which will be enforced after the attachment has subsisted for three months. If, however, it be impossible to award the decree-holder any compensation, then the only remedy which must be adopted would be to detain him in civil prison. AIR (Vol 22) 1935 All 480 : 57 All 858 : (1935) ALJ 416 : 1935 AWR (HC) 406 : 154 Ind Cas 744.

——O. 39, Rr. 1, 2; O. 21, R. 32 — Injunction against all defendants jointly — Death of one of them — Reduction of compensation — Legality of.

Where the injunction was against all the defendants jointly and they were all jointly and severally responsible for its disobedience as well as for the profit which they had made out of the plaintiffs' lands by holding a fair on such lands, the mere fact that one of them was dead will not justify a reduction of the amount which the plaintiffs are entitled to get. AIR (Vol 22) 1935 All 480 : (1935) ALJ 416 : 1935 AWR (HC) 406 : 57 All 858 : 154 Ind Cas 744 (DB).

——O. 39, R. 1(2) (Cal.) — Detention in civil prison — Duration of.

Under sub-r. (2), O. 39, R. 1, the detention in the civil prison must be for a term not exceeding six months but may extend to that term unless in the meantime the Court directs his release. AIR (Vol 21) 1934 Cal 818 : 38 CWN 799 : 59 CLJ 463 : 61 Cal 971 : 153 Ind Cas 126 (2) (DB).

——O. 39, R. 1 — R. 2(3) — Provisions of R. 2(3), O. 39 were intended to be applied to breach of injunction under R. 1 also but as Cl. (3) is included under R. 2, it would follow that the provisions of that clause will not apply to R. 1. It is suggested that the clause may be split into separate rules. AIR (Vol 17) 1930 All 387.

——O. 39, R. 1 — The existence of a temporary injunction does not render void an alienation made in contravention of the injunction. AIR (Vol 17) 1930 All 387.

——O. 39, R. 1 — Injunction against alienation — Bona fide purchaser without notice not affected.

A temporary injunction restraining alienation of a house pending decision of a suit for recovery of money does not render a sale as void as against a bona fide purchaser for valuable consideration without notice of any fraud or collusion on the part of the vendor even though it might have been made in defiance of the restraining order. A firm brought a suit for recovery of money against another firm, K F, through K and his son F and an ad interim injunction was issued against the defendants but the order was served on K alone restraining them from transferring the property pending decision of the suit. The suit was settled by compromise. But in the meantime F had transferred the property by mortgage with possession to D. The decree-holder proceeded to attach the house. The lower Court dismissed objections by D, holding the mortgage to be void under S. 64.

Held, that the order was erroneous both as a statement of fact and law. The injunction had been served on K and not on F who actually effected the mortgage which being in favour of bona fide mortgagee for consideration, was not void. AIR (Vol 17) 1930 Lah 858.

——O. 39, R. 1 — Sale held in execution of a decree in spite of an injunction is not void merely on that ground. AIR (Vol 16) 1929 Oudh 235 : 6 OWN 226 : 4 Luck 635 : 117 Ind Cas 471 (DB).

——O. 39, R. 1 — It is clear law that an alienation effected in violation of a prohibitory order is not void though the person who alienates it may be liable for action in contempt of Court or damages. AIR (Vol 15) 1928 Lah 639 : 108 Ind Cas 395.

——O. 39, R. 1 — An injunction is binding on the party to whom it is issued from the time it is communicated for there can be no contempt unless the party concerned knows what he is required to do or to abstain from doing and a Court cannot punish a man from doing what he did not know he was forbidden to do. AIR (Vol 13) 1926 All 457 : 24 ALJ 519 : 96 Ind Cas 137 (DB).

——O. 39, R. 1 — Bona fide purchaser without notice is protected.

Order for an injunction differs from an order attaching the property. Where property has been attached by order of the Court, any transfer of the property in face of such an attachment is void if the attachment has been made by "actual seizure or by written order duly intimated or made known." But a temporary injunction has no such effect. Bona fide purchasers of property, under temporary injunction restraining alienation, for valuable consideration without notice of any fraud or collusion on the part of the vendor are protected. AIR (Vol 12) 1925 Lah 644 : 6 Lah 380 : 90 Ind Cas 937 (DB).

——O. 39, R. 1 — Effect — Injunction — Alienation pending — If void.

An alienation pending a temporary injunction is not void. AIR (Vol 1) 1914 Lah 356 : 253 PLR 1914 : 145 PWR 1914 : 25 Ind Cas 180 (DB).

——O. 39, R. 1 — Mandatory — Refusal of interim injunction — Building — Completion — Damages.

Where the defendant, after notice of a suit for injunction to restrain him from erecting a building, pushes on with his work and completes, the Court should grant a mandatory injunction if the plaintiff proves his right and makes out a case for such injunction. But if the Court thinks that a mandatory injunction is not called for, it may give the plaintiff damages under the general prayer "for such other relief, as the Court thinks fit", because the suit when filed rightly prayed solely for injunction, as the building had not then been completed and the relief of damages had to be given by reason of subsequent events. (1901) 3 Bom LR 542 (544) : 26 Bom 136 (DB).

6. Duration.

——O. 39, R. 1 — Injunction under — Security bond given in pursuance of order of trial Court — Whether becomes ineffectual as soon as case is disposed of — Surety's liability — Extent of.

An injunction issued under O. 39, R. 1, subsists only until the disposal of the suit or until further orders. Hence it cannot be said that a security bond, which is furnished merely with the object of vacating an order of injunction which does not itself subsist beyond the disposal of the suit, would survive the injunction itself and be resuscitated as soon as the decree is made.

Consequently, a security bond given in pursuance of an order of the trial Court under O. 39, R. 1, Civil P. C. becomes ineffectual as soon as the case is disposed of by it and does not enure to the benefit of the decree-holder so as to enable him to enforce the decree of the Appellate Court against the surety. AIR (Vol 22) 1935 Lah 718 : 37 PLR 489 : 156 Ind Cas 912 (DB).

——O. 39, R. 1 — Injunction pendente lite ends with suit.

An injunction granted pendente lite until the disposal of the suit or further orders will end in any case on the disposal of the suit or any earlier date on which further orders may be passed. The words "until further orders" do not extend its duration beyond the date of decree. AIR (Vol 17) 1930 All 387.

——O. 39, R. 1 — Injunction pendente lite ends with suit.

An injunction granted pendente lite until the disposal of the suit or further orders will end in any case on the disposal of the suit or on any earlier date on which further orders may be passed, the reference to further orders not applying to anything after the disposal. AIR (Vol 11) 1924 Mad 178 : 1923 MWN 670 : 19 MLW 613 : 76 Ind Cas 126 (DB).

——O. 39, R. 1 — A temporary injunction was asked for in a declaratory suit but the application was refused. An appeal was preferred and the appellate Court granted a temporary injunction "pending the final decision of the suit".

Held, per Piggott, J. (Walsh, J., doubting) the temporary injunction came to an end with the passing of a decree by the trial Court in the declaratory suit. AIR (Vol 8) 1921 All 99 : 19 ALJ 174 : 43 All 383 : 61 Ind Cas 417 (DB).

——O. 39, Rr. 1 and 2 — Suit for injunction — Interlocutory injunction — When is dissolved.

An interlocutory injunction in a suit for perpetual injunction is dissolved ipso facto by a decree granting a perpetual injunction. AIR (Vol 2) 1915 Cal 713 : 42 Cal 550 : 18 CWN 1189 : 21 CLJ 68 : 26 Ind Cas 296 (DB).

——O. 39, R. 1 — When granting relief ceases to be appropriate — Expiry of period of agreement — Practice.

When injunction is asked for in virtue of the terms of an agreement, the relief ceases to be appropriate if the period of the agreement expires before decree. (1905) 29 Bom 107 : 7 Bom LR 107 (112) (DB).

——O. 39, Rr. 1, 2 (Ss. 492, 493 old Code) — Temporary injunction — Suit between rival lessees.

In a suit between rival lessees of a village, each of whom impeached the validity of the other's leases no temporary injunction should be issued restraining the defendant lessee from receiving the rents of or interfering with the management of the village in dispute. The proper remedy, if at all, is the appointment of a receiver. Where a temporary injunction is granted pending the determination of a suit, it is usual to put the applicant under terms to abide by such order as the Court shall think fit to make by way of damages resulting from the passing of such order. (1904) 1 ALJ 527 (528) (DB).

——O. 39, R. 1 — Temporary injunction pending suit — Dismissal of suit — Discharge of temporary injunction.

Where a temporary injunction is granted pending a suit, and the suit is dismissed, the discharge of the temporary injunction follows as a matter of course. (1901) 28 C 597 (607).

7. Execution proceedings.

See also N. 7A.

——O. 39, R. 1 — Injunction restraining execution of decree for possession in suit under R. 103 of O. 21, C. P. Code.

It cannot be said that in no case an injunction could be issued restraining execution of the decree in a case arising out of a suit under O. 21, R. 103, C. P. Code. Where the balance of convenience would be not to disturb the status quo of parties pending another suit in respect of the same property an injunction could be granted on terms as to deposit of rent, etc. AIR (Vol 37) 1950 Ajmer 14.

——O. 39, R. 1 — No injunction can be issued against Court.

No injunction can be issued against a Court for staying confirmation of sale. It is difficult to see how injunction can be granted to restrain a judicial officer from doing that which a statute mandatorily directs him to do. AIR (Vol 33) 1946 Nag 428.

——Order 39, R. 1 — Suit for injunction restraining the mortgagee from exercising the powers of sale — The mortgagor must file a suit for redemption and offer to pay the mortgage debt after the due date has expired if he wants to file a suit for injunction. AIR (Vol 29) 1942 Bom 46: 43 Bom LR 890: ILR (1942) Bom 83: 198 Ind Cas 646.

——O. 39, R. 1 — Temporary injunction declined by Judge — His successor, if can go behind order and subsequently grant it.

Where a Judge has declined to grant a temporary injunction, his successor can go behind that order when new circumstances have subsequently arisen and make another order when the exigencies of the case require. AIR (Vol 27) 1940 Lah 39: 41 PLR 823: 187 Ind Cas 304.

——O. 39, R. 1 — Proceedings for grant of letters of administration — Application for injunction restraining certain persons from paying money belonging to estate lying with them, to certain persons — If falls under O. 39, R. 1.

It is clear from the provisions of O. 39, R. 1, Civil P. C. that before an application for injunction can be granted under that rule, the applicant must show that the property with respect to which an injunction is prayed for, is property in dispute in a suit. In a proceeding for the grant of letters of administration it cannot be said that there is any property in dispute. No question regarding title to property can be decided in an application for probate or letters of administration. An application made in such proceedings for an injunction restraining certain persons from withdrawing certain sums alleged to appertain to the estate of the deceased and restraining various authorities with whom these sums are lying, from paying them out, until the disposal of the application for letters of administration, cannot be brought within the scope of O. 39, R. 1. AIR (Vol 26) 1939 Cal 642: 187 Ind Cas 586.

——O. 39, R. 1 — Decree-holder in execution selling property and taking possession — Application in same Court for injunction, if maintainable.

It is impossible to contend that the person who has got a decree and is entitled to execute it, can be said to be wrongfully selling in execution because some other person has brought an action through which he hopes to succeed in getting possession of the property which is being sold. Moreover, in India an injunction, when issued, is issued against an individual prosecuting his case in a Court. There is no method in India by which an injunction could be directed to a Court in contradistinction to the persons or parties prosecuting their litigation in that Court. Where, therefore, a decree-holder in execution has sold property and taken delivery of possession, an application to the same Court in which the execution is being taken out for injunction restraining the decree holder from taking possession, is not main-

tainable. AIR (Vol 25) 1938 Pat 606: 5 BR 197: 179 Ind Cas 112.

——**O. 39, R. 1, (as amended by Rangoon High Court) — Effect of amendment — Suit under O. 21, R. 63, or appeal therefrom — Temporary injunction to prevent sale of property under attachment in execution case which led to suit — Application, if can be granted under S. 151, Civil P. C.**

The result of the amendment of O. 39, R. 1, Civil P. C. by Rangoon High Court prima facie is that the Court in which a suit under O. 21, R. 63, is pending, or the Court in which an appeal from such a suit is pending, does not enjoy the power of granting a temporary injunction to prevent the sale of the property under attachment in the execution case which led to the suit and then to the appeal. The claimant in a proceeding under O. 21, R. 58, who files a suit under O. 21, R. 63, is not the judgment-debtor against whom execution is taken; and by sale of the property attached in the execution case, his right, title and interest in the property cannot be impaired for it is only the right, title and interest of the judgment-debtor which is conveyed to the purchaser at the sale. If his suit or his appeal succeeds, then the interests which are declared in his favour are to be deemed not to have been disposed of by the sale. There is obviously no good ground for thinking that a sale made in the execution case during the pendency of a suit under O. 21, R. 63, or an appeal from such a suit will be injurious to the right, title and interest if any, of the claimant in the property sold. An application for stay not only of the sale but also of other steps taken or in contemplation in aid of execution does not fall within any definite provision either in the body or in the rules of the Civil P. C. and cannot, therefore, be granted:

Held, that such an application was not such as was necessary for the ends of justice or to prevent abuse of the process of the Court and could not, therefore, be granted even under S. 151, Civil P. C. AIR (Vol 25) 1938 Rang 21: 174 Ind Cas 503 (DB).

——**O. 39, R. 1 — Injunction.**

An order of injunction for stay cannot be issued by one Court to another which is not subordinate to it. AIR (Vol 23) 1936 Pesh 184: 165 Ind Cas 112.

——**O. 39, R. 1 — Stay of suit — Balance of convenience.**

Suit by A against B for declaration of title — Suit dismissed — Appeal by A — During pendency of appeal suit by B for possession. Held, that B's suit should be stayed pending the appeal and that the Court should grant an injunction. AIR (Vol 18) 1931 Lah 65 (2): 31 PLR 550 (1): 129 Ind Cas 889.

——**O. 39, R. 1 — Execution proceedings and sale — Delivery of possession.**

Where an objector's declaratory suit under O. 21, R. 63 has been dismissed and the house property sold in execution of the decree since the sale cannot be held as complete until possession has been delivered, on appeal by objector against the dismissal, an injunction can be issued under O. 39, R. 1, preventing the delivery of possession. AIR (Vol 17) 1930 Lah 850.

——O. 39, R. 1 — Where there is a bona fide contention to be determined between the parties and balance of convenience is that the execution sale should be stayed, a temporary injunction to prevent the sale should be passed. AIR (Vol 17) 1930 Lah 108 : 123 Ind Cas 527.

——O. 39, R. 1 — One K obtained a money decree against M, the husband of G. In execution of the decree a building was attached but G successfully objected to the attachment claiming the building as her property. K subsequently brought a suit for declaring that the property was attachable in execution of his decree and succeeded. In appeal against this decision G applied for stay of execution.

Held, that in view of amended O. 39, R. 1 (a) the application should be rejected. AIR (Vol 16) 1929 All 115 : 116 Ind Cas 794 : 1929 ALJ 214.

——O. 39, R. 1 — Sale in favour of an auction-purchaser was confirmed, but a third person, S, sued to establish his title to the property purchased and applied for injunction restraining the delivery of possession of the property to the purchaser. S was not already in possession of the property.

Held, that S is not entitled to prevent auction-purchaser from obtaining possession. AIR (Vol 16) 1929 Lah 161 : 112 Ind Cas 689.

——O. 39, R. 1 — A Court has an inherent power to issue an injunction restraining a party from proceeding with the execution of the decree in another suit as there is no difference between proceeding with another suit or proceeding with the execution of the decree in another suit. AIR (Vol 13) 1926 Mad 1126 : 24 MLW 421 : 1926 MWN 708 : 97 Ind Cas 938.

——O. 39, R. 1 — Injunction restraining the execution of a decree obtained by the defendant against the plaintiff cannot be granted under O. 39, Rr. 1 and 2. AIR (Vol 13) 1926 Mad 258 : 23 MLW 85: 1925 MWN 886 : 92 Ind Cas 615.

——O. 39, R. 1 — Where a temporary injunction is issued against a party restraining him from alienating certain property till the disposal of a certain suit, he does not disobey the injunction if he mortgages the property, after decree is passed in the suit and while no proceedings in execution are pending. AIR (Vol 12) 1925 Lah 258 : 79 Ind Cas 444.

——O. 39, R. 1 — Where a suit was instituted for setting aside a decree on the ground that it had been obtained against the plaintiff when he had been a minor, by means of fraud.

Held, that a temporary injunction restraining the execution of the decree by the sale of the properties of the judgment-debtor must not be granted unless there was a reasonable prospect that the plaintiff would be able to prove the allegation that he had been a minor. AIR (Vol 12) 1925 Pat 337 : 75 Ind Cas 381 : 5 PLT 121 : 1 Pat LR 462.

——O. 39, R. 1 — The plaintiffs, as owners of the property, filed a suit against the defendant claiming that they were entitled to possession on the ground that the lease had expired and that the decree which the defendant had obtained against his sub-tenants for possession was not binding upon them and for an injunction against the defendant not to take possession; and after the suit was filed asked for and were granted a temporary injunction restraining the defendant from executing his decree against the sub-tenant.

Held, the Court had no jurisdiction to restrain the defendant from seeking to get the benefit of the decree he had obtained and which had nothing whatever to do with the plaintiff's claim. What the plaintiffs ought to have asked for was the appointment of a Receiver so that the Court might take charge of the property through its Receiver pending the settlement of the dispute between the plaintiffs and the defendant. AIR (Vol 9) 1922 Bom 385 : 66 Ind Cas 768 : 24 Bom LR 378: 46 Bom 939.

——O. 39, R. 1 — Where plaintiffs brought a suit for setting aside two compromise decrees obtained against them during their minority, alleging that

they were not properly represented, and an application was made for temporary injunction to restrain execution of decrees.

Held, that the application cannot be granted. AIR (Vol 9) 1922 Pat 34 : 69 Ind Cas 891 : 4 PLT 10 : 1 Pat 356 (DB).

——O. 39, R. 1 — Co-ordinate Courts cannot restrain the action of each other.

One subordinate Court has no right to restrain the action of another subordinate Court co-ordinate to itself by any order or rubkar and therefore where one subordinate Court appoints a Receiver in execution proceedings to take charge of certain properties another Court co-ordinate to the same cannot issue a rubkar for restraining the Receiver to take charge of the properties. AIR (Vol 8) 1921 Pat 92 : 63 Ind Cas 465 : 2 PLT 716 : 6 PLJ 268 (DB).

——O. 39, R. 1 — Execution sale — Injunction — Irregularity.

A prohibitory order by way of injunction can be issued so long as the property in dispute is in danger of being wrongfully sold in execution of a decree but once it is sold no such order can be passed. The rule that a stay order issued by an Appellate Court suspends the power and jurisdiction of the executing Court to conduct further proceedings from the moment of the order of superior Court cannot be extended to the case of an injunction passed under O. 39, R. 1, C. P. C. A sale held in ignorance of an order by way of an injunction staying the sale is an irregularity but the sale will not be set aside unless the judgment-debtor has sustained substantial injury by reason of such irregularity. AIR (Vol 7) 1920 Nag 12 : 54 Ind Cas 928 (DB).

——O. 39, Rr. 1 and 2 — Execution proceedings — Injunction.

A plaintiff, who, after being defeated under O. 21, R. 99, C. P. C. brings a suit under R. 103, of the same order, is not entitled to get a temporary injunction restraining the defendant from taking possession of the property. AIR (Vol 1) 1914 Bom 148 : 16 Bom L R 676 : 27 Ind Cas 56 (DB).

——O. 39, R. 1 — Principles — Injunction — Essentials.

In granting temporary injunction the Court should exercise wise discretion and see that the machinery of the Court is not abused for the fraudulent purposes. So where in a suit to set aside decree on the ground of fraud, the plaintiff applied for temporary injunction restraining the deft. from executing the decree, the Court should not grant temporary injunction on the sole ground of the injunction of the suit but should decide whether the suit is bona fide or not, especially when the deft. pleads that the suit is not bona fide. (1911) 9 Ind Cas 227 (Cal) (DB).

——O. 39, R. 1 — Execution proceedings — Decree in Revenue Court.

When a decree of the Revenue Court is transferred to the Civil Court it should be treated as one passed in a Civil Court and so a Court may grant a temporary injunction staying execution of such a decree. (1901) 9 CLJ 125 : 36 Cal 252 : 13 CWN 791 : 1 Ind Cas 933 (DB).

7-A Interpretation.

——O. 39, R. 1 — Interlocutory injunction — Essentials for grant of — Irreparable injury — Meaning of.

The plaintiff, in order to obtain relief of temporary injunction, must prove that the withholding of the injunction will cause him irreparable injury before legal right claimed by him can be established.

Irreparable injury does not mean injury that is not physically capable of being remedied but it is such an injury which could not be adequately remedied by damages. Inadequacy of remedy by damages means that the damages obtainable by law are not such compensation as will, in effect, though not in specie, place the parties in the position in which they formerly stood. AIR (Vol 33) 1946 Pat 177: 24 Pat 656 (DB).

——O. 39, R. 1 — Defendant can apply under O. 39, R. 1 (a).

The words 'by any party' used in O. 39, R. 1 (a) include the plaintiff and hence an application under O. 39, R. 1 (a) can be made on behalf of a defendant. AIR (Vol 26) 1939 Mad 495: 49 MLW 441: (1939) 1 MLJ 519: (1939) MWN 402.

——O. 39, Rr. 1, 2 (3) — R. 2(3), if governs R. 1 — Desirability of re-drafting R. 2, pointed out.

Order 39, Rule 2 (3), Civil P. C., governs both R. 1 and the earlier part of R. 2. Consequently, the penalty prescribed in O. 39, R. 2 (3) applies to cases of injunctions issued under O. 39, R. 1 also, although there is no specific provision in that rule to that effect.

Desirability of redrafting Rule 2 perhaps by replacing Rule 2 (3) by a new rule with such modifications as may be required, pointed out. AIR (Vol 23) 1936 Pat 23: 2 BR 187: 15 Pat 320: 17 PLT 61: 160 Ind Cas 347 (DB).

——O. 39, R. 1 — The words 'in case of disobedience' used in Cl. 3, R. 9 of O. 39 are wide enough to cover breaches of injunctions issued under O. 39, R. 1. AIR (Vol 22) 1935 Pat 274: 16 PLT 309: 1 BR 476: 155 Ind Cas 619.

——O. 39, Rr. 1, 2, Ss. 94 (e), 151 — Suit for money — Plaintiff deliberately choosing Civil Court as forum — Plaintiff receiving part of the money and attempting to recover the rest by summary procedure under District Local Boards Act — Injunction under inherent powers of Court.

The plaintiffs deliberately chose the Civil Court as the forum for the determination of their claim against the defendants. Having done so and having in the process of negotiations for settlement with defendants obtained from defendant No. 1 a sum of money, they gave the go-bye to the Civil Court and attempted to recover money alleged to be due to them out of the agreement which was the subject-matter of litigation by summary procedure under the District Local Boards Act. On the defendants' application for interim injunction:

Held, that although the application did not fall under O. 39, Rr. 1 and 2, equities were in favour of the defendants and the Court had jurisdiction to make an order under S. 151, and issue injunction to prevent abuse of the process of Court. AIR (Vol 21) 1934 Sind 179: 153 Ind Cas 295.

——O. 39, R. 1 — Interpretation.

The expression "property in dispute in a suit" in Rule 1 means the property which is the subject-matter of the suit. AIR (Vol 12) 1925 Lah 628: 89 Ind Cas 678 (DB).

——O. 39, R. 1 — Order to prepare inventory.

An order to defendant to prepare an inventory and to keep accounts is not an order under the inherent powers conferred by S. 151 of the Code, but is an order under O. 39, R. 1. AIR (Vol 10) 1923 Lah 48: 72 Ind Cas 569.

——O. 39. R. 1 — The word "defendant" cannot be extended in meaning as equivalent to respondent. AIR (Vol 8) 1921 Nag 90:4 NLJ 207 (DB).

——O. 39, R. 1 — Security and accounts — Order directing furnishing of accounts.

An order directing the furnishing of security and submission of accounts passed on an application for the issue of interim injunction is not an order under O. 39, R. 1, (1913) 17 CWN 318: 17 Ind Cas 361 (DB).

——O. 39, R. 1 — (S. 492 old Code) — Injunction — "Courts of Civil Jurisdiction" — Revenue Courts — Execution of decree of Revenue Court in Civil Court, stay of.

The Revenue Courts are Courts of civil jurisdiction within the meaning of the Code of Civil Procedure, in that their decrees when transferred in the regular course are to be treated in all respects as if they were passed by a Court of Civil judicature. Hence a Civil Court may, under S. 492, Civil Procedure Code, grant a temporary injunction, staying proceedings in execution of decree passed in a suit under Section 93 of NWP Rent Act and which was transferred for execution to a Civil Court. 16 A 496, dissented from.

The decree does not lose its original character. It is only in the course of execution that the Civil Court should treat such a decree in all respects as if it had been passed by itself. (1908) 13 CWN 791: 1 Ind Cas 933: 9 CLJ 125: 36 C 252 (254) (DB).

——O. 39, R. 1 — Wrongfully sold in execution of a decree — Temporary injunction — Act XIV of 1882, S. 492 — Act X of 1877, S. 492 — Act VIII of 1859, S. 92.

By using the words "wrongfully sold in execution of a decree" the legislature intended that an injunction might be granted when property which the claimant claims to be his was in danger of being sold in execution of a decree against another person or even against himself. (1909) 7 ALJ 932 (936): 33 All 79: 1 Ind Cas 183 (FB).
(Overruling (1904) AWN 37: 26 A 311).

——O. 39, R. 1 ((old), section 492) — Execution of decree — Temporary injunction — "Wrongfully sold".

In execution of a simple money decree against one, the decree-holder, attached certain property as belonging to his judgment-debtor. To this attachment one Musammat objected, and her objection was sustained. The decree-holder thereupon brought a suit as provided by section 283 of the (old) Code of Civil Procedure against the Judgment-debtor and Musammat Chando Bibi, and in this suit obtained a decree from the Court of first instance. Musammat appealed to the High Court, and, pending the appeal applied for an injunction against Rai Krishna Chand under section 492 of the Code. Held that such an injunction could not under the circumstances be granted, inasmuch as it was impossible to say that the attached property was in danger of being "wrongfully" sold in execution of a decree within the meaning of section 492. 10 All 80. Overruled (1904) 26 All 311 (312): 1904 AWN 37.
(Overruled in (1909) 33 All 79 : 7 ALJ 932 (FB).)

8. Persons beyond jurisdiction

——O. 39, R. 1 — Jurisdiction to restrain person not resident within jurisdiction from proceeding in another Court.

The Calcutta High Court in its original jurisdiction has no power to issue an injunction restraining a party to proceeding before it from proceeding with a suit in other Court unless the party sought to be restrained resides within the jurisdiction of the High Court. A I R (Vol 30) 1943 Cal 89 : 208 Ind Cas 178.

——O. 39, R. 1 — Courts in India, if foreign Courts to each other.

The fact that for administrative purposes the various Courts in British India are given separate territorial jurisdiction does not justify the view that they bear the same relationship to one another as an English Court does to a foreign Court. The order of one Indian Court may be effective against a person within the jurisdiction of another Indian Court when a similar order by an English Court would be of no avail against a person within a foreign jurisdiction. The inclusion of the Courts in British India within the expression "Foreign Court" not only disregards the definition of "Foreign Courts" which is laid down in the Civil P. C. but fails to take into consideration the provisions of S. 136 of the Code which lay down the procedure to be adopted for enforcement of the Court's order by arrest of a person outside the local limits of the Court's jurisdiction. Consequently, the Court has power to grant an interlocutory injunction against a person outside the local limits of the Court's jurisdiction and a machinery exists for its enforcement. In a proper case therefore the Calcutta High Court can issue an injunction against person in British India (which at present includes Burma) although that person is not within the jurisdiction. AIR (V 24) 1937 Cal 172 : 171 Ind Cas 652.

——O. 39, R. 1 — Submission to jurisdiction.

Although a Court will not issue any injunction against a person not within its jurisdiction, yet when that person has submitted to its jurisdiction, the Court will in the ends of justice restrain that party from doing anything which it considers is improper and will amount to an abuse of the process of the Court. A I R (Vol 13) 1926 Pat 171 : 6 P. L. T. 540 : 85 Ind Cas 852 (DB).

——O. 39, R. 1 — Very early stage.

An application for an injunction restraining the deft. in a pending suit from prosecuting an action in a Foreign Court must be made at a very early stage of the proceedings. A I R (Vol 7) 1920 Cal 798 : 59 Ind Cas 218 : 24 C W N 735.

——O. 39, R. 1 — Suit in foreign Court — Injunction — Stay of suit in foreign Court.

A Court can restrain a person from proceeding with a suit in a foreign Court if the person resides within its jurisdiction so as to make him liable for contempt if he disobeys the order. (1909) 36 Cal 233 : 13 C W N 346 : 1 Ind Cas 927.

9. Power of High Court

——O. 39, R. 1 — Interim injunction outside the scope of — Power of High Court to grant in its appellate jurisdiction. See A I R (Vol 38) 1951 Mad 279 : (1950) 2 M L J 482.

——O. 39, R. 1 — Injunction under inherent powers.

Court cannot grant temporary injunction under S. 151 if the case cannot be brought under O. 39. A I R (Vol 32) 1945 Pat 483 : 24 Pat 496 (DB).

——O. 39, R. 1 — Injunction — Jurisdiction — Calcutta High Court, Power of, to issue injunction to restrain person not resident within its jurisdiction from proceeding with suit in Court outside province of Bengal — Limits of exercise of such power.

The Calcutta High Court in its original jurisdiction has power to restrain by injunction a party to proceedings before it not resident within the limits of its jurisdiction from proceeding with a

suit in another Court. These injunctions are granted by the Calcutta High Court, not under the Civil P. C., but in the exercise of its equity jurisdiction which it inherited from the Supreme Court. The Supreme Court was vested with the same powers in this matter as the Court of King's Bench and Chancery in England. An injunction can be granted even with respect to proceedings in Courts outside the Province of Bengal and not subordinate to the Calcutta High Court.

It is not possible to frame a comprehensive formula of the conditions under which such power should be exercised. The Court will have to decide for itself upon the peculiar circumstances of each case whether the exercise of such power is necessary for the ends of justice and it is not desirable to fetter the discretion of the Court by laying down any rigid rule. Such power should be exercised sparingly and with great caution and only when the ends of justice urgently require its exercise.

Simultaneous proceedings for letters of administration were started by A in the Calcutta High Court and by B in the Court at Bhagalpore. B was not a resident within the Calcutta High Court's jurisdiction but had filed caveat in the proceedings by A and thereafter had applied in those proceedings for stay of A's application. At no time had B objected to the jurisdiction of the Calcutta High Court.

Held, that B having fully submitted to the jurisdiction of the Calcutta High Court and also invoked its aid, it was not open to him to say that the Calcutta High Court had no jurisdiction to restrain him from proceeding with his application at Bhagalpore.

Held, further that in the circumstances of the case, B should be restrained from proceeding with his application at Bhagalpore pending the disposal of A's application by the High Court. A I R (Vol 30) 1943 Cal 93 : I L R (1942) 2 Cal 203 : 208 Ind Cas 122.

——O. 39, R. 1 — Calcutta High Court has jurisdiction to restrain persons within its jurisdiction, by injunctions, from litigating in another Court on ground of convenience. A I R (Vol 28) 1941 Cal 434 : I L R (1941) 1 Cal 373 : 196 Ind Cas 415.

——O. 39, R. 1 — Power of Chartered High Court to grant injunction apart from provision of O. 39, R. 1.

Although the application cannot be brought within the scope of O. 39, R. 1, a Chartered High Court is not powerless to grant an injunction otherwise than in accordance with the provisions of O. 39, R. 1, if a proper case is made out. A Chartered High Court has an inherent jurisdiction to grant injunctions operating in personam under circumstances and conditions other than those set out in the Civil P. C., where the ends of justice so require. A I R (Vol 26) 1939 Cal 642 : 187 Ind Cas 886.

——O. 39, R. 1 — Dismissal of suit for default, effect of, on interlocutory orders — Restoration of suit, whether revives interlocutory proceedings — Dismissal of suit and restoration pending revision petition from interlocutory order — Petition, whether can be proceeded with.

Where a suit is dismissed for default, all interlocutory matters connected with the suit and pending at the time of the dismissal come to an end and when the suit is restored to the file, the question whether any interlocutory matter is also restored should be decided with reference to the intention of the officer who passed the order of restoration. It is a question of the construction of the order. If he intended to restore the suit and all the ancillary matters connected with it, they are all restored. But if he did not so intend, they are not restored. As a matter of general rule it may be taken that the intention would be to restore the suit and all incidental matters.

Pending a suit, an application was made for a temporary injunction; the Munsif granted it, but the District Judge on appeal refused to grant the injunction and against this order a revision petition was filed in the High Court. The suit was subsequently dismissed for default and restored to the file.

Held, that the revision petition was not incompetent and could be proceeded with. A I R (Vol 21) 1934 Mad 49 : (1933) M W N 782 : 38 M L W 887 : 65 M L J 844 : 57 Mad 308 : 147 Ind Cas 1045.

——O. 39, R. 1 — Grant of interlocutory injunction — Grounds on which can be made — Bill of Legislature — Suit for declaration that Bill is ultra vires — Injunction to restrain President of Legislative Assembly — Whether can be granted.

The Courts can only grant an interlocutory injunction if they are satisfied that in all probability the declaration, which is the foundation for the permanent injunction claimed will be made when the suit comes to be tried. The Court has no jurisdiction to grant an injunction to restrain an act which inflicts no legal wrong upon the plaintiff.

Where the plaintiff sought for the grant of an interlocutory injunction to restrain the President of the Legislative Assembly from allowing the introduction of a certain Bill in the Assembly, the High Court refused to grant the injunction prayed for.

Per Broomfield, J. — It is doubtful whether the High Court has jurisdiction in any case to make an injunction against the President of the Legislative Assembly qua President, or indeed to consider whether an enactment of the Central Legislature is or is not ultra vires, merely on the ground of its being inconsistent with some other enactment of that legislature. A I R (Vol 19) 1932 Bom 166 : 34 Bom L R 231 : 56 Bom 254 : 137 Ind Cas 379 (DB).

——O. 39, R. 1 — Powers of High Court to grant interim injunction, limits of.

Ordinarily, if a plaintiff makes no prayer for a permanent injunction in a plaint, a temporary or interim injunction of a like nature should not be issued in his favour. But there may be cases in which a relief in the shape of a permanent injunction may not be necessary for the plaintiff, the other reliefs which the decree may provide for being sufficient and in such cases the withdrawal of the prayer for a permanent injunction should not preclude the plaintiff as regards the temporary injunction.

The powers of the High Court in the matter of issuing injunctions on parties in an appeal pending before it are not circumscribed by the provisions of O. 39, R. 1, Civil P. C., and any order may be made by it which the ends of justice and expediency may require. A I R (Vol 19) 1932 Cal 353 : 54 C L J 317 : 36 C W N 291 : 137 Ind Cas 519.

——O. 39, R. 1 — Equitable jurisdiction of High Court — Civil Procedure Code, whether exhaustive — Appeal from order refusing to set aside ex parte decree — Power to issue injunction restraining execution pending appeal.

The High Court has power to grant an injunction to restrain a person from executing an ex parte dercee pending the disposal of an appeal preferred to the High Court from order refusing to set aside the ex parte decree.

The High Courts, over and above the powers which they enjoy under the Civil P. C., possess an equitable jurisdiction derived from the old Supreme Court to issue an injunction in appropriate cases and there is nothing in the Civil P. C. that deprives the High Courts of that power. A I R (Vol 19) 1932 Mad 180 : 35 M L W 168 : 136 Ind Cas 346 (2).

——O. 39, R. 1 — High Court has power to stay partition proceedings in a Revenue Court if the terms of S. 112, U. P. Land Revenue Act (III of 1901) are applicable but it cannot do so in any other circumstances. It has, therefore, no power to stay proceedings before as Assistant Collector pending an appeal from the decision of Civil Court to which the Assistant Collector had referred the parties for determination of question of title under S. 111(1)(b) of the Land Revenue Act. AIR (Vol 18) 1931 All 57 (2): 14 RD 651: (1930) ALJ 1469: 53 All 180: 132 Ind Cas 42.

——O. 39, R. 1 — Stay of — High Court's power is not under R. 1.

It is doubtful whether a subordinate Court in British India has power to restrain by injunction a party from prosecuting a suit in a foreign Court (though within the British Empire). The Chartered High Courts have such power, not by reason of O. 39, Rr. 1 and 2, C. P. C., but by reason of the equity jurisdiction they inherited from the old Supreme Courts. AIR (Vol 15) 1928 Mad 491: 27 MLW 418: 109 Ind Cas 281 (DB).

——O. 39, R. 1 — The High Court has power to stay execution or issue an injunction in revision petitions provided it can do so in second appea's. AIR (Vol 13) 1926 Mad 1126: 24 MLW 421: 1926 MWN 708: 97 Ind Cas 938.

——O. 39, R. 1 — High Court has an inherent power to grant injunction in suitable cases irrespective of the provisions of O. 39. AIR (Vol 12) 1925 Lah 242: 78 Ind Cas 802.

——O. 39, R. 1 (Ss. 492, 493 old Code) — Injunction — High Court's power to restrain trial of suit in Presidency Small Cause Court by injunction.

The High Court has power to stay the trial of a suit in the Presidency Small Cause Court (the subject-matter being the same in both the Courts) and this power is not affected by the fact that Ss. 492 and 493, C. P. C., do not mention the particular injunction prayed for. (1906) 34 C 97 (99). See also (1906) 34 C 101 (103).

——O. 39, R. 1 — Batwara proceedings — Power of High Court to restrain parties to a pending suit from proceedings.

Though the High Court has no jurisdiction over the Batwara Court, it will a.ways assert its right to act in pesonam and has comp'ete jurisdiction to restrain the parties to a pending suit from proceeding with batwara proceedings until the determination of the suit. The High Court will not assume that the Batwara Court will take any steps unfair to the parties restrained from proceeding with the batwara proceedings or compel them to act in any way inconsistent with their duty of obedience to the High Court. AIR (Vol 12) 1925 Pat 710: 85 IC 551: 6 Pat LT 524 (DB).

——O. 39, Rr. 1, 2 (Ss. 492, 493 old Code) — Specific Relief Act, Ss. 54, 56 — Jurisdiction of High Court — Injunction temporary to restrain suit in Small Cause Court.

An interlocutory application for an injunction temporarily restraining the defendant from carrying on his suit, in the Small Cause Court against the plaintiff does not fall within S. 92, C. P. C., (O. C.) and the High Court has no power to grant such an application in the course of a suit except by the decree in the case; but it may remove the small Cause suit to its own file under Cl. 13 of the Letters Patent. (1903) 27 B 357 (361): 5 Bom LR 201.

10. Revision.

——O. 39, R. 1 — Proceedings for temporary injunction under Order 39 constitute "case" within the meaning of S. 115 and are open to revision. AIR (Vol 20) 1933 Lah 1046: 149 Ind Cas 1064 (DB).

——O. 39, R. 1 — Where there is a bona fide dispute between the parties and the injunction relates only to such properties belonging to the deceased as are not in possession of the defendant-appellant, there is no reason to interfere with the order of injunction though issued without notice to the parties. AIR (Vol 10) 1923 Lah 239: 71 Ind Cas 743.

11. Specific performance.

——O. 39, R. 1 — Specific Relief Act does not govern temporary injunctions but O. 39, R. 1 governs them. Even a Subordinate Court can grant an injunction against a party in respect of proceedings in a superior Court, Specific Relief Act, however regulates the grant of perpetual injunctions. AIR (Vol 12) 1925 Cal 233: 81 Ind Cas 2.

——O. 39, R. 1 — Specific performance — Temporary injunction — Concealment of facts — Specific performance of contract.

A temporary injunction will be granted to a plaintiff, restraining defts. from selling property to a third person during the pendency of a suit for specific performance of contract for sale, where permission necessary to sell the property was obtained owing to certain facts being not brought to the notice of the Court granting it. AIR (Vol 7) 1920 Cal 540: 57 Ind Cas 847 (DB).

——O. 39, R. 1 — Specific performance — Contract to lease — Temporary injunction.

Pending a suit for the specific performance of an agreement to grant a lease of certain property to the plff. the Court should grant a temporary injunction to restrain the deft. from granting a lease of the same property to any other person till the disposal of the suit. If there is a valid contract for transfer, the Court will not permit the transferor afterwards to transfer the legal estate to a third person, although such third person, would be affected by 'lis pendens'. (1913) 17 CLJ 427: 16 Ind Cas 359 (DB).

——O. 39, R. 1 — Specific performance — Code not exhaustive — Injunction.

C. P. Code is not exhaustive, hence Court should interfere by injunction in cases of specific performance, to maintain matters in their present state. (1909) 2 Ind Cas 266 (Cal) (DB).

12. When granted.

See also Note 2.

(a) **General principles.**
(b) **Prima facie case.**
(c) **Irreparable injury.**
(d) **Infringements of right.**
(e) **Alienation of property.**
(f) **Balance of convenience.**
(g) **Balance of advantage.**
(h) **Other cases.**

(a) General principles.

——O. 39, R. 1 — Grounds for grant of temporary injunction — Duty of plaintiff applying.

A plaintiff applying for a temporary injunction pending his suit must in order to entitle him to the grant of an injunction, show (1) that in the event of withholding the relief of temporary injunction he will suffer an irreparable injury; (2) that the case is one in which in the event of his success in the suit he will not have the proper remedy in being awarded adequate damages; (3) that in taking into consideration the comparative mischief or inconvenience to the parties, the balance of convenience is in his favour; and (4) that there is clear necessity for affording immediate protection to his alleged right or interest which would otherwise be seriously injured or impaired. AIR (Vol 33) 1946 Pat 177: 13 BR 275: 229 Ind Cas 40: 24 Pat 656 (DB).

——O. 39, R. 1 — Temporary injunction, grant of.

A temporary injunction in respect of a matter which does not form part of the cause of action of the suit but came into being after the institution of the suit cannot be granted. AIR (Vol 32) 1945 Cal 44: ILR (1944) 1 Cal 181.

——O. 39, R. 1 —Petitioner must come with clean hands.

Relief by way of an injunction can only be granted to persons who come to Court with clean hands.

Held, after considering the relevant matters, that the injunction, to stay the operation of the order of the Judicial Commissioner, pending the appeal, could not be granted, as the petitioner did not come with clean hands. AIR (Vol 23) 1936 Lah 567: 164 Ind Cas 16.

——O. 39, R. 1 — Per Boys, J.— The conditions relating to the grant of temporary injunctions are governed by the Civil P. C. They are not identical with those applicable to perpetual injunctions. AIR (Vol 20) 1933 All 86: 1932 ALJ 803: 143 Ind Cas 98 (DB).

——O. 39, R. 1 — Against co-sharer — Great caution necessary.

The law with regard to granting of injunction which obtains in a case brought against a trespasser is not the same as that in a case where one of the co-sharers sues another in partition. Every owner of the land, whatever the extent of his share, has the right to use the land in any way which he thinks proper. If that be not so, it will not be possible for any co-sharer to use any part of the land in coparcenary for any profitable purpose and, therefore, an order passed against a co-sharer restraining him from building upon a portion of the joint property must be passed with great caution. AIR (Vol 15) 1928 Cal 293 (DB).

——O. 39, R. 1 — Object to avoid suit — Improper.

Where the real object underlying the wish of the applicant to obtain a temporary injunction is to avoid having to sue for possession and having to pay Court-fees accordingly injunction cannot be granted. AIR (Vol 15) 1928 Nag 222: 107 Ind Cas 908.

——O. 39, R. 1 — Declaration suit — No consequential relief — Cannot be granted.

Although hard and fast rule cannot be laid down that ad interim injunction can never be granted in a suit for declaration, it should not be granted when in that suit there is no prayer for consequential relief or for a perpetual injunction, and where the plaintiff if successful in his suit for declaration must bring another action for enforcing the right which he seeks to keep undisturbed by such injunction. AIR (Vol 13) 1926 Lah 504: 8 LLJ 289: 27 PLR 453: 96 Ind Cas 439 (DB).

——O. 39, R. 1 — Whether it is competent to the Court to grant an interlocutory injunction in a suit which is a suit for a declaration only, and where no permanent injunction is claimed. AIR (Vol 13) 1926 Pat 318: 7 PLT 337: 96 Ind Cas 623 (DB).

——O. 39, R. 1 — The general principles applicable to cases of interim injunction is that where a permanent injunction cannot be given, no prayer for a temporary injunction will be allowed. AIR (Vol 10) 1923 Pat 133: 2 Pat LR 17: 73 Ind Cas 294 (DB).

——O. 39, Rr. 1 and 2 — Principles — Temporary injunction — Suit for permanent injunction.

In a suit for permanent injunction a temporary injunction ought to be refused where the refusal would defeat the object of the suit and amount to denial of justice to the applicant AIR (Vol 5) 1918 Cal 495: 43 Ind Cas 24 (DB).

——O. 39, R. 1 — Principles — Temporary injunction — Principles guiding, grant of.

Where the defendants put forward a claim of right which is quite inconsistent with the rights which plaintiffs sue to establish as theirs, and where it appears probable that the claim is sought to be exercised in a wholly unwarranted manner, out of spite and ill-feeling, the Court will grant temporary injunction. But under colour of temporary injunction a plaintiff cannot seek a relief which forms the cause of action in the suit. AIR (Vol 2) 1915 Cal 661: 27 Ind Cas 647 (DB).

——O. 39, R. 1 — Principles — Injunction, temporary — When to be granted.

Before granting an injunction though a temporary one, the Court must be satisfied that there is a serious question to be tried at the hearing, and that there is a probability of the plaintiff succeeding. (1913) 17 CWN 964: 18 Ind Cas 394 (DB).

(b) Prima facie case.

——O. 39, R. 1 — Intention to dispose of property — Inference.

Where the defendant while admitting part of the plaintiff's claim also admits the need to dispose of his property to pay even the admitted amount, from this it is a matter of inference that he has an intention to dispose of the property and an injunction can be granted under O. 39, R. 1, C P. Code, on the strength of such an inference. AIR (Vol 37) 1950 Kut 49 (2).

——O. 39, R. 1 — Scope of inquiry — What the plaintiff has to make out — Points raised being points which ultimately have to be decided as issue in suit itself — If to be excluded from consideration at stage of application for injunction.

In an application for a temporary injunction pending a suit, the Court has to consider, on 'prima facie' grounds of course, the existence of the legal rights alleged and the respective strength and weakness of the cases of the parties. The mere fact that the points raised are points which will ultimately have to be decided as issues in the suit itself does not exclude them from the consideration of the Court at the stage of an application for a temporary injunction. It is enough for the plaintiff if he can show that he has a fair question to raise as to the existence of the right alleged and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question can be disposed of. He is not required to make out a clear legal title. AIR (Vol 37) 1950 Pat 527 (DB).

——O. 39, R. 1 — Grounds for temporary injunction — Principles governing grant of injunction — Trespasser — Right of prima facie title and balance of convenience — Proof of — Effect.

It is well-settled that, before granting a temporary injunction, the Court must be satisfied that

the plaintiff has a 'prima facie' case; that the Court's interference is necessary to protect him from irreparable or at least serious injury; that the balance of convenience is in favour of the person who asks for the injunction; and that there is no other sufficient or adequete remedy open to him by which to protect himself.

The law does not lean in favour of a trespasser, and the possession of the latter for which he can seek protection, is ordinarily confined to what is actually possessed (e.g., in the case of a lime quarry and limestone actually possessed); it does not however extend to what he may take in future by continuing in trespass. 'Prima face', this is all the protection to which he is entitled: but he cannot claim an injunction to restrain his ejectment from possession. To grant an injunction in such a case would be tantamount to giving a right both present and future to a trespasser who cannot legally claim such right.

Where the plaintiff applicant has however, made out a 'prima facie' case of title to the property and as to the serious injury which would result if no injunction is granted, he being in possession and having on the land kilns, buildings, bungalows, dwelling houses, tram lines, railway sidings, fixed plant and machineries, etc., he would be entitled to the grant of an injunction both on the ground of 'prima facie' title and on the ground of balance of convenience, restraining the defendant from interfering with his possession or from compelling him to remove the erections pending the hearing of the suit, as otherwise there would be irreparable injury. AIR (Vol 37) 1950 Pat 222: 31 PLT 100 (DB).

——O. 39, R. 1 — **Interlocutory injunction — Grant of — Essentials to be proved, indicated.**

In order to obtain an interlocutory injunction, it is not enough for the plaintiff to show that he has a prima facie' case. He must further show that:

(1) In the event of withholding the relief of temporary injunction he will suffer an irreparable injury;

(2) in the event of his success in the suit in establishing his alleged legal right, the encroachment whereof is complained against, he will not have the proper remedy in being awarded adequate damages;

(3) in taking into consideration the comparative mischief or inconvenience to the parties, the balance of convenience is in his favour, or in other words, that his inconvience in the event of withholding the relief of temporary injunction will in all events exceed that of the defendant in case he is restrained. This condition can, under circumstances, be so adjusted as not to deprive either party of the benefits he is entitled to in the event it turns out that the party in whose favour the order is made shall be in the wrong, by imposition of terms on one party or the other as condition of either granting or withholding the injunction;

(4) lastly, the plaintiff must show a clear necessity for affording immediate protection to his alleged right or interest which would otherwise be seriously injured or impaired.

In order to make out a 'prima facie' case necessary for granting an interlocutory injunction, it is not necessary that the plaintiff should establish his title to the property in suit. It is enough for him if he can show that he has a fair question to raise as to the existence of the right which he alleges and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question can be disposed of. The Court in interfering by a temporary injunction, does not in general profess to anticipate the determination of the right but merely gives it, if, in its opinion, there is a substantial question to be tried, and if, till the question is ripe for decision, a case has been made out for the preservation of the property in the meantime in 'status quo'. The plaintiff is not required to make out a clear legal title.

The plaintiff brought a suit for possession of certain coal lands on the ground that they were comprised in his lease and applied for an interlocutory injunction restraining the defendant from working the disputed coal lands:

Held. that (1) the quantity and value of the coal that might be extracted by the defendant till the decision of the suit could be determined and, in the event of the plaintiff's success, award of compensation and damages would be full and complete remedy and, therefore, interference by a temporary injunction was not called for.

(2) the balance of convenience was also in favour of withholding the relief of interlocutory injunction. In case injunction was granted, the working out of the coal lands would be stopped. By the time the litigation was over the existing coal market may not be there. It was more likely that market would fall as soon as war conditions disappeared. In such circumstances, the plaintiff, even in the event of his success, would be a great loser because he could not call upon the defendant to pay him damages. On the other hand, if injunction was withheld and the defendant worked out the mine and derived profits those would be of the plaintiff in the event of his success coming to him in the shape of damages or mesne profits. AIR (Vol 33) 1926 Pat 177: 24 Pat 656 (DB).

——**Interlocutory injunction — Prima facie case for grant of — Meaning of — Title need not be established.**

In order to make out a 'prima facie' case necessary for granting an interlocutory injunction, the plaintiff need not establish his title. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleged and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question can be disposed of. The Court must also, before disturbing any man's legal right, stripping him off any of the rights with which law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit. A mere existence of a doubt as to the plaintiff's right to the property does not itself constitute a sufficient ground for refusing an injunction though it is always a circumstance which calls for the attention of the Court. AIR (Vol 33) 1946 Pat 177: 24 Pat 656 (DB).

——**O. 39, R. 1 — Temporary injunction — considerations.**

In granting or refusing a temporary injunction under the Civil P. C., the Court would primarily consider two questions: (1) whether the plaintiff has made out a good prima facie case; (2) on which side would lie the balance of convenience or inconvenience.

(Plaintiff was granted temporary injunction on the ground of balance of convenience and of having a prima facie case). AIR (Vol 31) 1944 Sind 107 : ILR (1943) Kar 504 : 212 Ind Cas 545 (DB).

——**O. 39, R. 1, S. 115 — Person applying must show that he has prima facie case — Material irregularity.**

The first principle governing applications for temporary injunction under O. 39, R. 1 is that the applicant must show that he has a prima facie case. Where the Court passing an order grant-

ing temporary injunction loses sight of this principle and grants injunction merely because the plaintiff has filed a suit and has asked the Court to preserve the status quo, its order is vitiated by material irregularity. AIR (Vol 26) 1939 Mad 750 : (1939) MWN 621.

——O. 39, Rr. 1, 2 — Injunction to restrain defendant from ejecting plaintiff — Suit for declaration — Prima facie case of ownership not made out — Injunction.

An injunction to restrain the defendant from ejecting the plaintiff in execution proceedings, pending suit for declaration of ownership, should not be granted when the plaintiff has not made out a prima facie case that he is the owner of the property. AIR (Vol 22) 1935 Sind 128 : 156 Ind Cas 698 (DB).

——O. 39, R. 1 — Prima facie case is essential before either injunction or attachment can be granted. AIR (Vol 21) 1934 Cal 694 (696) : 38 CWN 771 : 61 Cal 814 : 155 Ind Cas 354 (2).

——O. 39, R. 1 — Absence of 'prima facie' case — No risk of irreparable injury — Injunction.

A temporary injunction 'pendente lite' will not be granted unless the plaintiffs have a good 'prima facie' case and unless there is risk of irreparable injury being caused if the injunction is not granted.

Where, in a suit instituted for injunction against the defendants on behalf of certain minors, it was found that the minors had no 'prima facie' case and that the suit was collusive and it also appeared that the defendants were maintaining proper and accurate accounts, and there was no risk of irreparable injury to be caused:

Held, that the plaintiffs were not entitled to a temporary injunction as they could easily be compensated for the loss of income in case they succeeded in the suit. AIR (Vol 20) 1933 Lah 621 : 146 Ind Cas 67.

——O. 39, R. 1 'Prima facie' case shown — Temporary injunction.

Where, the plaintiff, pending the disposal of his suit for a declaration that an alleged contract of suretyship executed by him was of no effect, sought relief by way of a temporary injunction restraining the Collector from proceeding to the sale of certain property which he had attached in pursuance of the powers vested in him by the provisions of Akbari Act read along with the provisions of the Land Revenue Code and it appeared that the plaintiff had made out a 'prima facie' case:

Held, that a temporary injunction should be granted subject to his furnishing security for the amount claimed by the Collector. AIR (Vol 20) 1933 Sind 311: 147 Ind Cas 478.

——O. 39, R. 1 — 'Prima facie' case — Irreparable injury if not granted — Balance of convenience.

The effect and object of an 'ad interim' injunction is merely to keep matters in 'status quo' until the final disposal of the suit, and the principles on which such injunction will issue or will be continued pending the final disposal of the suit are well settled. The person who seeks the aid of the Court in that behalf must, as a rule be able to satisfy the Court on three points: (1) that there is a serious question to be tried at the hearing, and there is a probability that he will be entitled to the relief sought by him, or, in other words, that he has a 'prima facie' case to go to trial: (2) that the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable before his legal right can be established on trial; and (3) that the comparative mischief or the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it. AIR (Vol 17) 1930 Sind 287 (DB).

——O. 39, R. 1 — 'Prima facie' good case — Irreparable injury if not granted — Balance of convenience.

A person who seeks the aid of the Court by way of interlocutory injunction must as a rule be able to satisfy the Court (1) that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that he will be entitled to relief, (2) that the Court's interference is necessary to protect such person from that species of injury which the Court calls irreparable before his legal right can be established upon trial, and (3) that the comparative mischief or the inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise by granting it. Thus when a mortgagee or attaching creditor is proceeding to sell the right, title and interest of his debtor, the balance of convenience is in favour of the creditor, that no injunction should issue in such cases, and all that the Court might do 'ex majeure cautila' is to require the creditor to give an undertaking that at the time of the sale, whether it be through Court or otherwise, the intending purchasers should be informed of the pendency of the suit. (AIR Vol 16) 1929 Sind 182 (DB).

——O. 39, R. 1 — An interlocutory injunction is merely provisional in its nature. It does not conclude or purport to conclude a right, but is intended to keep the matters in status quo pending further orders. All that the plaintiffs are required to show is firstly that they have a strong 'prima facie' case in support of the right which they assert; and secondly, that it is just and convenient that, pending the determination of such right, the property in suit should be maintained in 'status quo'. 21 SLR 368: 103 Ind Cas 167: AIR (Vol 15) 1928 Sind 82 (DB).

——O. 39, R. 1 — In granting temporary injunctions all that the Court has to see is whether a 'prima facie' case for a temporary injunction has been made out by the plaintiffs and whether the balance of convenience requires that it should grant a temporary injunction against the defendant till the final determination of the suit. 43 CLJ 405 : 95 Ind Cas 667 : AIR (Vol 13) 1926 Cal 837.

——O. 39, R. 1 — Temporary injunction restraining defendant from interfering with plaintiff's possession, cannot be granted on the ground of apprehended interference with collection of rent and breach of the peace. AIR (Vol 13) 1926 Cal 604: 94 Ind Cas 871: 30 CWN 214 (DB).

——O. 39, R. 1 — 'Prima facie' good case.

In order to entitle the plaintiffs to an interlocutory injunction, though the Court is not called upon to decide finally upon the right of the parties, it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and on the facts before it there is a probability that the plaintiff is entitled relief. 7 PLT 337: 96 Ind Cas 623: AIR (Vol 13) 1926 Pat 318 (DB).

——O. 39, R. 1 — Reversioner's suit — Danger to estate.

Where there is a substantial dispute between the parties and there is a reasonable 'prima facie' apprehension based upon the extravagant conduct of the defendant widow in reference to her administration of the estate of her husband that during the pendency of the suit further alienations

and damage to the estate might be achieved by her, an injunction may be issued at the instance of the reversioners to prevent such further alienations. 89 Ind Cas 678: AIR (Vol 12) 1925 Lah 628 (DB).

——O. 39, R. 1 — Contract of service.

Where a contract forbade the defendants (a steam-ship company) to employ as stevedores none but the plaintiffs.

Held, that the plaintiffs could not be granted a temporary injunction to enforce the covenant. The question of a temporary injunction is dealt with by Civil P. C., whereas the question of a permanent injunction is dealt with under the Specific Relief Act. The principles applicable to the two proceedings are very similar. They both derive from the Court of Chancery and they postulate that man will be punished if he does what his conscious tells him not to do. It is, therefore, impossible disposing of temporary injunction to exclude from one's mind the English doctrine as contained in the Specific Relief Act. Courts of equity will not give an order over the execution of which they cannot watch and which they cannot enforce. A contract by which one party is required to do numerous and delicate services for the other, the performance of which need a particular amount of skill and fidelity is one which cannot be specifically enforced by threats of penalty. Except in very special circumstances where no other redress is open to the parties, the Court will not grant specific relief in such cases both because to attempt to enforce its order would be embrassing to the parties and because it would be derogatory to the Court itself.

Per Rupchand Bilaram, A. J. C. — Preventive relief by way of injunction whether perpetual or temporary is within the discretion of the Court depending on the particular circumstances of each case. In order to entitle the plaintiffs to a temporary injunction pending the disposal of the suit, the plaintiffs must make out a 'prima facie' strong case in support of the right they claim, and further show that irreparable damage will result to them if the injunction is not granted. Though the Court may not issue an injunction to restrain the breach of an affirmative covenant in a contract in view of S. 55. Cl. (f), of the Act, it is not precluded from enforcing by injunction a negative covenant which is coupled with such affirmative covenant and which is either express or implied. Whether the Court would enjoin the performance of a negative covenant or would infer the existence of such covenant by implication must again depend on the circumstances of each case. There are no equitable grounds for enforcing a negative covenant of an employer in a contract of employment pure and simple where the employee is only entitled to his remuneration. (Case law discussed.) 21 SLR 170: 89 Ind Cas 321: AIR (Vol 12) 1925 Sind 347 (DB).

——O. 39, R. 1 — Imaginary injury — Not enough

Plaintiff and the defendant were rival candidates at a Municipal election in which deft. was declared successful. Three months after the result of the election had been published in the Government Gazette, the plaintiff brought a suit for a declaration that the election was void and that the defendant was consequently not entitled to sit as a Commissioner on the Municipal Committee. He also made an application for the grant of a temporary injunction that the defendant be restrained from attending the meetings of the Municipal Committee and from otherwise exercising the powers of a Municipal Commissioner pending the decision of the suit.

Held ,that plaintiff's sustaining irreparable injury by the defendant's continuing to act as a Municipal Commissioner pending the determination of the suit was a mere imaginary apprehension, that there was no substance in the application made by the plaintiff for the issue of a temporary injunction and that he was obviously prompted by a desire to cause injury to the defendant. The Court should, before disturbing any man's legal rights or stripping him of any rights with which the law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of the suit. AIR (Vol 11) 1924 Lah 633: 75 Ind Cas 428.

——O. 39, R. 1 — An ad interim injunction is justified only when a prima facie case is made out by the plaintiff. On which side lies the balance of convenience should be seen by the Court. Where damage could be recovered from the defendant who had spent a large sum of money which would be wasted if the injunction were granted, the injunction was refused. AIR (Vol 11) 1924 Pat 526: 75 Ind Cas 859: 5 PLT 196 (DB).

——O. 39, R. 1 — When plaintiff has made out a prima facie case for possession and there is a real danger of damage or waste to the suit property which is in defendant's possession, an order for temporary injunction restraining defendant from using the property is good. AIR (Vol 10) 1923 Lah 227: 81 Ind Cas 322: 5 LLJ 262 (DB).

——O. 39, R. 1 — Principles — Injunction — Reasons.

In an application for a temporary injunction the Court will have to be satisfied that the applicant has a prima facie case and that the protection of his interest requires that an injunction should issue temporarily. Quaere. Whether when a party goes to Court claiming an injunction against his opponent to restrain him from doing something wrongful, the opponent should have the right as a matter of interlocutory relief to restrain him from doing the very act which he claims to be entitled to do and which he asks the Court to be allowed to be done without obstruction. (1912) 23 MLJ 316: 17 Ind Cas 219.

——O. 39, R. 1 — Temporary — Grant of — Grounds — Mining operations — Aquiescence — Delay.

Their Lordships revoked the grant of a temporary injunction pending suit restraining defendant mining company from carrying on their constructions on the following grounds: (1) that there was no evidence of plaintiff's title; (2) that the plaintiff stood by for a period of eight months allowing the operations to go on without prohibition; (3) that the loss to the defendants by stopping their going on which the construction would be out of all proportion to the loss which the plaintiff would sustain namely, by the non-cultivation of their lands; (4) that the plaintiff would have no difficulty in securing compensation if he can prove any title thereto. (1906) 10 CWN 173 (176) (DB).

——O. 39, R. 1 — Interlocutory motion — Injunction — Receiver.

It is the practice on the original side of the Bombay High Court on an interlocutory motion to require before any order for injunction or receiver is passed that the plaintiff makes a sufficient affirmative case, a strong prima facie case, to show that he is entitled to the relief which he seeks. (1905) 7 Bom LR 925 (927).

——O. 39, R. 1 — Interlocutory application — Ad-interim injunction to restrain defendant from using plaintiff's alleged trade mark — Overwhelming prima facie case — Irreparable injury.

Where the plaintiffs by an interlocutory application sought to restrain the defendants from using the words 'camel-hair' in respect of certain belting sold by them alleging that in so using the words there was a false representation that the defendants' said goods were of the plaintiffs' manufacture.

Held, that the plainitffs' right to an ad interim injunction depended on their making out a strong, if not an over-whelming, prima facie case that the words complained of signified that the belting was exclusively of the plaintiffs' manufacture and that the use of the description was such as was calculated to deceive purchasers into the belief that they were purchasing goods of the plaintiffs' manufacture, and that irreparable injury might be done if the relief sought were not given.

Held, further—that failing to make out a strong prima facie case as above, the plaintiffs' remedy was to apply for expedition of the suit. (1904) 8 CWN 151 (152, 153).

(c) Irreparable injury.

——O. 39, R. 1 — Applicability — Bengal Estates Partition Act — Proceedings under — Injunction — Jurisdiction of Batwara Court to issue — Grounds for injunction.

The Bengal Estates Partition Act is not complete code in itself, although it contains a number of sections with regard to procedure; it cannot be said that the Batwara Court has no power to issue a temporary injunction on the ground that the Act contains no provisions with regard to the issue of injunctions. The batwara Court, as a Revenue Court, is a Court of civil jurisdiction and can issue an injunction when there are good grounds for doing so, e.g., for preventing waste, damage or mischief to the property under partition. (1947) 13 BR 32.

——O. 39, R. 1, O. 21, R. 63 — Suit under O. 21, R. 63 — Substantial question in controversy between parties — Plaintiff applying for injunction restraining decree-holder from selling property attached by him during pendency of suit.

Order 39, R. 1 authorizes the Court to grant temporary injunction to restrain an auction-sale when the property attached is in danger of being wrongfully sold. The principle underlying the rule is to prevent multiplicity of judicial proceedings.

Where, therefore, in a suit instituted under O. 21, R. 63, there is a substantial question in controversy between the parties and the plaintiff applies under O. 39, R. 1 for an injunction restraining the decree-holder from selling the properties attached by him during the pendency of the suit, the Court should grant the application. The mere fact that the applicant has lost a claim case under O. 21, R. 58 is not sufficient to indicate that the suit is frivolous or that it is in abuse of the process of the Court. AIR (Vol 25) 1938 Cal 371: 42 CWN 409 (DB).

——O. 39, R. 1, S. 151 — Powers of Subordinate Courts to issue injunctions and punish disobedience — S. 151, if can be invoked to add to such powers — Only order passed under O. 39, 'notice and interim stay' — Mere act of taking possession in execution subsequently, if amounts to disobedience.

The words "if it is so prescribed" occurring in the opening paragraph of S. 94 of the Civil P. C. mean "prescribed by the Rules." Whatever may be said as to the power of the High Court to issue injunction for other purposes and to punish disobedience thereof in exercise of its own inherent power as a Court of Record, the power of Subordinate Courts must be found within the four corners of the Code and when the Code has expressly dealt with the injunction in O. 39, S. 151 cannot be invoked to add to the powers thus conferred.

Order 39, R. 1, contemplates an injunction being granted only to prevent any property being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. Where, therefore, in a suit by judgment-debtor under O. 21, R. 103, upon an application under O. 39, Rr. 1 and 2, the Court passes an order 'notice and interim stay' against the decree holder and the notice to him does not make matters clearer, the mere act of the decree-holder in taking possession of the property subsequently does not amount to a disobedience of an injunction punishable under O. 39. AIR (Vol 25) 1938 Mad 190: (1937) MWN 1229: 46 MLW 956: (1937) 2 MLJ 888: 176 Ind Cas 688.

——O. 39, R. 1 — Temporary injunction, when can be granted.

The power of a Court is very wide with respect to the issue of a temporary injunction and the injunction can be issued in any suit if it is proved to the satisfaction of the Court that the property in dispute in the suit is being wrongfully sold in the execution of a decree. There is no restriction in R. 1 of O. 39, Civil P. C., that the suit should be for the issue of a perpetual injunction if a temporary injunction is to be granted. AIR (Vol 25) 1938 Pesh 67: 1938 Pesh LJ 75: 177 Ind Cas 917.

——O. 39, R. 1 — Temporary injunction — Principles on which it should be granted.

The basic principles for issuing a temporary injunction is that the plaintiff must show that the injunction is necessary to protect him from irreparable injury and mere inconvenience is not enough; by the term "irreparable injury" is meant injury which is substantial and could never be adequately remedied or atoned for by damages. Where the inconvenience caused to the plaintiff would not be irreparable and could obviously be remedied by damages, no temporary injunction can be granted.

The Municipal Committee gave the plaintiff a notice under S. 246 of the C. P. Municipalities Act, calling upon him to construct certain roads on the laying out of plots and informing him that if he did not do so, the Committee would construct the roads and recover the cost of doing so from the plaintiff. Thereupon the plaintiff filed the suit against the Municipal Committee claiming an injunction to restrain the Committee from acting in that way:

Held, that the plaintiff should not be granted the injunction asked for because any inconvenience that he may suffer by this could obviously be compensated by money payment. AIR (Vol 24) 1937 Nag 137: ILR (1937) Nag 313: 170 Ind Cas 239.

——O. 39, R. 1 — Tests.

The object of an interim injunction is to preserve status quo. Generally it is applied for and granted where there is an apprehension that damage to property of the plaintiff or, at any rate, some definite injury to the plaintiff will or is

likely to be caused if a certain order is not made. The right criterion which is applicable to a matter of this character is that the Judge should ask himself the question whether the plaintiff is likely to suffer any damage or any irreparable damage and if he comes to the conclusion that the plaintiff would not suffer any serious damages, injunction should be refused. AIR (Vol 21) 1934 Cal 713: 60 CLJ 1: 152 Ind Cas 563 (DB).

——**O. 39, R. 1 — Injunction — Drastic injunction without notice, if can be issued.**

A drastic injunction should not be granted without notice unless there is any risk of irreparable injury or grave inconvenience. AIR (Vol 20) 1933 Lah 282: 149 Ind Cas 642.

——**O. 39, R. 1 — Party wall — Demolition of — Temporary injunction.**

Where the demolition of the party wall is likely to endanger the plaintiff's building and the lives of its inmates, the Court ought to grant a temporary injunction. AIR (Vol 20) 1933 Sind 244: 150 Ind Cas 337.

——O. 39, R. 1 — The cases in which temporary injunction may be granted are where the property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of decree, or where the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors. (1928) 110 Ind Cas 621 (Nag) (DB).

——O. 39, R. 1 — Where neither the equities of the case nor the balance of convenience is in favour of the plaintiff, a temporary injunction cannot be granted. It is necessary for the plaintiff to establish that irreparable injury or grave inconvenience would result to him if the injunction is not granted. A I R (Vol 13) 1926 Lah. 435 : 93 Ind Cas 848.

——**O. 39, R. 1 — Plaintiff out of possession.**

Injunction will be refused, where plaintiff is out of possession of the property in suit unless there is fraud or collusion or unless the act perpetrated or threatened is so injurious as to cause irreparable loss. Irreparable injury means material injury which is not adequately reparable by damages. A I R (Vol 12) 1925 Lah. 167 : 80 Ind Cas 727.

——**O. 39, R. 1 — Possession and waste — Finding.**

Order granting injunction without finding of possession or of danger of waste is unsustainable. Existence of allegation in affidavit is not enough. A I R (Vol 12) 1925 Mad 896 : 91 Ind Cas 307 : 21 M L W 698 (DB).

——O. 39, R. 1 — An applicant asking the Court to issue a temporary injunction must show that the requirements of R. 1, have been fulfilled, viz. that there is risk of the property being damaged or a risk of creditors being defrauded. A I R (Vol 12) 1925 Oudh 698 : 88 Ind Cas 581 (DB).

——O. 39, Rr. 1 and 2 — **Principles — Temporary injunction — "Injury" — Meaning of inherent power.**

The word "injury" in O. 39, R. 2, (1) C. P. C. means an act which is contrary to law. To justify a temporary injunction plaintiff must show irreparable injury or inconvenience likely to result to him before the disposal of the suit, if the opposite party were not restrained by injunction. The Court has inherent power to grant a temporary injunction. A I R (Vol 7) 1920 Lah. 436 : 2 Lah. L J 283 : 55 Ind Cas 403 (DB).

——**O. 39, R. 1 and O. 40, R. 1 — Principles — Waste — Receiver — Temporary injunction — Proper relief.**

Proof of waste is a ground for appointing a receiver. To obtain an injunction or a receiver, the applicant must show that the property is in danger of being wasted or alienated. To secure an injunction it is enough if the applicant has a fair question to raise regarding his right. The Court will not appoint a receiver while one party is in possession and an irreparable wrong may be done to him by the Court taking possession of the property. A I R (Vol 6) 1919 Mad 157 : 10 L W 551 : 53 Ind Cas 760.

——**O. 39, R. 1 — Muhammadan law — Waqf.**

Appointment of co-mutwalli by the first mutwalli grantor of waqf does not invite the application of the rule unless there is danger of waste of property. A I R (Vol 3) 1916 All 68 : 14 A L J 554 : 35 Ind Cas 718 (DB).

——**O. 39, Rr. 1 and 2 — Principles — Interlocutory — Injunction — Principles regulating grant of — Injury — Delay.**

The only thing to be considered by the Court in case of interlocutory injunctions in aid of the legal right is, if the case is so clear and free from objection on equitable grounds that it should interfere without waiting for the legal right to be established. There is no general rule to guide the discretion of Courts. If the Court finds that there is a substantial question to be investigated and that matters should be preserved in status quo till final disposal of that question, it is sufficient ground for granting the injunction. Where the plaintiff fails to prove that the damage he might sustain if the injunction is refused and he should ultimately turn out to be right, is likely to be greater than the damage which the defendants would suffer if the injunction were granted and they should finally turn out to be right, the balance of convenience is against the grant of an injunction. A plaintiff making a considerable delay is not to be assisted at the expense of the defendant. A I R (Vol 3) 1916 Cal 782 : 21 C L J 469 : 29 Ind Cas 855 (DB).

——**O. 39, R. 1 — Execution sale — Injunction.**

Where it is fairly established that there is a danger of a wrongful sale in execution, an injunction can properly be granted. A I R (Vol 1) 1914 Oudh 206 : 25 Ind Cas 9 (DB).

——**O. 39, R. 1 — Suit for possession — Temporary injunction — Possessory suit.**

In a suit for possession, an injunction restraining the defendant from committing waste may be granted only if he is committing waste. But it must be precise. (1911) 38 Cal 791 : 13 C L J 394 : 10 Ind Cas 256 (DB).

——**O. 39, R. 1 (S. 492 Old Code) — Injunction to party and not to Court contemplates property being in danger of waste.**

An injunction under S. 492, C. P. C. cannot be issued to a Court, but only to a party, and an injunction to a party contemplates that some property, the subject-matter of the suit, is in danger of being wasted. (1905) 2 A L J 601 (601) (DB).

(b) Infringement of rights.

——**O. 39, Rr. 1, 2, S. 151 — Enforcement of mortgage, if waste or damage of property — Suit by mortgagor at Agra — Suit by mortgagee in Bombay Court — Mortgagee, if can be restrained by injunction from proceeding with his case at Bombay.**

The enforcement of a mortgage can never be characterized as an attempt to waste or damage any property.

The lawful exercise of a right vested in a person cannot be legally restrained by the Court under R. 2, O. 39, Civil P. C.

A mortgage contained properties situated outside U. P. The principal and interest due under a previous mortgage formed part of the consideration of this mortgage and the deed stated that the first mortgage was satisfied and discharged. The mortgagor paid some instalments according to the terms of the mortgage on account of the interest but subsequently, being advised that he was paying higher rate of interest than what he was bound to do as an agriculturist a suit was filed by the mortgagor under S. 33, U. P. Agri. Relief Act, in the Court at Agra against the mortgagee. While this suit was pending, the mortgagee brought a suit in Court at Bombay which had jurisdiction, for the enforcement of the mortgage. The mortgagor applied to the Court at Agra for the issue of an injunction restraining the mortgagee from proceeding with the Bombay suit and the application was granted. The suit at Agra was, however, dismissed and the injunction came to an end. An appeal was preferred by the mortgagor and he asked for an issue of an ad interim injunction which was rejected. An appeal was preferred to the High Court from this order and an application for temporary injunction pending the disposal of appeal was made:

Held, that O. 39, R. 2 and S. 151, Civil P. C., had no application. The mortgagee had a right to bring the suit in Bombay and his action was neither illegal nor dishonest nor even improper and hence the injunction restraining him from proceeding with the Bombay case could not be granted. AIR (Vol 26) 1939 All 643 : ILR (1939) All 825 : (1939) ALJ 688: 1939 AWR (H C) 561 : 187 Ind Cas 305.

——O. 39, R. 1 — Belated application — Injunction, if can be granted.

Where an application for injunction is filed by the plaintiffs very late, on the eve of the date fixed for the election, although they had had over two weeks' time before, the Court will be acting injudiciously in issuing an injunction against the Returning Officer which would put a stop to the carrying out of the election. AIR (Vol 22) 1935 All 106: (1935) ALJ 139: 152 Ind Cas 817 : 4 AWR (HC) 1392 : 1934 ALR 1057 (DB).

——O. 39, R. 1 — Injunction restraining election.

The Court should not, unless there are exceptional circumstances, grant an injunction restraining the holding of an election, at the instance of a candidate who alleges that his nomination has been wrongly rejected.

Though a candidate for election to a Local Board like any one else has a right to pursue his legal remedies whatever they may be, save in exceptional circumstances, it is an abuse for a candidate, who, for some reason, is shut out to make his pursuit of his remedies in the Civil Courts, a weapon for dislocating the electoral machinery and stopping an election. AIR (Vol 20) 1933 Mad 103: 140 Ind Cas 441.

——O. 39, R. 1 — Dispute as to an office.

The office of imam is well-recognized office, and when there is a dispute about it, it is open to the Court to issue a temporary injunction in the interests of the people as well as of the disputants and in order to avoid breach of the peace, but a Court cannot compel by such injunction the Mahomedans of the locality to engage a particular person to officiate at marriages because the presence of the kazi is not of absolute necessity for the validity of a Mahomedan marriage and therefore the people of the locality are not bound to call in any man obnoxious to them. AIR (Vol 14) 1927 Mad 1070: 106 Ind Cas 523.

——O. 39, R. 1 — Prima facie existence of right and its infringement.

One must be satisfied in the first instance before granting a temporary injunction, that the plaintiff has a fair question to raise as to the existence of the right alleged. The Court must also be satisfied that the defendants have infringed or are threatening an infringement of those rights. A consideration that by the cutting of pipal tree the susceptibilities of a community would be wounded should not be allowed unduly to restrict the recognised rights of ownership in property. The fact that plaintiffs' veneration for a sacred hill leads them to regard the creation of buildings thereon as an act of sacrilege, cannot by itself confer the right to restrain the owner from exercising the ordinary acts of ownership. Every one is entitled to his own religious beliefs but he cannot force them upon another so as to restrain that other from dealing with his property in a manner incompatible with those beliefs. AIR (Vol 10) 1923 Pat 209: 71 Ind Cas 11: 4 PLT 48 (DB).

——O. 39, Rr. 1 and 7 — Right to worship — Injunction to restrain plff. from preventing defts. entering and worshipping in certain temples.

Application by the defts. in a suit for injunction to restrain the plff. pending the suit from interfering with the deft.'s right to worship in, and free access to the temples which were the subject-matter of the suit, does not fall under O. 39, R. 1. AIR (Vol 3) 1916 Pat 17: 3 Pat LW 98: 1 Pat LJ 560: 38 Ind Cas 48 (DB).

(e) Alienation of property.

——O 39, Rr. 1, 2, S. 151 — Enforcement of mortgage, if waste or damage of property — Suit by mortgagor at Agra — Suit by mortgagee in Bombay Court — Mortgagee, if can be restrained by injunction from proceeding with his case at Bombay

The enforcement of a mortgage can never be characterized as an attempt to waste or damage any property. AIR (Vol 26) 1939 All 643: ILR (1939) All 825: (1939) ALJ 688: 1939 AWR (HC) 561: 187 Ind Cas 305.

——O. 39, R. 1 — Essentials for an order under O. 39, R. 1.

Before any order can be made under the provisions of O. 39, R. 1, the plaintiff must prove some overt act towards the alienation of the properties such, for example, as negotiation or offers for sale and that the property is in danger of alienation. AIR (Vol 21) 1934 Cal 694: 38 CWN 771: 61 Cal 814: 155 Ind Cas 354 (2).

—O. 39, R. 1 — Unless plaintiff proves by definite evidence that the defendant threatened to remove or dispose of his property with a view to defraud his creditors a temporary injunction cannot be granted. AIR (Vol 11) 1924 Lah 718: 85 Ind Cas 88: 6 LLJ 298.

——O. 39, R. 1 — Injunction — Notice of prohibitory order.

A party is presumed to have knowledge of a prohibitory order "not to alienate his property, when it is made in the open Court, in the presence of the parties appearing before the Court". Hence no notice of it is necessary and he cannot plead excuse of its failure, to disobey it. AIR (Vol 6) 1919 Ali 20: 42 All 98: 17 All LJ 1127: 58 Ind Cas 600 (DB).

——O. 39, R. 1 (S. 492 — old Code) — Injunction temporary not to alienate property — Effect of —

Alienation subsequent not void — Contract Act, S. 23.

The effect of a temporary injunction granted under S. 492 (b) is not to make a subsequent alienation of the property in respect of which the injunction was issued illegal and void within the meaning of S. 23, of the Contract Act. (1903) 25 A. 431 (433): 1903 AWN 92 (DB).

(f). Balance of convenience.

——O. 39, R. 1 — Temporary injunction — Granting of — Principles — Balance of convenience.

The power of the Court to issue an injunction under O. 39, R. 2 is not circumscribed by any limitations, but the power is not arbitrary and must be exercised according to sound judicial principles. The person seeking injunction must be able to satisfy the Court that there is a serious question to be tried at the hearing and there is a probability that he will be entitled to the relief sought by him or in other words, he has a prima facie case to go to trial; that the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable before his legal right can be established on trial; and that the comparative mischief or the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it. The balance of convenience must be in favour of the issue of the injunction.

Where the election was to be held next day and the voters were more than 300 in number and they had been notified and a large number of them had already arrived from different parts of the province at considerable expense and inconvenience, if the elections were postponed by the issue of an injunction the candidates and the voters would have been put to considerable inconvenience while the inconvenience to the plaintiff would have been relatively little, the grant of a temporary injunction restraining the defendants from proceeding with the election was refused. AIR (Vol 33) 1946 Oudh 42 : 1945 AWR (C C) 237 : 1945 OWN (C C) 350 (DB).

——O. 39, Rr. 1, 2 — Action for infringement of trade-mark — Consideration — Plaintiff taking action with reasonable promptitude — Balance of convenience in favour of plaintiff — Right to injunction.

In an action for restraining the defendants by injunction from selling certain products alleged to be a colourable imitation of the plaintiff's products, the Court should be satisfied that there is a substantial question to be investigated in the suit, that on the facts before it, there is a probability that the plaintiff, is entitled to relief, and then on which side, in the event of success, will lie the balance of inconvenience if the injunction does not issue.

The plaintiff charged the defendants of imitating his trade-mark and applied for injunction under O. 39, Rr. 1 and 2, Civil P. C. A comparison of the get up of the parcels containing the products of the plaintiffs and defendants, respectively, displayed a remarkable similarity which could scarcely be said to be accidental. The plaintiff took immediate action as soon as he became aware of the infringement with reasonable promptitude. It appeared that if an injunction, did not issue, the balance of inconvenience would be against the plaintiffs:

Held, that the plaintiff was entitled to the injunction prayed for. AIR (Vol 21) 1934 Sind 194 : 153 Ind Cas 324.

——O. 39, Rr. 1, 2 — Infringement of trade-mark — Balance of convenience — Conditions under which injunction can be granted.

Where, in a suit for injunction and other reliefs on the ground that the defendant infringed upon the plaintiff's trade-mark, the plaintiff prays for a temporary injunction, the Court has to see if the balance of convenience demands that a temporary injunction should be issued or whether the ends of justice would be met if the defendants are put on conditions so as to safeguard the interest of the plaintiffs if they ultimately succeed in the suit. If it is found that the issue of a temporary injunction is likely to cause such loss to the defendant which it may not be possible afterwards to remedy if plaintiff ultimately fails in the suit, the injunction should be refused. AIR (Vol 20) 1933 Lah 1046 : 149 Ind Cas 1064 (DB).

——O. 39, R. 1 — Mortgagee or attaching creditor proceeding to sell right, title and interest of debtor — Injunction — Balance of convenience.

Where a mortgagee or attaching creditor proceeds to sell the right, title and interest of his debtor, the balance of convenience is in favour of the creditor and no injunction should issue restraining him from effecting such sale during the pendency of a suit to which he is a party and where his claim is being impugned, all that the Court might do ex majore cautela is to require the creditor to give an undertaking that at the time of the sale, whether it be through the Court or otherwise, the intending purchaser should be informed of the pendency of the suit. AIR (Vol 20) 1933 Sind 118 : 144 Ind Cas 54 (1) (DB).

——O. 39, R. 1 — When granted — Stay of suit by injunction.

Where pending the disposal of an appeal by the High Court the party had filed a suit in the lower Court and thereupon an application was made to the High Court for an injunction restraining the party from proceeding with the suit till the disposal of the appeal.

Held, that the injunction could be granted if the balance of convenience was in favour of such a course. AIR (Vol 18) 1931 Lah 65 (2) : 31 PLR 550.

——O. 39, R. 1 — Underlying principle — Maintenance of status quo at the time of suit — Not merely balance of convenience but prima facie title.

It is often a predominant necessity to maintain the status quo at the time of the institution of the suit. But there is not the same jurisdiction for carrying the principle back to some period anterior to the suit. An injunction cannot be passed merely on a balance of convenience before the Court is satisfied that on the facts before it there is a probability that the plaintiff is entitled to relief. The party who feels himself aggrieved must show a fairly colourable right to the relief before the Court can act; and the Court cannot in terms decline to address itself to any of the issues between the parties to the suit. AIR (Vol 14) 1927 Mad 188 : 24 MLW 839 : 99 Ind Cas 383.

——O. 39, R. 1 — Judicial discretion — Bona fide case — Balance of convenience.

The granting of a temporary injunction is a matter of discretion, albeit a judicial discretion. One of the principles the Court has to bear in mind is that it must first see that there is a bona fide contention between the parties and then, on which side, in the event of success, the balance of inconvenience will lie, if the injunction does not issue. The real point is not how the question should be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in status quo until that question can be finally decided. If in the event of success balance of convenience is in favour of the plaintiff, injunction

should be granted. AIR (Vol 9) 1922 Lah 356 : 66 Ind Cas 161.

——O. 39, R. 1 — In granting a temporary injunction the Court has to balance the convenience and inconvenience of both sides where the basis of the appellants' claim would be gone if the status quo ante is not preserved and irreparable injury would accrue to him, the Court would issue an interim injunction pending the appeal. (1922) 66 Ind Cas 599 (Lah).

——O. 39, R. 1 — Principles — Injunction — Deft. in possession — Bona fide — Irreparable injury — Status quo — Balance of convenience.

Upon an application by a plaintiff for a temporary injunction it is sufficient if he shows a prima facie case in support of the title asserted by him. Where a plaintiff out of possession claims possession, the Court will not grant an injunction against a deft. in possession under a claim of right unless the threatened injury would be irreparable. By irreparable injury it is not meant that there must be no physical possibility of repairing but only that the injury would be a material one and one not adequately reparable by damages. An interlocutory injunction should not be lightly granted because it would be a serious thing if the person in possession were restrained from making use of the properties merely because a suit has been instituted with reference to the property. In granting an interim injunction the Court should see on which side, in the event of obtaining a successful result in the suit, will be the balance of convenience if the injunction do not issue, bearing in mind the importance of retaining immoveable property in status quo. AIR (Vol 7) 1920 Cal 276 : 46 Cal 1001 : 23 CWN 677 : 29 CLJ 584 : 54 Ind Cas 862 (DB).

(g) Balance of advantage.

O. 39, R. 1 — Balance of advantage — Injunction pending suit.

Where there is no balance of advantage, the Court should certainly not issue an injunction pending decision of the suit. AIR (Vol 23) 1936 Pesh 184 : 165 Ind Cas 112.

——O. 39, R. 1 — Absence of advantage.

Unless the plaintiff satisfies the Court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's Dominions, the Court should not stop him from proceeding with the only proceedings which he, as plaintiff, can control. AIR (Vol 15) 1928 Mad 491 : 27 MLW 418 : 109 Ind Cas 281 (DB).

(h) Other cases.

——O. 39, R. 1 — Suit for possession — Affidavit in reply to application for temporary injunction — Whether substantive evidence in case.

In a suit for possession the plaintiffs prayed for a temporary injunction under O. 39, R. 1, to restrain the defendants from continuing to build the mosque pending the decision of the suit. For the purposes of contesting this application the defendants had filed an affidavit and the plaintiffs had not filed any affidavit by way of rejoinder:

Held, that it was doubtful whether this affidavit could be taken into consideration as substantive evidence in the case. AIR (Vol 21) 1934 All 362: 3 AWR (HC) 421: (1934) ALJ 147: 56 All 755: 152 Ind Cas 12 (DB).

——O. 39, R. 1 — Co-proprietors — Some of them building kothas on part of cremation ground — Suit for ejectment, if proper — Relief by injunction, if can be given.

A suit by some proprietors of a village against other proprietors on the basis of the latter having built kothas on land set apart as cremation ground, should be one for mandatory injunction for demolition of the kothas and not for ejectment. Where, however, the suit has been wrongly framed as one for ejectment, the plaint may be amended or the proper relief may be given to the plaintiffs though not specifically asked for. AIR (Vol 21) 1934 Lah 1009: 36 PLR 253: 153 Ind Cas 968.

——O. 39, R. 1 — Declaratory suit by plaintiff having no present right to possession — Injunction to restrain auction-purchaser from obtaining possession.

Where, according to the plaintiff's own showing, the plaintiffs had no present right to possession of a property and they would at the most be declared to be entitled to a certain charge on it after the death of a widow, while the defendants had on the other hand purchased the property in execution of a decree:

Held, that the lower Appellate Court had no jurisdiction to resort to inherent power to grant an injunction restraining the defendants from obtaining possessions in such circumstances. AIR (Vol 21) 1934 Lah 79: 36 PLR 142: 150 Ind Cas 15.

——O. 39, R. 1 — Injunction, when granted — Suit by sons for patition and declaration that father's debts are not binding.

In a suit by the sons for partition and declaration that the debts incurred by the father were illegal and immoral and so not binding, the sons applied for a temporary injunction to stop the sale, threatened by some of the creditors. Apart from considerations of balance of convenience, the chief ground for granting or refusing an injunction in such a case is whether the plaintiff's have or have not a bona fide claim, and to a certain extent, it is inevitable that the Court should prejudge the merits of the case in deciding the question if the plaintiffs have or have not a bona fide claim. AIR (Vol 17) 1930 Nag 345: 127 Ind Cas 345 (DB).

——O. 39, R. 1 — Marriage — Injunction temporary, to restrain marriage, whether can be granted.

An application by the husband of a Muhammadan woman, who having exercised the option of puberty ceased to be his wife, against certain of her relatives who were parties in a cross suit by the husband which was dismissed and was the subject of an appeal, for a temporary injunction restraining them from giving away the woman in marriage was held to be not maintainable. AIR (V 6) 1919 All 11: 17 ALJ 1138: 1 UPLR: (11 C) 185: 54 Ind Cas 223 (DB).

——O. 39, R. 1 — Suit for injunction — Co-sharer — Building on land — Injunction.

Where the plaintiffs who were joint owners with defendants but who left the latter in sole occupation of a building being constructed by the latter on the common land and brought a suit for declaration of title and injunction, a temporary injunction could be granted restraining further building on the land. AIR (Vol 1) 1914 Cal 362: 41 Cal 436: 18 CWN 176: 19 CLJ 47: 21 Ind Cas 861 (DB).

——O. 39, R. 1 — Watercourse, construction of — Collection of water in a definite channel — Former flow — Natural percolation.

Held, that the plaintiff is entitled to an injunction restraining the defendant from making a watercourse so as to make the water which flowed previously from the defendant's to the plaintiff's land naturally and through percolation in no defined manner into a particular part of flow through

the plaintiff's channel through a defined course, even though no greater quantity of water might eventually be carried into the plaintiff's channel than before. (1904) 28 M 15 (16) (DB).

——O. 39 R. 2.

See also, Civil P. C., O. 39, R. 1.

1. Appeal.
2. Attachment.
3. Breach of contract.
4. Balance of convenience.
5. Disobedience.

See also Note 9.

6. Grant on terms.
7. Injunction in mandatory form.
8. "Or other injury of any kind".
9. Power of Court.

See also Note 5.

10. Scope.

1. Appeal.

——O. 39, R. 2, O. 41, R. 5 (1) — Under O. 41 R. 5 (1), Civil P. C., an Appellate Court has power to order stay of proceedings when an appeal is filed from an 'interim' injunction. The expression "stay of proceedings in the Court itself but entitles the Appellate Court to interfere with the operation of injunction which had been already issued. AIR (Vol 24) 1937 All 528 : 1937 ALJ 377 : 1937 AWR (HC) 381: 1937 ALR 304: 168 Ind Cas 32 (DB).

——O. 39, R. 2 — Order granting or refusing temporary injunction — Appealability of.

An order granting or an order refusing to grant a temporary injunction is an order passed under O. 39, R. 2, Civil P. C. The Court can either grant the application of it can refuse it and its jurisdiction to decide the matter is conferred by the rule. An appeal lies from an order refusing to grant a temporary injunction. AIR (Vol 24) 1937 Rang 150: 169 Ind Cas 413.

——O. 39, R. 2 — An appeal is maintainable against an order refusing to discharge an injunction issued under O. 39, R. 2, Civil P. C. AIR (Vol 20) 1933 Lah 203: 14 Lah 330: 34 PLR 975: 148 Ind Cas 49.

——O. 39, R. 2, O. 43, R. 1 (r) — Application for attachment before judgment — Defendant undertaking not to sell — Sale in breach of undertaking — Application to take proceedings for contempt — Appeal.

In the course of a suit the plaintiff applied for attachment before judgment of certain immovable property of the defendant. The defendant thereupon stated that he had no intention to sell the same till the disposal of the suit and the Court passed an order that this was equivalent to placing the property in the Court's protection so that none else could attach or proceed against the property until further order of the Court. The defendant, however, sold the property and the plaintiff applied for proceedings for contempt of Court. The Judge refused to take proceedings and the plaintiff appealed:

Held, that the undertaking given by the defendant read in conjunction with the order of the Court had the effect of an injunction and the order being one under O. 39, R. 2, Civil P. C., was appealable under O. 43, R. 1. AIR (Vol 18) 1931 Bom 509: 33 Bom LR 1109: 134 Ind Cas 1165.

——O. 39, R. 2 — When the Code specifically gives a right of appeal against order passed under O. 39, R. 2, a person cannot be deprived of his right of appeal merely because the lower Court acts under O. 39, R. 2 by virtue of S. 141. AIR (Vol 16) 1929 Nag 273: 118 Ind Cas 675.

——O. 39, R. 2 — An order refusing to attach property for disobeying an injunction is an order passed under O. 39, Rule 2 (3) and is appealable under O. 43, R. 1. AIR (Vol 9) 1922 Lah 347: 5 LLJ 142: 66 Ind Cas 9.

2. Attachment.

——O. 39, R. 2 — Attachment of property is not a suitable form of remedy except where a person is ordered to do something and does not do it. AIR (Vol 14) 1927 Cal 598: 31 CWN 814: 105 Ind Cas 348 (DB).

3. Breach of contract.

——O. 39, R. 2 — Contract for sale of goods — Breach of negative covenant in it — Injunction.

Assuming that a party to a contract for the sale of goods can only obtain a decree for specific performance if his case is covered by S. 58, Sale of Goods Act, it does not follow that breach of an implied negative covenant cannot be restrained by injunction merely because the covenant is contained in a contract for the sale of goods. AIR (Vol 27) 1940 Cal 466: ILR (1940) 2 Cal 53: 191 Ind Cas 847.

——O. 39, R. 2 — An injunction cannot be granted to prevent the breach of a contract to employ certain people. Nor can injunction be granted where the applicant has no personal interest in the matter. O. 39, R. 2 Civil P. C. AIR (Vol 20) 1933 Lah 203: 14 Lah 330: 34 PLR 975: 148 Ind Cas 49.

4. Balance of convenience.

——O. 39, R. 2 — Grant of temporary injunction — Grounds for — Balance of convenience — Public policy — Relevancy — Duty of Court — Action of authority within limits of powers conferred by statute — If can be restrained.

Ray, C. J.:— The Civil Court, when asked to issue an order of injunction to restrain the defendant in a suit, must always consider the balance of convenience, which includes consideration of matters of public policy. Whenever a Civil Court finds that some statutory authority is acting within the limits of the powers conferred upon such authority by law, as a matter of balance of convenience, such Court should generally consider it to be in favour of the said authority and the agents of such authority. Rare case may, however, arise where such authority and agents act 'mala fide' and abuse their powers. In such cases the arm of the Civil Court is long enough to restrain them, although wise regulation of powers, with reference to public policy and the balance of convenience, would reduce the happening of conflict of jurisdiction to nullity. AIR (Vol 38) 1951 Orissa 230: 16 Cut LT 174 (DB).

——O. 39, R. 2 (1) — Inconvenience likely to result from granting injunction greater than that which is likely to arise from withholding it — Injunction should not be granted.

In a suit for a declaration that the plaintiff had been duly nominated as a candidate for seeking election as President of the British India Association and that his nomination paper had been unjustly rejected, the plaintiff prayed for an injunction to the office-bearers of the association and the other candiates for the election not to proceed with the election without permitting the plaintiff also to participate in the same. It was found that a large number of voters had arrived in the city, where election was to be held, at considerable expense and inconvenience, and also that the injunction, if issued, would result in suspension of all business and activities of the association. On the other hand, no loss or inconvenience would result to the plaintiff by the refusal of the injunction as the suit itself was not likely to take much time:

Held, that the injunction could not be granted as the balance of inconvenience resulting from

the postponing of the election would be greater than the inconvenience resulting from the election being held on the fixed date.

Held also, that the contention that if a temporary injunction did not issue, the suit would be infructuous was not correct, though that in itself was not sufficient to warrant the issue of a temporary injunction. AIR (Vol 33) 1946 Oudh 42: 1945 OWN (CC) 350: 1945 AWR (CC) 237 (DB).

——O. 39, R. 2 — Temporary injunction in suit for declaration and injunction, can be granted if 'prima facie' case is made out and balance of convenience is on the side of the plaintiff. AIR (Vol 26) 1939 Sind 256: 185 Ind Cas 57.

——O. 39, R. 2 — Defendants, members of old Executive Committee managing its affairs — Dispute as to validity of election of new office-bearers — Injunction restraining old Committee from acting.

Where the defendants, are members of the old Executive Committee of a Union who carry on the management of the affairs of the Union pending valid election of new office-bearers and the plaintiffs are new office-bearers and the validity of their election is in dispute, greater inconvenience and mischief will be caused by the issue of an injunction restraining the old Committee from acting pending the disposal of the suit and till then the plaintiffs cannot be empowered by the Court to manage the affairs of the Union as their election is challenged. AIR (Vol 21) 1934 Sind 180: 28 SLR 161: 153 Ind Cas 286.

5. Disobedience.

See also Note 9.

——O. 39, R. 2 (3) — Suit for permanent injunction — Interim injunction also applied for and granted on plaintiff's undertaking not to do certain acts — Contravention of plaintiff's undertaking — Sufficient ground for punishment with imprisonment — Breach of undertaking was breach of injunction provided in the section.

The plaintiff in a suit for a permanent injunction for restraining the defendants from interfering with the plaintiff's right to take water to his land, applied by petition for an interim injunction against defendants, & he was granted the same on his own undertaking not "to dig any channel, neither by himself nor by his servants". On a contravention of such an undertaking the defendants complained to the Court, and the lower Court held that the plaintiff had contravened the undertaking and therefore ordered his detention in prison.

Held, that since there was a breach of an injunction, it would be punishable under O. 39, R. 2 (3), C. P. Code. It did not matter whether the undertaking given by plaintiff was regarded as an injunction issued by the Court restraining him from digging a channel or whether his undertaking should be regarded as part of the interim injunction issued against the defendant.

Held further, that as the lower Court maintained its order on the Commissioner's report of the absence of a channel in existence, the digging of a channel alleged was not mere repairing but surely a contravention of the plaintiff's undertaking. AIR (Vol 34) 1947 Mad 98: 59 LW 412: 1946 MWN 505: 230 Ind Cas 261: (1946) 2 MLJ 116.

——O. 39, R. 2 (3) — Injunction — Aggrieved party must obey till it is set aside by that Court or suspended by another Court.

Per Manoharlal, J.— When an injunction order has been issued, whether it is right or wrong, it must be obeyed. The only remedy of the aggrieved party is to come up in appeal to a superior Court to have the order vacated. So long as the order stands and its operation has not been suspended by another Court or by the Court which passed the order itself, it will not be tolerated that the litigants would disobey that order. AIR (Vol 33) 1946 Pat 47: 24 Pat 606 (DB).

——O. 39, R. 2 — Injunction order — Disobedience — Contempt of Court.

Per Das, J.— Disobedience of an injunction order passed under Order 39, Rule 1, by a Court subordinate to the High Court can be punished by it as a contempt of Court. AIR (Vol 33) 1946 Pat 47: 24 Pat 606 (DB).

——O. 39, R. 2 (3) — Injunction — Disobedience — Punishment under R. 2 (3).

Disobedience of order made under Rule 1 is punishable under R. 2 (3).

Desirability of re-drafting R. 2 pointed out. AIR (Vol 33) 1946 Pat 47: 24 Pat 606 (DB).

——O. 39, R. 2 — Plaintiff obtaining temporary injunction against defendant pending hearing of suit — Injunction disobeyed — Plaintiff's application under Order 39, Rule 2 (3) for action against defendant and certain other persons — Compromise — Application withdrawn and dismissed — In consequence of subsequent happenings, plaintiff filing second application under O. 39, R. 2 (3) for action in respect of same breach.

The plaintiff brought a suit for an injunction against the defendant and obtained a temporary injunction pending the hearing of the case. This temporary injunction was disobeyed and he put in an application under O. 39, R. 2 (3), Civil P. C., asking the Court to proceed against the defendant and certain other persons under this provision. Later on, however, in pursuance of an agreement with the defendant compromising the original suit, he withdrew this application, upon which it was dismissed by the Court. In consequence of certain subsequent happenings, he again came to the Court with a fresh application for action to be taken under Rule 2 (3), O. 39, in respect of the same breach:

Held that even if O. 39, R. 2 (3) was to be regarded as punitive and the second application could legally lie, this was not a case in which that application ought to be granted. For one thing, although this would be no legal bar to the granting of it, the original suit has been decided and decided by a compromise between the parties and not by a forced adjudication. In the second place, the plaintiff himself withdrew his first application and must be presumed at that time to have been satisfied with what he had got from the compromise. In the third place, by permitting this withdrawal, the Court must be held to have condoned the contempt of its authority and if the object of this provision were merely punitive, then once the Court itself had decided that it was prepared to overlook the breach and not proceed against the offender, the only remedy would be by way of appeal. In bringing this second application, the plaintiff was merely trying to have an effective counter-blast against a notice served on the plaintiff by one of the opposite parties to the application thereatening suit on the ground that application for injunction was brought against him mala fide and was not actuated by a motive to vindicate the honcur of the Court. AIR (Vol 28) 1941 Lah 334: 43 PLR 447: 196 Ind Cas 776.

——O. 39, R. 2 (1) — The terms of O. 39, R. 2, do not contemplate punishment of one who, not being a party bound by an injunction incites or aids in the commission of a breach to it. AIR (Vol 27)

1940 Nag 203: 1940 NLJ 157: 41 Cr LJ 803: ILR (1942) Nag 45 : 189 Ind Cas 813.

——O. 39, R. 2 — O. 39, Rr. 1, 2 — Cl. 3 of R. 2, whether covers breach of injunctions issued under R. 1.

Clause 3 of R. 2 of O. 39, applies to disobedience generally of an injunction granted by the Court and the words 'in case of disobedience' in Clause 3 are wide enough to cover breaches of injunctions issued under O. 39, R. 1, for which breaches no penalty is elsewhere provided. AIR (Vol 22) 1935 Pat 274: 16 PLT 309: 1 BR 476: 155 Ind Cas 619.

——O. 39, R. 2 — Injunction against alienation — Disobedience — Punishment.

A person who alienates property in contravention of an injunction issued by the Court under Order 39, Civil P. C. must be punished as provided in O. 39, R. 2 (3) of the said Code. No one should be permitted to disobey such orders with impunity. AIR (Vol 18) 1931 Lah 201: 131 Ind Cas 343.

——O. 39, R. 2 — Detention in prison — Actual disobedience — Necessary.

Where a temporary injunction was obtained against a person directing him not to get the girl who had gone to his house married and when the person was not responsible in promoting or bringing about the marriage but did not do all that he could do to prevent it, it cannot be said that he actually disobeyed the order as it was passed and so an order for his detention in prison is incompetent. AIR (Vol 16) 1929 Nag 273: 118 Ind Cas 675.

——O. 39, R. 2 (3) — Injunction — Breach of — Karnavan restrained from contracting loans — Validity of loans contracted thereafter.

In a suit by the member of a Malabar tarwad against a Karnavan for removing him from his office, an injunction was issued restraining him from contracting loans.

Held, that notwithstanding such injunction, a loan raised by the Karnavan for family purposes and utilised for such purposes, was binding on the tarwad. AIR (Vol 6) 1919 Mad 772: 35 MLJ 96: 47 Ind Cas 778 (DB).

——O. 39, R. 2 (3) — Contempt — Disobedience to order of Court.

The provision as to punishment for disobedience to orders of Court is not confined to suits of the nature contemplated by Rule 2 Order 39 has to be read along with S. 94, Cl. 3, R. 2 of O. 39 applies to case of disobedience to an order to do or abstain from doing a single act. Clause (3) is independent of and is not controlled by R. 4 of O. 39, C. P. C. AIR (Vol 5) 1918 Mad 340: 7 LW 328: 44 Ind Cas 56.

——O. 39, R. 2 (3) — Extent of the order under — If a disobedience of an injunction granted under O. 39, R. 2 (3).

If a disobedience of an injunction granted under O. 39, R. 2 (3) has occurred and an application for action being taken within R. 2 (3) is made and a dissolution of the injunction takes place subsequently as a result of the dismissal of suit the dismissal of the suit does not excuse the party guilty of disobedience. The Court is not bound under R. 2 (3) in the first instance to attach property and then only order imprisonment. The matter is one left to the discretion of the Court. An order for attachment of property or imprisonment of the person guilty of disobedience of an injunction is not an enforcement of the order of injunction but is a punishment for past disobedience. AIR (Vol 4) 1917 Mad 448: 39 Mad 907: 3 LW 430: 30 MLJ 523: 19 MLT 314: (1916) 1 MWN 328: 34 Ind Cas 588 (FB).

——O. 39, R. 2 (3) — Injunction restraining defendant company from disposing of the goods — Assistant of the firm.

When an injunction was issued restraining the defendant company from disposing selling or dealing in any manner with certain goods, in the absence of a mention of servants and agents in the order, an assistant in the firm not named in the order, cannot be punished for contempt of Court. AIR (Vol 3) 1916 Cal 340: 42 Cal 1169: 21 CLJ 578: 30 Ind Cas 4 (FB).

——O. 39, R. 2 (3) — Injunction — Extent of operation — Disobedience — Government's liability.

An injunction which is discharged subsequently must be obeyed during its subsistence. The Government paid the money against Court's order of injunction with notice of the order to one of the parties, held, though with regard to the payments made under statutory powers, the action of the executive is justifiable, the question whether any particular sum mentioned in the contract in suit could be paid as for "labour and supply" was a question of construction and therefore of law. The proper course for the executive would have been either to apply to the Court to determine the question of construction of the contract and to pay accordingly or to pay the whole amount over to the Receiver and to obtain an order from the Court or the Receiver to pay the sums properly payable according to the true construction of the terms of contract. Obiter — Where the true owner of a pension is prevented by injunction from getting his pension from Government he should be committed for contempt if he disobeys the Court's injunction and gets the pension from the Government. AIR (Vol 2) 1915 PC 106: 20 CWN 457: 84 LJPC 157: 35 Ind Cas 378.

——O. 39, R. 2 (3) — Disobedience of injunction — Issued by Court — Suit transferred to another Court — Jurisdiction of second Court to punish disobedience.

Under O. 39, R. 2 (3) the Court granting the injunction can punish its disobedience; where after an order for injunction was passed the suit was transferred to another Court, that Court cannot punish the disobedience of the injunction as the order for granting the same was not passed by it. AIR (Vol 1) 1914 Cal 815: 18 CWN 470: 22 Ind Cas 499 (DB).

——O. 39, R. 2 (3) — Disobedience to injunction order — Detention in prison — Attachment of property, if a necessity for.

Attachment of property is not a pre-requisite before an order to detain a person in prison for disobedience of an order of injunction, can be passed. AIR (Vol 1) 1914 Mad 141: (1913) MWN 1019: 14 MLT 545: 26 MLJ 37: (1914) MWN 90: 22 Ind Cas 404.

——O. 39, R. 2 (3) — O. 30, R. 1 (r) — Disobedience to order of injunction.

An order refusing to attach property for disobedience to an injunction is one under O. 39, R. 2 (3) and appeal lies from it under O. 43. R. 1. . AIR (Vol 1) 1914 Mad 141 (2) : (1913) MWN 1019 : 14 MLT 545 : 26 MLJ 37 : (1914) MWN 90 : 22 Ind Cas 404.

6. Grant on terms.

——O. 39, R. 2 (2) — Guardians and Wards Act, (VIII of 1890), S. 43 (4) — Guardian of the person of a female ward — Power to demand security from.

A District Court can demand security from the guardian of the person of a female infant ward to prevent his giving her in marriage without the consent of her "proper male relations." Such an order does not abate by the death of the applicant.

AIR (Vol 1) 1914 Lah 180: 20 PLR 1914: 12 PWR 1914: 23 Ind Cas 351.

7. Injunction in mandatory form.

——O. 39, R. 2 — Not covered by R. 2.

A Court acting under O. 39, R. 2, can only grant an injunction restraining the defendant from committing injury. It is no answer to such injunction that in effect the defendant is compelled to perform certain acts which ordinarily would be subject of a mandatory injunction. And if for some reason the Court finds it necessary to issue a temporary mandatory injunction, it cannot be said that such an injunction is beyond its inherent power, but it should not act under O. 39, R. 2. AIR (Vol 14) 1927 Mad 210: 99 Ind Cas 566: 24 MLW 854.

——O. 39, R. 2 — Mandatory — Injunction, temporary — Mandatory in form.

Courts in India have power by virtue of the order to issue temporary injunctions in a mandatory form. 38 Bom 381, Diss. AIR (Vol 5) 1918 Mad 588: 41 Mad 208: 6 LW 140: (1917) MWN 501: 33 MLJ 448: 41 Ind Cas 384 (DB).

——O. 39, R. 2 — Mandatory injunction.

On an interlocutory application, the Court has power to pass a mandatory injunction before the suit is heard. AIR (Vol 1) 1914 Bom 195: 16 Bom LR 566: 28 Ind Cas 121 (DB).

——O. 39, R. 2 and S. 115 — Moffusil Courts — Competency to grant — Revision.

It is doubtful whether moffusil Courts have power to grant mandatory injunctions on interlocutory applications, still more to grant them before the hearing; in such cases, the High Court may interfere in revision. AIR (Vol 1) 1914 Bom 42: 38 Bom 381: 16 Bom LR 288: 24 Ind Cas 625 (DB).

8. "Or other injury of any kind".

——O. 39, R. 2 — Applicability — Execution of compromise decree which had not been set aside — If amounts to committing an injury — Inherent jurisdiction of Court to grant injunction apart from provisions of O. 39.

It cannot be said that proceedings in execution of a compromise decree which had not been set aside would amount to committing an injury within the meaning of O. 39, R. 2, C. P. Code.

The Subordinate Court and the High Court sitting as an appellate Court against the orders of the Subordinate Court have no inherent jurisdiction to issue an injunction apart from the provisions of O. 39, C. P. Code. AIR (Vol 36) 1949 Mad 104: 1948 MWN 535: ILR (1949) Mad 316: 61 LW 541: (1948) 2 MLJ 188 (DB).

——O. 39, R. 2 — Suit for infringement of trade mark — Issue of interim injunction — Considerations.

In disposing of an application for an interim injunction in a suit for a perpetual injunction based on an alleged infringement of a trademark, it is only necessary to decide whether a prima facie case has been made out for the issue of an interim injunction and whether the balance of convenience required it. AIR (Vol 33) 1946 Sind 70: 222 Ind Cas 26.

——O. 39, R. 2 — Where the defendants have published a book containing plays which are a verbatim copy of the plaintiff's book, the list of contents in plaintiff's book is exactly duplicated in the defendant's book and the whole paragraph from the foreward of the plaintiff's book has been accurately copied out in the introduction of the defendant's book, prima facie case is made out for issue of a temporary injunction. AIR (Vol 20) 1935 Lah 282: 156 Ind Cas 841.

——O. 39, R. 2 and S. 151 — Temporary injunction refused.

The issue of a temporary injunction staying further proceedings in another Court in the exercise of equitable jurisdiction was refused as the petitioner could easily raise his plea of want of jurisdiction in the other Court. AIR (Vol 20) 1933 Lah 592.

——O. 39, R. 2 — Plaintiffs were the proprietors of the Lahore Law Times, a monthly journal in which the judgments of the Financial Commissioner of Lahore in revenue cases decided by him were published. The defendants compiled, printed and published a book called "Current Punjab Case Law Revenue Rulings". Plaintiffs brought a suit for infringement of copyright and for issue of perpetual injunction restraining the defendants from infringing the plaintiff's copyright and directing them to render account of copies of the 'Revenue Rulings' published by them. Plaintiffs also prayed for an issue of a temporary injunction against selling copies of the book till the decision of the suit. The trial Court, dismissed the application but, however, passed an order directing the defendants to keep regular accounts of the publication and sale of the books and to produce them in Court, if and when called upon to do so:

Held, that on the facts of the case the plaintiffs had failed to make out a case for issue of a temporary injunction restraining the defendants from selling their books, pending the disposal of the suit. The injury with which the plaintiffs said, they were threatened was not irreparable, and the interests of the plaintiffs were amply safeguarded by asking the defendants to keep separate and regular accounts of the sale of their books, which they should produce in Court if and when called upon to do so. AIR (Vol 20) 1933 Lah 448: 34 PLR 249: 149 Ind Cas 984.

——O. 39, R. 2 — Injury, meaning of.

The word 'injury' complained of in O. 39, R. 2, includes the wrongful giving of a minor girl in marriage to an unsuitable husband. AIR (Vol 20) 1933 Nag 62: 28 NLR 332: 141 Ind Cas 170.

——O. 39, R. 2 — Arbitration proceedings — Futile proceedings — No injunction.

The Court will not restrain parties from proceeding to arbitration under O. 39 or S. 53, Specific Relief Act, where the proceedings sought to be restrained are merely futile and will do no injury to the applicant. Court will grant an injunction only where a suit has been brought in which the instrument containing the submission clause is impeached for fraud or mistake or surprise or for some other reason; and where the arbitrator has misconducted himself. The fact that the arbitrators will not deal with matters which ought to be dealt with together with those being dealt with by them is no ground for granting an injunction. AIR (Vol 14) 1927 Sind 182: 101 Ind Cas 160: 21 SLR 306.

——O. 39, R. 2 — Trade name — Infringement — Temporary injunction.

Where there is real danger of the plaintiff suffering irreparable loss by the user of the defendant of his present name, which was similar to the plaintiffs, the Court would issue a temporary injunction restraining defendant from issuing the

name till the case is over. (1913) 40 Cal 570: 21 Ind Cas 258.

9. Power of Court.

See also Note 5.

——O. 39, R. 2 — **Discretion — Exercise of — Principles — Temporary injunction — Conditions for grant of — Contract terminable at will of party — Injunction to restrain termination — Right to.**

Under O. 39, R. 2, C. P. Code, the Court has a discretion in the matter of granting a temporary injunction, this discretion is to be exercised judicially and according to well-settled principles. One such principle is that in a case of the kind referred to in the rule the Court will ordinarily decline to grant a temporary injunction, if the plaint and the affidavits filed by the parties show on the face of them that the case is not one for a perpetual injunction. S. 56, Specific Relief Act, specifies the cases in which a permanent injunction cannot be given. A Court ought not to prevent a man from doing what by contract, it is lawful for him to do. There can be no specific performance of a contract which by its terms is revocable at the will of a party thereto, and there can be no injunction in such case restraining the termination of the contract, because the decree, if any, may be rendered nugatory at the will and pleasure of that party. AIR (Vol 37) 1950 EP 40 (DB).

——O. 39, R. 2 — The lawful exercise of a right vested in a person cannot be legally restrained by the Court under R. 2, O. 39, Civil P. C. AIR (Vol 26) 1939 All 643: ILR (1939) All 825: (1939) ALJ 688: 1939 AWR (HC) 561: 187 Ind Cas 305.

——O. 39, R. 2 — Order 39, R. 2, is not applicable to a case where the breach of contract has already taken place and there is no prayer in the suit to restrain the defendant from committing any other injury.

But the Court can grant an injunction ex debito justitiae even in cases not covered by provisions in the Civil P. C. AIR (Vol 20) 1933 Lah 73: 34 PLR 51: 140 Ind Cas 843.

——O. 39, R. 2 — High Court can grant only an injunction in a case coming from a mofussil Court, in accordance with the provisions of O. 39. It has no power to grant an injunction staying the execution of a decree in a mofussil Court pending a revision petition. AIR (Vol 20) 1933 Mad 500 (2): (1933) MWN 18: 27 MLW 110: 36 Mad 562: 64 MLJ 112: 141 Ind Cas 607.

——O. 39, R. 2 — **Contempt — Abettors of.**

Clause (3), R. (2) is not intended to give the Court power to visit for contempt of Court people against whom no order is made or terms imposed and therefore abettors of contempt of Court cannot be punished. AIR (Vol 14) 1927 Cal 598: 105 Ind Cas 348: 31 CWN 814 (DB).

——O. 39, R. 2 — A temporary injunction can only be issued to the defendant and not to any other person. Suit for a declaration that L. K. is not eligible to stand as candidate, cannot be said to be a suit for restraining from committing an injury of any kind. But even supposing the suit comes within the four corners of O. 39, R. 2, the case is not one in which an injunction should issue. Where L. K. has been declared by competent authority to be eligible for standing as a candidate at the election, and, as the election itself cannot and obviously should not be stopped, it would not be right to restrain him from taking part in it. To restrain him in the way suggested would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendant of a right to which he is really entitled. This would be a grave injustice to him for which he could not be adequately compensated afterwards. AIR (Vol 10) 1923 Lah 47: 79 Ind Cas 233.

——O. 39, R. 2 — **Application to punish — Forum.**

Where business of the Court that granted the injunction was transferred to another Court and an application under O. 39, R. 2 (3) was made to the latter Court for punishing the breach of the injunction.

Held, that the Court had jurisdiction to entertain the petition under S. 150: O. 39, R. 2 (3) does not say that it is only the Court granting the injunction that should make the order under it; so that there is nothing in that rule which excludes the application of S. 150 by bringing it within the words "save as otherwise provided for". 26 C. W. N. 216, Diss. A I R (Vol 10) 1923 Mad 92 : 43 M. L. J. 713 : 86 Ind Cas 650 : 1922 M. W. N. 743 : 16 M. L. W. 748 : 46 Mad 83 (DB).

——O. 39, R. 2 — **Injunction — Legal proceedings — High Court — Original Side.**

A Judge sitting on the original side of the High Court has jurisdiction to restrain the deft. in a suit before the High Court by an injunction from proceeding with a suit instituted by him in a mufassal Court in such a way as to delay or embarrass the trial of the suit in the High Court. A I R (Vol 7) 1920 Bom. 296 : 21 Bom. L. R. 963 : 53 Ind Cas 518 (DB).

——O. 39, R. 2 — **Injunction — Order of single Judge — Notice.**

An order prohibiting a judgment-debtor from transferring his property, when passed in the presence of counsel for both parties takes effect from the date of its delivery just as much as a permanent injunction embodied in a judgment and the judgment-debtor is not absolved from liability simply because it is not served upon him personally. A single Judge of the High Court has jurisdiction to pass the order of stay, subject to certain conditions. A I R (Vol 6) 1919 All 20 : 17 A. L. J. 1127 : 42 All 98 : 58 Ind Cas 600 (DB).

——O. 39, R. 2 — **Injunction — Person not a party.**

A Court has no jurisdiction to issue an injunction against a person not a party to the suit or to summon before it any person not a party to the injunction. A I R (Vol 5) 1918 Pat. 582 : 44 Ind Cas 496 (DB).

——O. 39, R. 2 (3) — **Injunction — Breach — Penalty — Order without jurisdiction.**

Unless the Court has jurisdiction over the subject matter of the controversy disobedience of its injunction is not punishable. An injunction in matters beyond the jurisdiction of a Court is void. (1912) 15 C. L. J. 147 : 16 C. W. N. 447 : 14 Ind Cas 380 (DB).

——O. 39, R. 2 (S. 493 Old Code) — **District Court can act only on application and not 'suo motu'.** (1903) 26 M. 494 (495).

10. Scope

——O. 39, R. 2 — **Applicability — "Breach of contract or other injury of any kind" — Bihar Bakast Dispute Settlement Act, 1947 — Reference to Board under — Proceedings — Nature of — Injunction to restrain — If can issue.**

The lawful exercise of a right vested in a party cannot be legally restrained by a Court under O. 39, R. 2, C. P. Code. Where a party is prosecuting a reference in respect of a dispute under the Bihar

Bakast Dispute Settlement Act before the Board constituted under that Act, it cannot be said that such party is committing a breach of contract or "other injury of any kind" within the meaning of O. 39, R. 2.

Further, proceedings before the Board, under the Bihar Act XIII of 1947, are of a judicial nature and no injunction can therefore issue to restrain such proceedings, when it is not shown prima facie that the continued prosecution of such proceedings would be vexatious or involve injustice to the applicant under O. 39, R. 2, C. P. Code. A I R (Vol 38) 1951 Pat. 224 (DB).

——O. 39, Rr. 2 (3) and 1, S. 24 — O. 39, R. 2 (3), applicability of, to injunction issued under R. 1 — Injunction issued under R. 1 — Proceedings for its enforcement, if transferable under S. 24.

The provisions in Sub-R. (3) of R. 2 of O. 39, Civil P. C., must have been intended to apply to injunctions issued under that rule. Sub-Rule (3) of R. 2 does not apply to injunctions issued under R. 1. Consequently, the proceedings for enforcement of an injunction under R. 1 are transferable under the provisions of S. 24, Civil P. C., and the proper Court to enforce the injunction is the Court which, at the time, was seized of the suit in the course of which the injunction was issued. A I R (Vol 28) 1941 All 140 : (1941) A L J 46 : 1941 A W R (H C) 51 : 1941 O W N (H C) 41 : I L R (1941) All 295 : 194 Ind Cas 166 (DB).

——O. 39, R. 2 (3) — Whether coercive or punitive.

Quaere — Whether the provisions of R. 2 (3) of O. 39, Civil P. C., are coercive or punitive. A I R (Vol 28) 1941 Lah. 334 : 43 P L R 447 : 196 Ind Cas 776.

——O. 39, R. 2 — Interlocutory injunction, when granted.

The plaintiff is entitled to an interlocutory injunction, if he can make out a good case that he will succeed, having regard to the provisions of Chap. X, Specific Relief Act, in obtaining a perpetual injunction at the trial. A I R (Vol 27) 1940 Cal 466 : I L R (1940) 2 Cal 53 : 191 Ind Cas 847.

——O. 39, R. 2 — Suit for perpetual injunction — Temporary and interim injunction.

In a suit for a perpetual injunction, a temporary injunction is to be granted or refused on a consideration of the following points : (1) Has the plaintiff made out a good prima facie case ? (2) On which side lies the balance of convenience ?

A deed of conveyance gave the plaintiff a right of way to certain road. The deed of conveyance made no mention of the nature and dimensions of that passage and, therefore, prima facie plaintiff was entitled to the passage as it existed on the date of the conveyance. On the date of the conveyance that passage was a passage which connected his property with the road and ran between two compound walls. That passage was 20 feet wide. The defendant started operations for construction of a building and was encroaching upon the passage to the extent of about 5 feet. Plaintiff brought a suit for declaration and a permanent injunction and applied for a temporary and interim injunction.

Held, that the plaintiff had every right to say that having made out a prima facie case, he was entitled to a temporary injunction. A I R (Vol 26) 1939 Sind 17 : 179 Ind Cas 626.

——O. 39, R. 2 (3) Civil P. C., governs both R. 1, and the earlier part of R. 2. Consequently, the penalty prescribed in O. 39, R. 2 (3) applies to cases of injunctions issued under O. 39, R. 1 also, though there is no specific provision to that effect. A I R (Vol 23) 1936 Pat 23 : 2 B R 187 : 15 Pat 320 : 17 P L T 61: 160 Ind Cas 347 (DB).

——O. 39, R. 2 — Temporary injunction — Discretion of Court — Extent of — Pecuniary interest of applicant must be involved.

Relief by way of temporary injunction is in the discretion of the Court, but that discretion is not unfettered, and it must be exercised in accordance with the principles generally recognised. One of these principles is that the Court will not grant an interlocutory injunction, except in cases where there is some pecuniary or proprietary right of the plaintiff which requires protection.

Although the powers of the Court under O. 39, R. 2, appear to be wide enough to enable it to grant an interlocutory injunction, yet in cases where the question is merely one of personal status of the applicant the Court will refuse to grant it, unless the applicant has also pecuniary interest in the subject-matter of the injunction. (1937) 172 Ind Cas 800 : I L R (1937) 1 Cal 382 : 41 C W N 755.

——O. 39, R. 2 — Specific Relief Act (I of 1877), S. 56 — Suit for perpetual injunction — Perpetual injunction not capable of being granted — Temporary injunction, if can be granted — Declaration asked for as a basis of injunction.

Where a perpetual injunction cannot be granted under S. 56, Specific Relief Act, then a temporary injunction cannot be passed under O. 39, R. 2, Civil P. C. Where the plaintiff's case is primarily one for injunction and he only asks for a declaration as a basis for that injunction, the Court has to be satisfied that the declaration will in all probability, be granted and not merely that the suit needs consideration and is not bound to fail by virtue of some apparent defect. In the case of a suit which is, on the face of it, one to prove that the Local Govt. was wrong in passing an order which it had a statutory right to pass, it cannot be said that the Court, without hearing the evidence or going into the merits of the case, was satisfied that such a suit would in all probability, succeed; and without being so satisfied, it cannot legally grant the injunction. A I R (Vol 21) 1934 All 876 : 1934 A L R 938 : 152 Ind Cas 98.

——O. 39, R. 2 — Effect of order to deprive defendant of right — Injunction, if can be granted.

Where the effect of an injunction would be to deprive the defendants finally and for ever, of the right which they claimed and to restrain the defendants would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendants of a right to which they are really entitled, the injunction should not be granted as to do so will be a grave injustice to the defendants for which they cannot be adequately compensated afterwards. Further, a Court cannot be asked to give the relief which forms the cause of action in the suit under colour of a temporary injunction. A I R (Vol 21) 1934 Sind 136 : 151 Ind Cas 862.

——O. 39, R. 2 — Conditions — Delay in filing suit — Injunction to prevent discharge of employees — Applicant not having personal interest — Effect — Order refusing to discharge injunction — Appealability of.

The issue of a temporary injunction is governed by the same principles as the grant of a permanent injunction at the trial of a case. The mere fact that the suit would be infructuous if the temporary injunction does not issue is no reason in law why it should be granted.

No injunction can issue except against a named person. Equity acts in personam and an injunction must be addressed to the defendant personally. The N. W. Railway Administration, Lahore, is not an individual nor is the Agent, N.-W. Railway, an individual.

Where a suit is delayed till the last day and a temporary injunction is applied for on the very day the suit is instituted and the facts underlying the application were known long before that, this in itself is a sufficient reason for refusing to issue a temporary injunction.

An injunction cannot be granted to prevent the breach of a contract to employ certain people. Nor can an injunction be granted where the applicant has no personal interest in the matter.

It is not open to a Court frivolously and vexatiously to issue such a process without proper cause and due consideration.

An appeal is maintainable against an order refusing to discharge an injunction issued under O. 39, R. 2, Civil P. C. AIR (Vol 20) 1933 Lah 203: 14 Lah 330: 34 PLR 975: 148 Ind Cas 49.

——O. 39, R. 2 — Injunction against Criminal Proceedings.

A Civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy, under S. 488, Cr. P. Code, in a Criminal Court. AIR (Vol 17) 1930 Cal 753.

——O. 39, R. 2 — Exercise of powers — Prima facie case, what is.

The rule that before the issue of a temporary injunction the Court must satisfy itself that the plaintiff has a prima facie case does not mean that the Court should examine the merits of the case closely and come to a conclusion that the plaintiff has a case in which he is likely to succeed. This would amount to pre-judging the case on its merits. AIR (V 13) 1926 Lah 589 : 96 Ind Cas 286.

——O. 39, R. 2 — Municipal election.

Holding of an election by the Chairman of a Municipality under a notification of the Governor in Council under S. 43 of the Madras District Municipalities Act not properly notified under S. 328 of the Act does not give a cause of action to a voter for an injunction against the Municipality. AIR (Vol 13) 1926 Mad 1147: 97 Ind Cas 172: 1926 MWN 582.

——O. 39, R. 2 — The drafting of Rule 2 (3) of O. 39 is somewhat inartistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. It applies not only to disobedience of an order issued under Clauses (1) and (2) of that rule but has a more general application; it applies alike to disobedience of all the injunctions issued under S. 94. AIR (Vol 13) 1926 Mad 574: 50 MLJ 401: 95 Ind Cas 196 (DB).

——O. 39, R. 2 — Meeting of shareholders.

A very strong case must be made out to induce the Court to stop a meeting of shareholders, specially on an interlocutory motion. AIR (Vol 13) 1926 Sind 295: 97 Ind Cas 84.

——O. 39, R. 2 — Election — Suit to contest — Injunction pendente lite.

In a suit by plaintiff to declare the election of defendant invalid plaintiff applied for a temporary injunction restraining defendant from sitting and voting as member of the Legislative Council. Held, having regard to the fact that the plaintiff had deliberately elected to carry his appeal to the Governor-General-in-Council and failed, and to the serious delay occasioned, and to the fact that defendant had already sat and voted on the Council for two sessions, the injunction should not be granted. AIR (Vol 1) 1914 Cal 152: 41 Cal 384: 20 Ind Cas 676.

——O. 39, R. 2 — Decree of Revenue Court — Suit for declaration that decree bad — Temporary injunction — No prayer for permanent injunction.

Although a decree may have been passed by a Revenue Court, proceedings in execution in a Civil Court may be stayed by the Civil Court if a suit has been brought for a declaration that the decree was obtained by fraud or was made without jurisdiction and for a perpetual injunction to restrain the decree-holder from executing the decree. 16 All 426, Diss. from.

If the suit is brought simply for the declaration and there is no prayer for a perpetual injunction then a temporary injunction under O. 39, R. 2 of the C. P. Code cannot be issued. (1912) 16 CLJ 555: 18 CWN 12: 15 Ind Cas 614 (DB).

——O. 39, R. 3.

——O. 39, R. 3 — Practice — Injunction — Ex parte interlocutory injunction — Nagpur High Court Rules and Orders (Civil) (1938), Chap. XII, R. 283.

Interlocutory injunctions are very readily granted on the side that is asking for them undertaking to pay to the person damnified by the granting of the injunction any damages that that person may sustain. It is necessary to take an undertaking from either Counsel or the party to that effect because the powers of the Court to make an order as to damages are exceedingly limited. If the undertaking is not forthcoming, the injunction should not be granted ex parte save in very rare circumstances. If it is given the injunction should readily be granted. AIR (Vol 27) 1940 Nag 45: 1939 NLJ 483: ILR (1941) Nag 578: 184 Ind Cas 570 (DB).

——O. 39, R. 3 — When an injunction has been granted and would remain in force till it is cancelled, an appeal is competent from the order granting the injunction. The fact that consequent upon the order notice to show cause has been issued is immaterial. AIR (Vol 20) 1933 Lah 282: 149 Ind Cas 642.

——O. 39, R. 3 — Interim injunction — Stay of, by Court, ex parte — Power of Appellate Court to stay — Revision.

An Appellate Court can order stay of an interim injunction ex parte if it thinks that a fit case has been made out.

Where the interim order, so far as the relief claimed in the suit is concerned, really decides the action, the Appellate Court is justified in ordering a stay so that as far as that issue is concerned, it might remain open until it has heard the appeal.

Where, in an appeal against an order granting an interim injunction, the Appellate Court passes an ex parte stay order and subsequently, after the hearing of the appeal on merits, purports to confirm the stay order, the order so passed is really a totally independent order based on the merits, and the High Court will not be justified in interfering with it in revision. AIR (Vol 19) 1932 All 223: 138 Ind Cas 822 (DB).

——O. 39, R. 3 — Appeal.

An order merely ordering notice under O. 39, R. 3, C. P. Code, is not appealable. AIR (Vol 11) 1924 Mad 857: 20 MLW 556 (DB).

——O. 39, R. 3 — Ex parte order.

If the object of granting the injunction is likely to be defeated by delay, the Court may grant an ex parte injunction without notice to the opposite

party. AIR (Vol 7) 1920 Low Bur 149: 64 Ind Cas 534: 13 Bur LT 227.

——O. 39, R. 4.

——O. 39, R. 4, O. 43, R. 1 (r) — Order refusing to discharge injunction, if appealable.

Where an order for an injunction has been passed, an application may be made under Order 39, R. 4 to discharge that order. If that application succeeds, clearly appeal lies because it results in an order being discharged. Also if the application is dismissed, still the order is made under O. 39, R. 4, which attracts O. 43, R. (1) (r) which makes that order appealable. AIR (Vol 27) 1940 Nag 45: ILR (1941) Nag 578: 1939 NLJ 483: 184 Ind Cas 570 (DB).

——O. 39 R. 4 — Temporary — Mokarrari tenure sold in certificate proceedings — Auction-purchaser applying for delivery of sale certificate and for dakhaldehani — Dakhal-dehani issued — Suit in meantime by members of certificate-debtor's family for permanent injunction restraining auction-purchaser from taking possession — Temporary injunction issued which was received by Certificate Officer on same date of issue of dakhal dehani but subsequent to such issue.

In a certificate proceeding, a 'mokarrari' tenure carrying an annual rent of over Rs. 2,000 situate within the jurisdiction of J Court was brought to sale and was purchased by defendant on March 15. Subsequently, there was an application under S. 20 of Public Recovery Act by some of the sons of the judgment-debtors which ended in a compromise whereby the sale was to be set aside on judgment-debtors' paying certain amount on certain date. On the expiry of such date without payment on September 3, the auction-purchaser applied for the delivery of the sale certificate to him and for 'dakhal dehani'. Next day, the sale certificate was signed and 'dakhal dehani' issued. On the same date, a letter was received, later on, from a Court at G saying that a temporary injunction had issued against defendant No. 1 in respect of his taking possession of the interest of the plaintiffs in the suit. The Certificate officer thereupon informed the Court that 'dakhal dehani' had already issued. The suit in which the temporary injunction had been issued was a suit instituted at G for the issue of a permanent injunction to restrain defendant from dispossessing plaintiffs from their legitimate interest in the 'mokarrari' tenure, and it was brought by some members of the family of the certificate-debtors on the footing that the minor plaintiffs had been impleaded in the certificate proceedings as majors, so that the certificate sale could not affect their shares, and that other plaintiffs, being younger sons, were not represented in the certificate proceedings at all, so that their shares were also not affected by those proceedings. The suit was valued at Rs. 1,100. The Court granted a temporary injunction on the ground among others that the balance of convenience was in the plaintiff's favour and that the 'status quo' ought to be maintained until the disposal of the suit:

Held. that no injunction, temporary or permanent, could lie, against a 'dakhal dehani' that had already been effected; nor would the balance of convenience in a case like the present lie in the plaintiff's favour in the face of the liability of the auction-purchaser or his successor to pay to the superior landlord a yearly rent much in excess of the figure at which the plaintiffs had valued their suit. The temporary injunction must, therefore, be set aside. AIR (Vol 26) 1939 Pat 509: 5 BR 543: 181 Ind Cas 270.

——O. 39, R. 4 — Scope and applicability.

Order 39, R. 4, is intended to cover two classes of cases. (1) when an urgent order 'ex parte' has been passed under R. 3, R. 4 will allow the party against whom it has been passed to apply to have it discharged or varied or set aside; and (2) when an injunction order already in force has, owing to fresh circumstances, become unduly harsh or unnecessary or unworkable, it would be open to either party to apply under R. 4 to the Court to discharge, vary, or set it aside. R. 4 is not intended to set at nought the ordinary 'cursus curiae' that, once a Court has decided a matter after giving each side an opportunity of being heard, its order is final and binding on itself as much as on the parties, and cannot be re-opened except on the presentation of some new matter not available when the original order was passed. AIR (Vol 16) 1929 Mad 803: 120 Ind Cas 862 (DB).

——O. 39, R. 5.

——O. 39, R. 5 — Corporations — Unregistered.

The rule applies only to Corporations strictly so-called to bodies authorised by law to act as a person in law and not to unregistered or unincorporated bodies or associations. AIR (Vol 4) 1917 LB 36: 9 Bur LT 247: 38 Ind Cas 572.

——O. 39, R. 6.

——O. 39, R. 6 — Interim sale of movables by Court, legality of.

In order to enable a Court to order an 'interim' sale of movable property, it must either be the subject-matter of the suit, or it must have been attached before judgment in a suit. If either of these two conditions do not exist, then the Court cannot exercise the power conferred by O. 39, R. 6, Civil P. C. AIR (Vol 19) 1932 Lah 51: 33 PLR 235: 134 Ind Cas 118.

——O. 39, R. 6 — Sale by Commissioner — Not covered by R. 6.

Order 39, R. 6 merely gives power to a Court to sell a perishable article and certainly does not authorize it to send a Commissioner to sell any crop. AIR (Vol 17) 1930 Mad 224.

——O. 39, Rr. 6, 7 and 8 — Attachment before judgment — Release of property on security — Execution against the property — Preferential right.

Where property attached before judgment is released on security which comprised some items of attached property, the plaintiff is preferentially entitled to execute his decree against the property given as security. AIR (Vol 7) 1920 Mad 409: 11 LW 6: (1920) MWN 264: 56 Ind Cas 267 (DB).

——O. 39, R. 7.

——O. 39, R. 7 — Plaint filed with petition for leave to sue as pauper — Suit commences.

The filing of the application for leave to sue as pauper in the form of a plaint which is taken on the file as a plaint, commences the suit. Consequently, a plaintiff who desires leave to sue as a pauper, can apply to prevent the defendant from making away with the property in suit, after the filing of his application for leave to sue as a pauper. He need not wait till his application for leave has been disposed of. AIR (Vol 30) 1943 Bom 143: 45 Bom LR 231: ILR (1943) Bom 138: 207 Ind Cas 59 (DB).

——O. 39, R. 7 — Commissioner can be authorised to dig up ornaments buried.

A Judge has power under O. 39, R. 7, to give the Commissioner authority to dig up the ornaments alleged to be in the defendants' land. AIR (Vol 30) 1943 Bom 143: 45 Bom LR 231: ILR (1943) Bom 138: 207 Ind Cas 59 (DB).

——O. 39, R. 7 — Appointment of Receiver or granting of injunction can be ex parte.

In case in which it is necessary to take action promptly in order to prevent property from being made away with by the defendant, the Court, before proceeding under O. 39, R. 7, can always ap-

point a Receiver or grant an injunction 'ex parte'. AIR (Vol 30) 1943 Bom 143: 45 Bom LR 231: ILR (1943) Bom 138: 207 Ind Cas 59 (DB).

——O. 39, R. 7 — Application for appointment of Commissioner made after application for leave to sue as pauper but before granting of leave — Commissioner, if can be appointed.

On presentation of the petition to sue as a pauper, the suit is to be deemed to have been instituted, and, therefore, there must be parties, the parties being those persons cited in the copy of the plaint filed with the petition. Where, therefore, an application for appointment of a Commissioner is made after the filing of a petition for leave to sue 'in forma pauperis' but before such leave has been granted, the applicant is entitled to the appointment of such a Commissioner. AIR (Vol 26) 1939 Mad 80: 48 MLW 688: (1938) MWN 1254: (1939) 1 MLJ 96: ILR (1938) Mad 1060: 179 Ind Cas 802.

——O. 39, R. 7 — "Preservation" of property — Stay of sale of property in execution, if "preservation" of property — Applicability.

An order staying sale of property in execution of a decree is not an order for 'preservation" of that property within the meaning of R. 7, O. 39, Civil P. C. Moreover, under O. 39, R. 7(a), the property sought to be preserved must be the subject-matter of a suit but where the suit does not relate to any property but to a debt owing by the applicant to the opposite party, O. 39, R. 7, Civil P. C., has no application. AIR (Vol 25) 1938 Oudh 87: 1938 OWN (CC) 136: 14 Luck 1: 1938 RD 213: 1938 AWR (CC) 9: 173 Ind Cas 10 (DB).

——O. 39, R. 7 — Inventory, when to be made.

An order directing the preparation of an inventory of the property which is the subject-matter of a suit, should be made only where it is essential for a proper decision of the case and not otherwise. AIR (Vol 6) 1919 Cal 429: 52 Ind Cas 33 (DB).

——O. 39, R. 7 — Inspection, right of — Principle — Inventory — Right to interlocutory order — High Court's power to interfere.

The right to grant an inspection implies a right to make an inventory if the Court is satisfied that the preparation of the inventory is essential for a proper decision of the case. Hence the Court has jurisdiction to make an order for preparation of an inventory under O. 39, R. 7, of the Code of Civil Procedure. The Court may not only allow inspection of the disputed property but may also direct the preparation of an inventory of the structures, fixtures and moveables on the premises claimed by plff. but should take care to impose as little inconvenience as possible on those on whom the order is made.

The principle upon which the right of inspection of the disputed property is justified is that wherever in respect of the property of one individual a right accrues to another which cannot be measured without inspection of the subject of property the Court is competent to compel the proprietor to permit that inspection as indispensable for administering the justice of the case. Such inspection is no invasion of his rights but a legal consequence of the obligations affecting the property and the proprietor. The Court will take care to impose as little inconvenience as possible on those on whom the order is made, though the Court will not hesitate to make the order if it is satisfied that without inspection the justice of the case cannot be attained and the proceedings are likely to miscarry.

The High Court can interfere with interlocutory orders made by the original Court in the exercise of its discretion, if a proper case is made out. The test to be applied is, whether irreparable injury would be caused to one of the litigants, if matters were not set right. (1910) 12 CLJ 519 (522, 523): 15 CWN 353: 6 Ind Cas 574 (DB).

——O. 39, R. 7 (1) (a) — Pledge — Suit for redemption — Pledgee not in possession of things pledged — Order for production.

In a suit of a pledge of jewels the deft. pleaded a settlement, under which plff. had abandoned his right to redeem and that he had dealt with them as his property having pledged some and broken up others. Held, that although the articles were not in the custody or possession of the deft. he nevertheless was in a position to redeem them and produce them in Court. The trial Court was, therefore, competent to make an order for the production of the jewels under O. 39, R. 7(1)(a), C. P. C. AIR (Vol 6) 1919 Cal 312: 30 CLJ 64: 52 Ind Cas 4 (DB).

——O. 39, R. 9.

——O. 39, R. 9 — Mortgagee put in possession — Whether landlord of tenants of mortgaged lands — Decree obtained by such mortgagee for rent against tenants, if rent decree.

The person who becomes entitled to possess the mortgaged property either by contract or by operation of law, becomes the landlord of the tenants of the mortgaged property. Hence a mortgagee who is put in possession of a tenure or revenue paying land under O. 39, R. 9, Civil P. C., becomes the landlord of the tenants of such land for the purposes of the Ben. Ten. Act and a decree in a rent suit brought by him whether concerning the period of his possession or arrears of a prior period or both is a rent decree. AIR (Vol 30) 1943 Cal 160: 46 CWN 893: ILR (1942) 2 Cal 546: 204 Ind Cas 349 (DB).

——O. 39, R. 9 — Mortgage suit — Order under O. 39, R. 9, can be passed after final decree and even after sale but before its confirmation.

The object of O. 39, R. 9, is to prevent the sale of the subject-matter of the suit for neglect of a party to the suit to pay revenue or rent during the pendency of the suit. A mortgage suit does not come to an end till the sale has been confirmed. Consequently, an order under O. 39, R. 9, Civil P. C., can be passed in a mortgage suit in favour of the mortgagee after the final decree and even after the sale in execution but before its confirmation. AIR (Vol 30) 1943 Cal 160: 46 OWN 893: ILR (1942) 2 Cal 546: 204 Ind Cas 349 (DB).

——O. 39, R. 9 — Purchase in execution of money-decree before rent decree but confirmation after rent sale — Non-joinder of such purchaser in rent suit — Purchase at rent sale.

Where a tenure is purchased by a person in execution of a money decree before passing of a rent-decree but his purchase is confirmed after the sale to a third person in execution of the rent decree, non-joinder of the purchaser in execution of money-decree in the suit for rent does not affect the character of the decree passed therein as rent decree and the sale in execution therefore as a rent sale.

A purchase at such rent sale at the instance of mortgagee in possession prevails over the earlier sale in execution of the money decree. AIR (Vol 30) 1943 Cal 160: 46 CWN 893: ILR (1942) 2 Cal 546: 204 Ind Cas 349 (DB).

——O. 39, R. 9 (S. 501 old Code) — Omission in decree to order restoration — Jurisdiction of executing Court to order such restoration: See (1903) 6 CWN 710 (712).

——O. 39, R. 10.

——O. 39, R. 10 — Admission — Scope of.

An admission insufficient for an order under O. 12, R. 6 is also insufficient for an order under O. 39, R. 10 as the scope of O. 39, R. 10 is admittedly less wide than that of O. 12, R. 6 for it is confined to an admission contained in the pleadings. 97 Ind Cas 623: AIR (Vol 14) 1927 Sind 25.

——O. 40.

——O. 40 — Powers of Court — Application for appointment of Receiver by Court of Wards — Application for withdrawal of by advocate — Duty of Court — Permission for withdrawal — If to be granted as a matter of course.

The powers of a Civil Court under O. 40, C. P. Code, are not controlled by statements made by an advocate withdrawing an application for the appointment of a receiver. Where an application is made by the Court of Wards for appointment of a receiver, the only question for the Court is whether it is just and convenient to appoint a receiver. If the Court is satisfied that it is just and convenient to appoint a receiver, it is not bound to permit the withdrawal of the application for appointment on the mere ground that the advocate for the Court of Wards withdraws the application. An application to withdraw the receiver application should not be granted as a matter of course, but must be considered by the Court on its merits. ILR (1946) Kar 21: 227 Ind Cas 129: AIR (Vol 33) 1946 Sind 141 (DB).

——O. 40 — Position of receiver — Not a judicial officer.

Receiver appointed by Court is not a judicial officer. He is merely a custodian of properties by order of the Court. In that capacity it may be his duty to institute a suit on behalf of the estate but it cannot be that any such officer can act as a Judge in the Court in which the suits are instituted. 121 Ind Cas 414: 31 Bom LR 1081: AIR (Vol 16) 1929 Bom 478 (DB).

——O. 40 — Source.

The appointment of a Receiver by way of execution is an exceptional remedy derived from English practice. 100 Ind Cas 735 : AIR (Vol 14) 1927 All 419 (DB).

——O. 40 — Mortgage decree — Not applicable to.

The provisions of O. 34 in the execution of mortgage-decrees allow no loophole for the application of the procedure provided by O. 40 to mortgage-decrees. 100 Ind Cas 735 : AIR (Vol 14) 1927 All 419 (DB).

——O. 40 — Plaintiff receiver — Dissolution of partnership — Retention of funds — Breach of duty.

Plaintiff in a suit for dissolution of partnership was appointed receiver without security and remuneration; he withdrew from the partnership funds in his hands as such receiver, first, a sum of Rs. 22,000 and odd and later one of Rs. 3,500. Subsequently he was ordered on several occasions to pay over these monies, but he failed to do so. The Court passed orders to condone the plaintiff's unauthorised retentions by treating them, without even any charge for interest, as being in account with the defendants both regular and final.

Held, that the action of the plaintiff in this matter, fully acknowledged and neither explained, nor excused, amounted to a breach of duty as serious in character as any that can be committed by an officer of the Court in his position.

Held, further that his action ought not to have been overlooked to any degree by any Court jealous of its responsibility for the actions of its own officers. 92 Ind Cas 274 : 23 ALJ 1045 : 1926 MWN 101: 23 MLW 628 : 7 PLT 275: AIR (Vol 12) 1925 PC 257.

——O. 40 — Execution proceedings — No reference in O. 40.

Order 40, C. P. Code, does not specifically refer to execution proceedings. When in execution proceedings a receiver is appointed he is put in the position of the judgment-debtor and there is no transfer of the property from the judgment-debtor to him. 81 Ind Cas 741: 46 All 924: AIR (Vol 12) 1925 All 72 (DB).

——O. 40 — Action suo motu.

A Court has a right to proceed under Order 40, R. 1, where it appears to be just and convenient to do so and the Court can make an order suo motu even in a suit for a declaration. 67 Ind Cas 383 : AIR (Vol 9) 1922 Lah 444 (DB).

——O. 40, R. 1.

See also Civil P. C., Ss. 51, 94 and 95.

1. **Appeal.**
1-A. **Appointment.**
   See Notes, 1, 5, 7, 9, 15 and 20.
2. **Contempt.**
3. **Continuation of, in appeal.**
4. **Discharge and removal of receiver.**
5. **Discretion.**
6. **Effect.**
   See also N. 14.
7. **Grounds for appointment.**
   See also Note 5.
8. **Interim receiver.**
9. **Jurisdiction.**
   See also Note 15.
10. **Mortgage.**
    See Notes 6 and 7.
11. **Partition suit.**
12. **Partnership.**
13. **Position of.**
    See also Notes 17 and 18.
14. **Possession.**
    See also N. 6.
15. **Powers of Court.**
16. **Procedure.**
17. **Proceedings by or against.**
    See also Notes 13, 16, 18 and Civil P. C., S. 80.
17-A. **Property outside subject-matter of suit.**
    See Notes 9 and 19.
18. **Rights and liabilities of.**
    See also Notes 13, 17.
19. **Scope.**
19-A. **Termination of appointment.**
    See Notes 3 and 4.
20. **Who may be appointed.**

1. **Appeal.**
   (a) **General.**
   (a-1) **Appointment.**
   (b) **Interference by appellate court.**
   (c) **Necessary party.**
   (d) **Objection to appointment.**
   (e) **Order naming no individual.**
   (f) **Removal of receiver.**
   (g) **Refusal to appoint.**

(a) General.

——O. 40, R. 1, Sub-r. (1) (d), O. 43, R. 1 (s) — Order granting sanction to lease granted by Receiver is not appealable.

An order granting sanction to a lease granted by the Receiver is merely a routine order and does not come under O. 40, R. 1, Sub-r. (1) (d) and as such, is not open to appeal. AIR (Vol 33) 1946 Lah 462.

——O. 40, R. 1 — No appeal was maintainable by reason of O. 43, R. 1 (s), Civil P. C., from an order merely refusing the third party's application to direct the Receiver to release the property inasmuch as the order of refusal did not fall under O. 40, R. 1 or R. 4. AIR (Vol 28) 1941 Rang 236 : 1941 Rang LR 300 : 196 Ind Cas 768.

——O. 40, R. 1 — Application by Collector under O. 40, R. 1, for directing Receiver in mortgage suit to pay money due by mortgagor to Government.

Where, in a mortgage suit, a Receiver is appointed and an application is made by the Collector under O. 40, R. 1 praying the Court to direct the Receiver to pay the amount due by the mortgagor to Government an order by the Court directing Receiver to pay aforesaid amount falls under O. 40, R. 1 and is, therefore, appealable. AIR (Vol 27) 1940 Mad 703 : 51 MLW 749 : (1940) MWN 320 : (1940) 1 MLJ 429.

——O. 40, R. 1 — Non-rendition of accounts by third party during Receiver's administration, whether appealable.

Neither R. 1 nor R. 4 of O. 40, has an application to accounts from a third party relating to the period of a Receiver's administration and the non-rendition of accounts by third party during that period is not appealable under any of these provisions of law. AIR (Vol 25) 1938 Lah 328 : 179 Ind Cas 637 (DB).

——O. 40, R. 1, Appendix F, Form 9 — Prayer should be for appointing named person — Appeal — Only order which is appealable is that appointing Receiver by name.

In applying for the appointment of a Receiver, it is preferable for the applicant to ask for the appointment of a named Receiver. Whether that person will be appointed or not does not matter. The Court may appoint him, or may direct the appointment of somebody else. But if the application does not name any Receiver, then the proper course to take is not to make an order stating that a Receiver is appointed, leaving at large who he shall be; nor is it proper to make an order granting the application and still leaving the matter at large as to who the Receiver ought to be. The proper course to take is to adjourn the matter for the name of a Receiver to be placed before the Court so that the Court can appoint a Receiver on the adjourned date. In other words, there should not be two orders, one stating that the Court finds it just and convenient to appoint a Receiver and stopping at that and then a later order appointing a particular person as Receiver. There should be one order appointing a Receiver who is named.

An order stating that a Receiver will be appointed but leaving at large who he shall be, or an order that the application is granted, when the application is merely an application for appointment of a Receiver unnamed, is not such an order as Order 40, Rule 1 (a), contemplates. It may be that such an order cannot be appealed against as not being a final order. But it is that order that decides the matter of substance between the parties. On the other hand, it may be that that order is appealable in which case, if the person aggrieved by it waits until the next order appointing the Receiver by name is passed, he will find himself on appeal met by the argument that his appeal is out of time. No litigant should be placed on the horns of this kind of dilemma and it can be very easily avoided by taking care that there is only one order and that that order appoints the Receiver by name.

Where the order passed on an application for appointment of Receiver directs the defendant to put the Receiver in possession of the property but at the same time it never states who the Receiver is, and it accordingly directs the defendant to do something that is manifestly impossible and the order sheet shows that a certain person was appointed as Receiver, it should be considered the final order which is applicable. The fact that it was imperfect will not make it anytheless a final order.

Per Niyogi J.— An expression of opinion by the Judge, whether it is named an order or a finding, that the case is a fit one for the appointment of a Receiver can hardly be operative by itself so as to affect one or the other party. It is only when that expression is followed by an operative order that it would affect the interests of the party against whom it is passed so as to give him a right of appeal. That order is the order appointing a Receiver contemplated by Rule 1 and for the true construction of this word "order", one must read the expression in conjunction with Form 9, Appendix F. That form indisputably shows that the appointment of a Receiver is to be made by name so that he may give security so as to be eligible to perform his duties as Receiver, and hence the only order which is appealable is the order appointing a party aggrieved a right of appeal. AIR (Vol 25) 1938 Nag 540: ILR (1938) Nag 174 : 174 Ind Cas 148 (DB).

——O. 40, R. 1 — An order in a suit for possession under S. 9, Specific Relief Act (1 of 1877) for appointment of a Receiver for collection of mesne profits is without jurisdiction. It is an order under O. 40, R. 1. Civil P. C. and is appealable. AIR (V 24) 1937 Sind 161 : 31 SLR 28 : 170 Ind Cas 12 (DB).

——O. 40, R. 1 (a), O. 43, R. 1 (s) — No application under R. 1 (a) — Order appointing Receiver passed.

The language of O. 40, R. 1, shows that it is not necessary for the Court to act upon an application made for the appointment of a Receiver. The Court can appoint a Receiver whenever it appears to the Court to be just and convenient. Even if no application under O. 40, R. 1 (a) is made, when the order for appointment of Receiver is passed under O. 40, R. 1 (a), the order is appealable under O. 43, R. 1 (s). AIR (V 23) 1936 Oudh 337 : 1936 OWN (CC) 1134 : 12 Luck 635 : 163 Ind Cas 204 (DB).

——O. 40, R. 1 — Order that it would be just and convenient to appoint a Receiver.

A decision that it is just and convenient to appoint a Receiver does not amount to an order appointing a Receiver and no appeal lies against such an order. No inconvenience will be caused if the party objecting to this order has to wait during the short interval that must elapse between such an order and the appointment of a Receiver. It is also possible that the final order appointing a Receiver may never be made. AIR (V 21) 1934 Nag 64 : 148 Ind Cas 184.

——O. 40, R. 1 (d) — Order giving instructions to Receiver as regards restoration of property.

An order giving instructions to a Receiver for his guidance as regards the persons to whom certain properties were to be restored, does not fall under O. 40, R. 1 (d), and is not appealable. AIR (V 20) 1933 Lah 216 : 145 Ind Cas 200.

——O. 40, R. 1 — No second appeal.

While O. 21, R. 11, cl. (4) gives the process of execution by appointing a Receiver, the mode of appointing a Receiver is given in O. 40, R. 1. Order to appoint Receiver in execution proceedings is under O. 40, R. 1. No second appeal there-

fore lies against it. (1928) MWN 390, Overruled. AIR (V 16) 1929 Mad 20 : 114 Ind Cas 839 (DB).

——O. 40, R. 1 — As an application under S. 12, Guardians and Wards Act is a proceeding in Court of civil jurisdiction, it is competent to the District Judge to appoint a Receiver in such a proceeding under C. P. Code, O. 40, R. 1, and an order passed thereunder is appealable as provided under O. 43, R. 1, cl. (s). AIR (V 16) 1929 Nag 119 : 116 Ind Cas 642.

——O. 40, R. 1 — Order in execution — Is appealable.

Civil Procedure Code, O. 40, R. 1, is a general provision relating to appointment of Receivers and even if an order appointing a Receiver is made in execution proceedings, it may fall within the purview of O. 40, R. 1, so as to be appealable under O. 43, R. 1 (s). AIR (V 14) 1927 Lah 190 : 100 Ind Cas 298.

——O. 40, R. 1 (2) and O. 43, R. 1 — Possession — Resistance to — Adverse order — Appeal.

The powers of a Receiver are regulated by O. 40 of the C. P. C. and the only ground upon which his possession can be resisted is under O. 40, R. 1 (2), C. P. C. Where a person who refuses to deliver possession to a Receiver is ordered by the Court to do so, his remedy is by appeal under O. 43, R. 1 (s) of the C. P. C. AIR (V 5) 1918 Pat 668 : 48 Ind Cas 779 (DB).

——O. 40, R. 1 — Mortgage — Execution — Objection by third party — Appeal — Revision.

An order appointing a Receiver in execution of a mortgage decree is not binding on a person not a party to the suit, and claiming to be in possession in his right as prior mortgagee.

A Court has no jurisdiction to overrule an objection petition put in by such a person unless it has reason to think that the objection is not bona fide or made on behalf of one of the parties. Any objector whose petition is dismissed and who is not a party to the suit has no right of appeal but a revision lies to the High Court, at his instance. AIR (V 5) 1918 Pat 364 : (1918) Pat HCC 138 : 4 Pat LW 414 : 45 Ind Cas 177 (DB).

——O. 40, R. 1, cl. (1) (d) — Directions to Receiver — Deed providing for appointment of — Direction by Court to Receiver to pay money to mortgagor to prefer appeal from mortgage decree — Order, whether appealable — Appeal.

A Receiver was appointed in a suit by the mortgagee as provided for in the deed of mortgage. The Court gave an order to the Receiver to pay certain sums of money to enable the mortgagors to appeal from the decree passed against them in the mortgage suit.

Held the order was appealable. The mortgage bond and the order passed for the appointment of the Receiver did not provide for any payment to the mortgagors for instituting appeals from decrees on the mortgage and the Court below should not have allowed them the amounts. (1913) 17 CWN 16 : 17 Ind Cas 849 (DB).

——O. 40, R. 1 (3) — Appeal — Possession — Order as to, if appealable.

An order authorising a Receiver to take possession of properties in the custody of a third person not a party to the suit is an order made under S. 503, cl. (b) and is appealable under S. 588, cl. 24. (1909) 6 ALJ 351 : 1 Ind Cas 354 (DB).

——O. 40, Rr. 1 to 3 (Ss. 503, 508, old Code) — Receiver's accounts, orders in passing — Appeal.

The directions which a Court gives in passing a Receiver's accounts are not appealable. (1908) 12 CWN 648 : 35 C 568 (570) (DB).

(a-1) Appointment.

——O. 40, R. 1 and O. 43, R. 1 (s) — Order directing notice to show cause why Receiver should not be appointed — Order not appealable.

Where an application for appointment of a Receiver is made by a party to a suit, an order directing notice to issue to other party to show cause why a Receiver should not be appointed is not appealable. AIR (V 33) 1946 Lah 462.

——O. 40, R. 1, (1) (a) — Appointment of Receiver.

Order 40, R. 1, (1) (a) covers a case of appointment of a Receiver in the place of one who had already gone out. Hence an appeal against an order appointing a Receiver in place of one who has resigned is maintainable. AIR (V 32) 1945 Pat 467 : 24 Pat 457 : 27 PLT 62 (DB).

——O. 40, R. 1 — Where a Receiver is appointed but he refuses to act, an appeal on the point whether a Receiver can be appointed or not can be entertained. AIR (V 25) 1938 Lah 10 : 176 Ind Cas 919.

——O. 40, R. 1 — Order appointing a Receiver ad interim is appealable. AIR (V 23) 1936 Lah 102.

——O. 40, R. 1 — Selection of Receiver.

No doubt the appellate Court will only interfere with the decision of an inferior tribunal in the selection of a Receiver if there is some overwhelming objection in point of propriety or some fatal objection in principle to the person named, but this principle is applicable only to an original appointment and not to an appointment in place of old one. AIR (V 16) 1929 Pat 114 : 115 Ind Cas 881 (DB).

——O. 40, R. 1 — Only after order is complete.

Where a Receiver has been appointed conditional on his furnishing security, the appointment is not complete till the security is furnished and therefore the order is not appealable before the security is furnished. 14 CLJ 489 and O.O. No. 327 of 1921, followed although their Lordships held contrary opinion in this case. AIR (V 14) 1927 Cal 253 : 45 CLJ 63 : 31 CWN 235 : 100 Ind Cas 140 (DB).

——O. 40, R. 1 — Where an appeal from an order is allowed by the C. P. Code the Court will construe such an order as a judgment within the meaning of cl. 13, and from an order appointing a Receiver under O. 40, R. 1, an appeal lies. AIR (V 14) 1927 Rang 139 : 101 Ind Cas 791 : 5 Rang 99 (DB).

——O. 40, R. 1 — An order refusing to appoint a Receiver is an order under O. 40 and hence under O. 43, R. 1 (s) it is appealable. AIR (V 13) 1926 Cal 1006 : 95 Ind Cas 632 (DB).

——O. 40, R. 1 — Receiver for minor's property.

A Judge before whom an application for the appointment of a guardian is pending has power to appoint a Receiver but that order is to be under the Code of Civil Procedure, and not the Guardians and Wards Act, Such an order, therefore, does not come under S. 12 of the Guardians and Wards Act but under O. 40, R. 1 of the Code and is therefore appealable under clause (s) of R. 1 of O. 43. AIR (V 12) 1925 Lah 489 : 90 Ind Cas 611 : 26 PLR 576 : 7 Lah LJ 281.

——O. 40, R. 1 and O. 43, R. 1 (s) — Appeal — Order made ex parte — Subsequent confirmatory order — Receiver appointed under S. 146, Cr. P. C.

Where an order appointing a Receiver was made ex parte against some defendants who thereafter preferred objections which were overruled and a second order was passed confirming the first order,

Held that the first order merged in second and that the latter order was appealable. A Civil Court cannot appoint a receiver in respect of pro-

perties for which a Criminal Court has already appointed a Receiver under S. 146, Cr. P. C. unless the Magistrate withdraws the attachment. (1913) 40 Cal 862 : 17 CWN 1070 : 20 Ind Cas 269 (DB).

——O. 40, R. 1 — Order for appointment.

An order not appointing a Receiver, but saying that a Receiver should be appointed is not liable to appeal. (1909) 3 Ind Cas 430 (Cal) (DB). But see contra AIR (V 5) 1918 Mad 1146: 40 M 18: 40 Ind Cas 185 (FB).

(b) Interference by appellate Court.

——O. 40, R. 1 — The right of a receiver to settle claims and compromise actions with the sanction of the Court cannot be disputed; of course, if the Court sanctions any such settlement without proper reason, it would amount to an abuse of its jurisdiction and the action of the Court can be questioned before the appellate or revisional tribunal. AIR (Vol 33) 1946 Cal 304 : 227 Ind Cas 543 (DB).

——O. 40, R. 1 — Trial Court exercising discretion judicially — No interference.

Where the trial Court, with whom the discretion under O. 40, R. 1 of the Civil P. C., primarily vests, has not exercised such discretion in an arbitrary fashion, illegally or improperly, the Appellate Court should not interfere with the order passed by the trial Court. AIR (Vol 28) 1941 Oudh 328 : 1941 OWN (CC) 272 : 1941 AWR (C C) 145 : 194 Ind Cas 8 (DB).

——O. 40, R. 1 — Interference.

When discretion is exercised by a Judge in matter of appointment of a Receiver after considering the facts of the case, the discretion will not be interfered with in appeal, unless it is shown that it was improperly exercised or that the appointment contravenes any principle of law. AIR (Vol 27) 1940 Lah 325 : 42 PLR 421 : ILR (1941) Lah 590 : 190 Ind Cas 451 (DB).

——O. 40, R. 1 — Although, in a simple mortgage, a Receiver should not ordinarily be appointed, where the lower Court has held in the exercise of its discretion that a Receiver should be appointed, the High Court will not interfere with the discretion unless strong grounds are shown that the lower Court was wrong in appointing the Receiver. AIR (Vol 20) 1933 Rang 94 : 144 Ind Cas 265 (DB).

——O. 40, R. 1 — Equitable mortgage — Interference with discretion.

An appellate Court can set aside an order appointing a Receiver, when the lower Court has not taken into consideration all the circumstances of the case and has not exercised a judicial discretion. AIR (Vol 19) 1932 Lah 82 : 133 Ind Cas 433.

——O. 40, R. 1 — Appellate Court should not interfere with the discretion exercised by the lower Court in appointing a Receiver without sufficient reasons. AIR (Vol 14) 1927 Lah 65 : 27 PLR 138 : 94 Ind Cas 39.

——O. 40, R. 1 — The appointment of a Receiver is a discretionary matter but this discretion must be exercised on sound judicial lines, and if the discretion is not exercised on these lines, the appellate Court should interfere with the order of appointment. AIR (Vol 13) 1926 Cal 1092 : 96 Ind Cas 30 (DB).

——O. 40, R. 1 — Courts of appeal are always reluctant to interfere in a matter which is regarded as one purely within the discretion of the Court concerned. The selection and appointment of a particular person as a Receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case, and the exercise of this, like other matters of judicial discretion, will rarely be interfered with by an appellate tribunal. AIR (Vol 13) 1926 Cal 593 : 53 Cal 319 : 92 Ind Cas 940 (DB).

——O. 40, R. 1 — Something to be said on either side.

After the death of a Mahant of a shrine there was a scramble between two persons each of whom claimed succession to the office and each of whom got himself elected as successor. There was something to be said for the claim of each party and if one of them was put into possession and appointed de facto Mahant during the pendency of the suit it would have given him a great advantage over the other.

Held, that there was pre-eminently a case for the appointment of a Receiver and the High Court would not interfere with the order of the lower Court. AIR (Vol 11) 1924 Lah 421 : 69 Ind Cas 361.

——O. 40, R. 1 — Appellate Court will not lightly interfere.

A Court of Appeal will not, except in an extreme case, disturb the appointment of selection of a Receiver by the Court below, unless there be some overwhelming objection in point of propriety or choice or some fatal objection in principle. AIR (Vol 11) 1924 Lah 421: 69 Ind Cas 361.

——O. 40, R. 1 — Very rare.

A Court of appeal will not, except in an extreme case, disturb an order as to the appointment of a receiver by the Court below. AIR (Vol 10) 1923 Lah 623: 73 Ind Cas 600: 5 LLJ 533.

——O. 40, R. 1 — Where a single Judge of High Court appoints a Receiver a Division Bench will refuse to interfere unless it is satisfied that the discretion has been improperly exercised and contravenes any principle of law. AIR (Vol 9) 1922 Lah 444: 67 Ind Cas 383 (DB).

——O. 40, R. 1 and O. 41, R. 5 (3) (c) and O. 43, R. 1 (s) — Stay of proceedings by appellate court ex parte — Without security — Revision.

In an appeal against an order appointing a receiver the appellate court ordered the proceedings in connection with the appointment to be stayed pending the hearing of the appeal.

Held, the order was, in effect, not an order of discharge but a direction to the receiver not to take any steps in regard to, or exercise any dominion over the property till further orders in the appeal. The appellate court in not hearing the opposite party may have committed an error of procedure but as there was no defect in jurisdiction the High Court had no power to interfere under S. 115, C. P. C. Where a receiver is appointed by a writ and an appeal is preferred against the appointment, it is competent to the appellate court either to stop the issue of the writ pending the appeal or if the writ has been issued, to direct the receiver, through the court which appointed him, not to take any steps in compliance with the writ of appointment. In the latter case O. 41, R. 5 does not apply and no security need be taken under sub-clause (3) (c). AIR (Vol 7) 1920 Pat 567: (1920) Pat HCC 40: 4 Pat LJ 642: 54 Ind Cas 222 (DB).

——O. 40, R. 1 — Appeal.

A Court before appointing a Receiver in any particular case must take all circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a Receiver. This discretion is primarily to be exercised by the Court in which the case is pending and to which the application is made. The Appellate Court will not as a rule when the first Court has acted after considering all the circumstances interfere with the exercise of that discretion. AIR

(Vol 7) 1920 Lah 125: 2 UPLR (Lah) 56: 30 PW R 1920: 55 Ind Cas 50.

——O. 40, R. 1 — Grounds for appointment — Poverty — Order under S. 145 Cr. P. C. — Effect of — Powers of appellate Court.

As a rule an appellate Court will not interfere with the discretion of the lower Court appointing a Receiver; but where the lower Court has based its order on a wrong view of the facts, it is the duty of the appellate Court to interfere and set it right. A Court can appoint a Receiver for property which has been declared to be in the possession of the defendant under S. 145 Cr. P. C. AIR (Vol 2) 1915 Mad 926: 29 MLJ 209: 18 MLT 155: 29 Ind Cas 485 (DB).

——O. 40, R. 1 — Selection — Appellate Court — Interference.

A court of appeal will not ordinarily disturb the selection of a Receiver by the court except on some fatal objection in principle. A receiver should be an impartial person and wholly disinterested in the subject-matter of the suit. (1913) 17 CWN 581: 18 Ind Cas 398 (DB).

——O. 40, R. 1 — An appellate court will not rightly interfere with an order of the first court passed after taking all the circumstances into consideration. (1911) 2 MWN 75: 21 MLJ 821: 10 MLT 490: 11 Ind Cas 870.

——O. 40, R. 1 — Consideration on the merits of the case — Appellate Court.

It is not desirable that an appellate court should go into the merits of the case when the question under consideration is merely the appointment of a receiver. Their Lordships declined to interfere with the order of the lower courts appointing a receiver in the view that the local authorities were the best to decide on the matter. (1905) 32 C. 741 (745) (DB).

(c) Necessary party.

——O. 40, R. 1 (1) (d) — Scope — Order directing Receiver to pay fees to auditor — Appealability — Parties to appeal — Receiver — If necessary party.

An order calling upon the Receiver in a suit to pay certain sums of money to the auditor, for work done by him in connection with the preparation of income-tax return to be filed before the income-tax authorities and auditing the Receiver's accounts, is a direction which comes within the purview of O. 40, R. 1 (1) (d), C. P. Code, and is appealable under O. 43, R. 1 (s), C. P. Code. The Receiver is not a necessary party to such appeal as he is not personally interested in the controversy between the parties to the suit on the one hand and the auditor on the other. AIR (Vol 34) 1947 Pat 5 : 25 Pat 342 : 13 BR 157 : 13 Cut LT 29 : 228 Ind Cas 212 (DB).

——O. 40, R. 1 — Appeal — Parties.

If a Receiver is appointed in an appeal from interlocutory order, the only person materially prejudiced thereby would be the person entitled to present possession. Where there is no suggestion that any of the defendants is entitled to present possession.

Held, that it is not necessary to have them on the record in the appeal. 77 Ind Cas 783: 28 CWN 86: AIR (Vol 11) 1924 Cal 456 (DB).

(d) Objection to appointment.

——O. 40, R. 1 — An order dismissing an objection to the appointment of a Receiver of a property, the objector not being a party, falls under O. 40, R. 1 of the C. P. Code and is appealable. 78 Ind Cas 1031: AIR (Vol 11) 1924 Nag 165.

——O. 40, R. 1 — Appeal — Objection to appointment.

An order dismissing an objection to the appointment of a Receiver of property of which the objector is in possession falls within O. 40, R. 1 and is appealable. AIR (Vol 5) 1918 Pat 301: 3 Pat LJ 573: 48 Ind Cas 133 (DB).

——O. 40, R. 1 — Appeal — Order refusing removal of receiver.

An order refusing an application for removal of a receiver is not appealable. AIR (Vol 3) 1916 Cal 824: 23 CLJ 217: 20 CWN 789: 34 Ind Cas 789 (DB).

(e) Order naming no individual.

——O. 40, R. 1 — Order that Receiver should be appointed but no person named as Receiver.

Obiter. — An order only deciding that a Receiver should be appointed but not naming any person as Receiver so appointed is appealable. AIR (Vol 21) 1934 Lah 129: 35 PLR 24: 149 Ind Cas 948 (DB).

——O. 40, R. 1, O. 43, R. 1 (s) — No individual appointed by name.

Where an order is made in a case that a Receiver is to be appointed, the order is appealable under O. 43, R. 1 (s) even though no particular individual is named as a Receiver. AIR (Vol 19) 1932 Pat 360: 13 PLT 525: 142 Ind Cas 300 (DB).

——O. 40, R. 1 — No name — No appeal.

No appeal lies from an order that there is a fit case for the appointment of a receiver, but nobody is appointed by name as receiver. 40 Mad 18 and AIR 1922 Pat 577, Diss. from. 102 Ind Cas 176: AIR (Vol 14) 1927 Sind 202 (DB).

——O. 40, R. 1 — No appointment — Appeal lies.

An order of a Court that a Receiver should be appointed in a case (without appointing anybody by name as Receiver) and adjourning the case to later date for so appointing one is an order under Order 40, R. 1 and can be appealed from under O. 43, R. 1. 69 Ind Cas 929: 1 Pat 625: 1922 PHCC 250: 4 PLT 210: 1 Pat LR 161: AIR (Vol 9) 1922 Pat 577 (DB).

——O. 40, R. 1 — Appeal — Order for appointment — O. 43, cl. (s) — (Per Abdur Rahim and Srinivasa Iyangar, JJ.)

The pronouncement by a Court that a receiver should be appointed without naming a specific person is an order under O. 40, R. 1, C. P. C. and is appealable under O. 43, R. 1, clause (s).

Per Spencer, J. — Dissenting. An order that a receiver should be appointed is merely interlocutory and as it cannot be put in operation until some one is actually appointed, an appeal against the same is premature. Case law discussed. AIR (Vol 5) 1918 Mad 1146: 40 Mad 18: 5 LW 776: 32 MLJ 304: (1917) MWN 393: 40 Ind Cas 185 (FB).

(f) Removal of receiver.

——O. 40, R. 1 and O. 43, R. 1 (s) — Orders under O. 40, R. 1 Cls. (b), (c) or (d), if passed after order under Cl. (a) appointing Receiver can be appealed against separately.

Though the orders contemplated by sub-cls. (b), (c) and (d) of Sub-R. (1) of O. 40, R. 1 are incidental to the main order which the Court may pass under Cl. (a) appointing a particular person a Receiver of a property, yet it is possible to think of cases where the Court at first merely passes an order of the appointment of a Receiver and reserves further orders of removing a person in possession or conferring powers upon the Receiver for a further occasion. If such an order is subsequently passed it can be appealed from separately. AIR (Vol 33) 1946 Lah 462.

——O. 40, R. 1 — Dismissal of Receiver — Appeal — O. 43, R. (1) (s).

Obiter. — An order dismissing the Receiver must be held to be an order passed under O. 40, R. 1. That being so, the order is appealable under O. 43, R. 1 (s). AIR (Vol 32) 1945 All 371: 1945 AWR (HC) 95: 1945 RD 271: ILR (1945) All 506: (1945) ALJ 415: 1945 OWN (HC) 102 (DB).

——O. 40, R. 1 — Order 40, R. 1, Civil P. C., must be regarded as giving authority to Court to remove Receiver and if an application is made to remove the Receiver then the dismissal of that application must be regarded as an order passed under O. 40, R. 1 and such order is appealable under O. 43, R. 1 (s). AIR (Vol 25) 1938 Rang 387: 1938 Rang LR 586: 178 Ind Cas 924 (DB).

——O. 40, R. 1 (1) (a), O. 43, R. 1 (s) — Order removing Receiver, whether appealable.

Where a Court appointing a Receiver under O. 40, removes him from his office, there is no right of appeal under O. 43 of the said Code. An application for revision under S. 115 is equally untenable. AIR (Vol 18) 1931 All 72: (1931) ALJ 13: 134 Ind Cas 454 (DB).

——O. 40, R. 1 — Removal — Appealable.

An order removing a Receiver is final and appealable even though another Receiver is not appointed in his place. AIR (Vol 13) 1926 Cal 593: 53 Cal 319: 92 Ind Cas 940 (DB).

——O. 40, R. 1, Cl. 2 (S. 503, old Code) — Receiver — Stranger, removal of — Court's jurisdiction — "Present right so to remove".

An order authorising a receiver appointed by the Court to remove any person in possession of the property is appealable under S. 588, Cl. (24) of the Civil Procedure Code, (Act XIV of 1882) at the instance of the person sought to be dispossessed. The mere assertion by a stranger in possession of a paramount title against the receiver does not compel the Court to withhold its hands. The title must be proved.

The Court has a discretion which it will exercise judicially in determining whether or not it will direct the removal of a stranger upon a proceeding under S. 503. The test which the Court will apply in such a case is whether the parties to the suit or some or one of them have or has a present right to remove the stranger. (1909) 9 CLJ 563 (567) : 13 CWN 654: 36 Cal 713 (DB).

(g) Refusal to appoint.

——O. 40, R. 1—Appeal—Order refusing to appoint.

An appeal lies from an order refusing to appoint a receiver during the pendency of a suit. AIR (Vol 3) 1916 All 338: 33 Ind Cas 735 (DB).

——O. 40, R. 1 — Appeal — Order of refusal to appoint.

An order refusing to appoint a receiver is appealable. AIR (Vol 2) 1915 Bom 137: 17 Bom LR 680: 30 Ind Cas 545 (DB).

——O. 40, Rr. 1 and 4 and O. 43, R. 1 — Appeal — Order refusing to remove receiver.

An order refusing to remove a receiver is not an order under R. 1 or of R. 4, of O. 40 and is therefore appealable. AIR (Vol 1) 1914 Cal 786: 24 Ind Cas 862 (DB).

——O. 40, R. 1 and O. 43, R. (1) (s) — An order refusing to appoint a receiver is appealable. 53 PWR 1910: 36 PR 1910: 72 PLR 1910: 6 Ind Cas 659 (659).

——O. 40, R. 1 — Appeal — Refusal to appoint receiver.

An order of refusal by a District Judge to appoint a person recommended by the Subordinate Judge as receiver is one made under S. 505 and not under S. 503 and so is not appealable under S 588. (1908) 33 Bom 104: 10 Bom LR 1037: 1 Ind Cas 657 (DB).

1A. Appointment.

See Notes 1, 5, 7, 9, 15 and 20.

2. Contempt.

——O. 40, R. 1 — Leave of Court appointing Receiver is necessary for attachment and sale of property in the hands of the Receiver. Person bringing about attachment and sale is guilty of contempt of Court and the sale is irregular and not void. AIR (Vol 23) 1936 Pat 572: 3 BR 73: 18 PLT 301: 165 Ind Cas 749 (DB).

——O. 40, R. 1 — Leave of Court — Proceedings instituted against a Receiver without permission of court, if contempt of Court.

Proceedings cannot be instituted against a receiver without the permission of the Court and if so instituted they constitute a contempt of the court. Where several receivers are appointed in respect of different portions of same property, and one of the receivers brought a suit against another without the permission of the Court though it is a contempt of Court yet it is not so grave or serious one as to make it obligatory on the court to dismiss the suit. AIR (Vol 1) 1914 Cal 587: 19 CLJ 191: 18 CWN 546: 22 Ind Cas 623 (DB).

——O. 40, R. 1 — Contempt — Receiver — Obstruction of receiver in discharge of his duty.

Where a receiver is appointed to take possession of property, the person in possession of property, though he may have a right to continue in possession, cannot interfere with the receiver but should apply to the Court for redress; a person who is guilty of contempt of Court by obstructing a receiver in the discharge of his duty may be made to pay costs of the receiver as such as those of a hearing. AIR (Vol 1) 1914 Cal 550: 18 CWN 289: 15 Cr LJ 64: 22 Ind Cas 417.

3. Continuation of, in appeal.

——O. 40, R. 1 — Receiver appointed, not for suit only — Whether continues after suit.

Although, in certain cases, by termination of the proceedings, the legal occasion for the Receivership ceases, the Receiver's duty to the Court still survives, and, therefore, mere termination of the proceedings does not operate to discharge the Receiver. An application to the Court is generally necessary in order to divest a Receiver of his possession.

Where the application for appointment of Receiver did not show that the appointment was intended pending the suit only, and there was nothing in the order of the Court to suggest that the appointment was for a limited period only and there were minors involved in the suit, in the absence of specific orders on the point, it cannot be said that the Receiver was appointed for a limited period only within the meaning of 'Re Shephard, Atkins v. Shephard ((1889) 43 Ch. D 131). If the Receiver is not discharged, he must be deemed to continue. It is necessary for the Court to pass a final order of discharge. AIR (Vol 32) 1945 Sind 75: ILR (1944) Kar 396: 47 Cr LJ 408: 222 Ind Cas 288.

——O. 40, R. 1 — Neither party in possession — Receiver — Prima facie title of parties established — Appeal.

In an interpleader suit at the time when the matter was in dispute in the trial Court the property was in the hands of the trustees, that is to say, in the enjoyment of neither of one claimant nor of the other, and in such circumstances for the preservation of the property, pending the determination of the rights of the parties, a Receiver was appointed in the common interest of both and to prevent a scramble.

The rights of the parties were determined and one of the parties was held entitled to a large number of villages and forest lands. The trial Court directed possession to be delivered to him. On appeal by the other party, the question was whether it was just and convenient to appoint a Receiver afresh or continue the Receivership for the period of the appal:

Held, that (1) the appointment of the Receiver in the trial Court was undoubtedly proper;

(2) after the determination of the rights of the parties by the trial Court it was not just and convenient in appeal to appoint either a fresh Receiver or to continue the existing Receivership for the period of appeal and that possession should be given to the successful party subject to safeguard for obtaining restitution from him in the event of such a course, becoming necessary at a future date. AIR (Vol 31) 1944 Oudh 225: 1944 AWR (CC) 68: 1944 OWN (CC) 52: 216 Ind Cas 244 (DB).

——O. 40, R. 1, S. 151 — Receiver — Suit decreed and Receiver ordered to hand over possession to plaintiff — Appeal by defendant — Application by him to continue Receivership till decision of appeal—Property, whether in medio—Contention that cash and ornaments be retained in Court custody — Prayer in alternative that security be taken from persons withdrawing cash under decree — Such order, held could be made.

During the pendency of a declaratory suit claiming title to 'zemindari' and 'non-zemindari' property, the 'zemindari' was in possession of a Receiver and cash and ornaments in the custody of the Court. The trial Court decreed the suit and ordered that the Receiver should be discharged and should hand over property to plaintiff. Certain persons were also held entitled to a certain amount. The defendants preferred an appeal from the decision and applied that the Receivership in respect of the 'zemindari' should be continued till the decision of the appeal.

In respect of the cash and ornaments it was contended that they should be retained in custody of the Court or if the amounts were paid to persons under the decree, security should be taken from those persons:

Held, that as regards 'zemindari' property it could not be said to be 'in medio' any longer after the declaratory decree was passed and there could be no question of irreparable loss in respect of that property. No order, therefore, could be made appointing or continuing the Receiver:

Held, further that in respect of the cash and ornaments, however, there was no question of real deprivation to anybody by making an order that the ornaments be retained in the Court's own custody pending the disposal of the appeal, and that persons wishing to withdraw the cash deposits might only do so on furnishing security to the satisfaction of the Court. AIR (Vol 26) 1939 Oudh 94: 1939 OWN (CC) 59: 1939 AWR (CC) 21: 179 Ind Cas 245 (DB).

——O. 40, R. 1 — Preliminary decree for sale on mortgage — Appeal.

A preliminary decree for sale on a mortgage cannot be executed and it cannot be made final until an appeal preferred against it is decided on merits. But in order to keep the mortgaged property intact as far as possible, a Receiver may be appointed. AIR (Vol 20) 1933 Nag 294: 16 NLJ 161: 150 Ind Cas 463.

4. Discharge and removal of receiver.

——O. 40, R. 1 — By Court of Wards.

Where a Receiver has been appointed in a suit against the ward whose property is under the management of Court of Wards, the Court of Wards is only entitled to move the Court for the discharge of the Receiver on the grounds which would entitle the ward himself if not disqualified, to move the Court. AIR (Vol 32) 1945 Cal 183: 48 CWN 183: ILR (1944) 1 Cal 623: 221 Ind Cas 226 (DB).

——O. 40, R. 1 — Proper Court.

Application for the discharge of a Receiver should be made to the Court of original jurisdiction or the Appellate Court. It cannot be made to the executing Court. AIR (Vol 32) 1945 Sind 75: ILR (1944) Kar 396: 47 Cr LJ 408: 222 Ind Cas 288.

——O. 40, R. 1 — Termination of proceedings, effect of.

There is ample authority in support of the proposition that a Receiver continues in possession until he is finally discharged. Unless he has been appointed specially for a limited time, the mere termination of the proceedings in course of which the appointment has been made does not put an end to the appointment. AIR (Vol 32) 1945 Sind 75: ILR (1944) Kar 396: 47 Cr LJ 408: 22 Ind Cas 288.

——O. 40, R. 1 — Receiver considering his personal interest to the exclusion of those of parties.

Where the attitude of a Receiver appointed in a partition suit is inconsistent with the attitude of a Receiver, that is, where he is considering his own personal interests to the exclusion of the interests of the parties whose representative he is and whose benefit should be his concern, such Receiver should be removed. AIR (Vol 28) 1941 Cal 144: ILR (1940) 2 Cal 102: 194 Ind Cas 13.

——O. 40, R. 1 — Official Receiver appointed Receiver of mortgaged property pending mortgage suit — Mortgage decree — Property sold by auction — Receiver directed to hand over possession of property to purchaser — Order of Court directing Receiver to give possession, held did not discharge Receiver.

Pending a mortgage suit, the Official Receiver was appointed Receiver of the mortgaged property. There was a mortgage decree and the property was brought to sale and sold by auction. The auction-purchaser obtained an order giving him leave to pay the balance of the purchase money and for confirmation of the sale of the property to him.

By that order, the Official Receiver was directed to make over possession of the property which had been purchased at the sale to the purchaser upon production by him of the appropriate certificate of the sale. Subsequent to this the Receiver instituted a suit for rent against the tenant of the mortgaged property and obtained a decree. The sale certificates were subsequently produced and possession of the property made over to the auction-purchaser. The Receiver then sought to execute the rent decree:

Held, that the order of the Court directing the Receiver to make over possession of the property to the auction-purchaser did not discharge the Receiver and he could execute the rent-decree. AIR (Vol 25) 1938 Cal 304: ILR (1937) 2 Cal 529: 175 Ind Cas 209 (DB).

——O. 40, R. 1 — Mortgage suit — Two sets of defendants joined — Appointment of Receiver — Striking off of one set of defendants as not necessary parties — Possession of that set at the time of appointment of Receiver.

Where in a mortgage suit to which two sets of defendants are added, the mortgagee gets a Receiver appointed to take charge of certain land covered by the mortgage but one set of defendants is struck off the record as not being necessary parties to the suit and they apply that the Receiver should be discharged and the land under the pos-

session of the Receiver should be released in their favour, they are entitled to get the order prayed for if it is found that they were in possession of the land at the time of the appointment of the Receiver and if none of the other parties had a right to remove them from their possession. AIR (Vol 25) 1938 Rang 387: 1938 Rang LR 586: 178 Ind Cas 924 (DB).

——O. 40, R. 1 — A Burmese husband mortgaging property of himself and his wife — Mortgage not entered with her knowledge or consent — Suit by mortgagee — Receiver appointed — Removal of.

Held, that the Receiver should not be discharged because, if the wife gets possession of land it is practically certain that the rents and profits of the land will never find their way towards the satisfaction of any decree against the husband's estate for she is not an officer of the Court, whereas the Receiver is. AIR (Vol 23) 1936 Rang 246: 163 Ind Cas 166 (DB).

——O. 40, R. 1 — Continue up to discharge.

Though a suit, in which a receiver is appointed, is dismissed by appellate Court, the receiver's powers do not terminate until he is discharged by the Court which appointed him. AIR (Vol 17) 1930 Mad 67: 57 MLJ 668: 52 Mad 967: 30 MLW 713: 1929 MWN 739: 120 Ind Cas 563 (DB).

——O. 40, R. 1 — Interlocutory appointment — Time fixed — Silence of final judgment — Not a discharge.

When a receiver has been appointed on an interlocutory application without any limit of time it is not necessary to provide for the continuance of the receiver in the final judgment. The silence of the judgment does not operate as a discharge of the receiver or determination of his powers. Where a receiver was appointed to execute a mortgage decree under S. 51, cl. (d), C. P. Code, and the order for the appointment of a receiver did not appear in the final decree making the order relating to sale of immovable property for the satisfaction of the mortgage debt absolute.

Held, it was not necessary to make the order for the appointment of the receiver absolute in the final decree and even if there was a failure to refer to the order of appointment of the receiver in the final decree, the right of the receiver to execute the decree is not thereby extinguished. AIR (Vol 16) 1929 Bom 279: 31 Bom LR 320: 118 Ind Cas 694 (DB).

——O. 40, R. 1 — Incapacity.

A receiver who has once been appointed should be discharged only for proved incapacity. AIR (Vol 16) 1929 Pat 114: 115 Ind Cas 881 (DB).

——O. 40, R. 1 — Impartiality.

Absolute impartiality as between the parties to the litigation is an indispensable qualification of a Receiver and upon an application for his removal the Court may properly consider his past relations to the parties as well as his present sympathies. If by reason of interest shown by him the efficiency of the Receiver as an officer of the Court is impaired, the Court will be justified in removing him. AIR (Vol 13) 1926 Cal 593 : 53 Cal 219: 92 Ind Cas 940 (DB).

——O. 40, R. 1 — Only by the order of Court — Preliminary decree — Effect of.

A Receiver is an officer of the Court, and as long as the order appointing the receiver remains unreversed, and as long as the suit remains lis pendens, his functions continue until he is discharged by order of the Court.

Hence the mere passing of a preliminary decree in a partition suit, declaring the shares of the parties in the estate, and directing partition of the property other than the agricultural land does not put an end to the appointment of the receiver, and, despite the provisions of O. 20, R. 18, it is legal for the Court to pass an order for ad interim injunction restraining interference with the receiver's possession of agricultural land. AIR (Vol 12) 1925 Lah 445 : 6 Lah 442 : 7 LLJ 239 : 26 PLR 564 : 89 Ind Cas 932 (DB).

——O. 40, R. 1 — A Court which appoints a Receiver has authority to pass the orders necessary for winding up his charge even though the suit is no longer pending. AIR (Vol 11) 1924 Lah 583 : 75 Ind Cas 858.

——O. 40, R. 1 — As unnecessary.

If in the course of the proceedings the continuance of a Receiver becomes unnecessary, he will be discharged although he had been appointed by consent of parties. AIR (Vol 8) 1921 Mad 234 : 13 MLW 367 : 1921 MWN 173 : 61 Ind Cas 562 (DB).

——O. 40, R. 1 — Discharge of receiver — Dismissal of suit — Duties and rights of a receiver thereafter.

The power conferred on the Court by O. 40, R. 1(a) to appoint a Receiver of "any property whether before or after the decree" refers only to the appointment of receiver in respect of the property in regard to which the litigation is pending i. e., as long as the suit remains lis pendens.

The function of the Receiver will continue until he is discharged by the Court. Although the dismissal of a suit may in some cases mean the discharge of the Receiver still the Court has jurisdiction over the Receiver who is an officer of the Court and the Court may require him to furnish accounts, to allow parties to examine accounts, and to deal with all the matters connected with the management of the Receiver. AIR (Vol 7) 1920 Pat 501 : 5 Pat LJ 513 : 1 Pat LT 643 : (1920) Pat HCC 231 : 58 Ind Cas 405 (DB).

——O. 40, R. 1(d) — Discharge of receiver — Termination of proceedings.

Neither the termination of the suit in a decree nor the pendency of the appeal against that decree will put an end to the authority of the Receiver appointed to collect rents. AIR (Vol 4) 1917 Mad 806 (2) : 33 Ind Cas 69.

——O. 40, R. 1 — Discharge of receiver — Resignation of one of two receivers — Order appointing receivers not at an end.

Where two persons are appointed Receivers by the Court one for one party and the other for the opposite party, by the retirement of one of them the order appointing the receivers does not come to an end. AIR (Vol 3) 1916 Cal 824 : 23 CLJ 217 : 20 CWN 739 : 34 Ind Cas 789 (DB).

——O. 40, R. 1 — Removal of Receiver — Power to appoint if includes power to remove — General Clauses Act (X of 1897), S. 16 — Burden of proof.

A power to appoint a Receiver does not of itself include a power to remove him as S. 16 of the General Clauses Act has no application to appointments of Receivers by Court. The burden of proving circumstances justifying the removal of a Receiver is upon the person applying for such removal. The appointment of the next friend of a minor as a Receiver to manage his property is not illegal. AIR (Vol 3) 1916 Mad 924 : (1916) 1 MWN 10 : 31 Ind Cas 908 (DB).

——O. 40, R. 1 — Execution sought against property in the hands of receiver — Effect of direction to the decree-holders to proceed against the property.

Certain joint family property, which was the subject of a suit for partition, was placed in the hands of a receiver. While the receiver was in charge a decree against certain members of the family was made over to him by the Court in order

that he might, if possible raise the amount of the decree. The receiver, however, reported that he was unable to do so without selling the property of the judgment-debtors, whereupon the Court ordered that the decree-holders should proceed against the property.

Held, that this order had the effect of discharging the receiver and that there was no bar to the execution of the decree. (1905) 1905 AWN 110 (111) (DB).

5. Discretion.

——O. 40, R. 1 — Appointment of Receiver — Impracticable and undesirable.

One A who was the husband of plaintiff No. 1 and the brother of the defendant, carried on a bakery business in the nature of "Adam Sumar & Co." A died leaving as his heirs plaintiff No. 1 the widow, and an infant son plaintiff No. 2. A few days before the death of A, his brother the defendant entered upon the business premises, took possession, removed the board which described the business as "Adam Soomar & Co., Bakers and Confectioners" and put his own board "Ismail D. Adam Soomar, Bakers and Confectioners".

The plaintiffs, therefore, filed the suit for a mandatory injunction directing the defendant to desist from interfering with the business and to remove himself from the business premises of Adam Sumar & Co., and for an account. Along with the suit the plaintiffs filed an application for the appointment of a Receiver under O. 40, R. 1, Civil P. C. :

Held, that though ordinarily in a matter of this kind, it would be proper to appoint a Receiver, it was impracticable and highly undesirable in the circumstances of the present case to interfere with the status quo. AIR (Vol 28) 1941 Sind 112: 195 Ind Cas 503.

——O. 40, R. 1 — Proof of embezzlement, if necessary.

It is not necessary for the appointment of a Receiver that proof should be forthcoming of any embezzlement or mismanagement. The appointment of a Receiver is a matter of discretion. AIR (Vol 23) 1936 Oudh 337: 1936 OWN (CC) 1134: 12 Luck 635: 163 Ind Cas 204 (DB).

——O. 40, R. 1 — Propriety of appointment of, in suitable case.

The propriety of appointing a Receiver in a suitable case cannot be challenged. AIR (Vol 21) 1934 Rang 321: 12 Rang 437: 155 Ind Cas 776 (DB).

——O. 40, R. 1 — Though under the Civil P. C., the Court has discretion to appoint a Receiver without security, it should obviously be done only in the most exceptional circumstances. AIR (Vol 19) 1932 PC 191: 59 IA 311: 36 CWN 882: 9 OWN (CC) 571: 56 CLJ 48: 34 Bom LR 1188: (1932) ALJ 747: (1932) MWN 830: 63 MLJ 658: 7 Luck 381: 137 Ind Cas 900.

——O. 40, R. 1 — The law allows the Court wide discretion in the appointment of Receivers and it is settled law that the appellate Court will not interfere lightly with such appointment. AIR (Vol 14) 1927 Rang 135: 100 Ind Cas 1020: 6 Bur LJ 13 (DB).

——O. 40, R. 1 — In an application for the appointment of a Receiver, one has got to see the nature of the charges made and if one finds that they are somewhat vague in character, it is a ground for declining to interfere on an interlocutory application for the appointment of a Receiver. AIR (Vol 13) 1926 Cal 1092: 96 Ind Cas 30 (DB).

——O. 40, R. 1 — The jurisdiction to appoint a Receiver must not be lightly, but must be most cautiously exercised. The relief is not one ex debito justitiae, but one which is purely within the judicial discretion of the Court. The power to appoint a Receiver is not to be generally exercised as a matter of course, and it is not a reason for allowing an application that it can do harm to appoint a Receiver.

Before appointing a Receiver in any particular case the Court must take the whole circumstances of the case into consideration and then decide whether it would be just and convenient to appoint Receiver. AIR (Vol 12) 1925 Lah 349: 88 Ind Cas 562: 6 Lah 74: 26 PLR 228 (DB).

——O. 40, R. 1 — Supersession of bona fide possessor not proper ordinarily — No arbitrary and non-regulated discretion.

The appointment as well as the removal of a Receiver is a matter which rests in the sound discretion of the Court. A Receiver should not be appointed in supersession of a bona fide possessor of the property in controversy unless there is some substantial ground for interference. It is not a reason for allowing an application for the appointment of a Receiver that it can do no harm to appoint one.

The words "just and convenient" in O. 40, R. 1 of the Code mean that the Court should appoint a Receiver for the protection of property or the prevention of injury according to legal principles and not that the Court can make such appointment because it thinks convenient to do so. They confer no arbitrary and non-regulated discretion on the Court.

But where the property is as it were in medio in the enjoyment of no one the Court can hardly do wrong in taking possession. It is the common interest of all the parties that the Court should prevent a scramble. Such is the case when a Receiver of the property of a deceased person is appointed pending a litigation in the ecclesiastical Court as to the right of probate or administration.

No one is in the actual lawful enjoyment of property so circumstanced and no wrong can be done to any one by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions.

The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant, in some cases an irreparable wrong. In such cases the Court should proceed with the greatest caution before dispossessing the defendant. AIR (Vol 11) 1924 Cal 456: 77 Ind Cas 783: 28 CWN 86 (DB).

——O. 40, R. 1 — Remuneration.

A Receiver is generally remunerated by the method of percentage or commission but there is no absolute rule that he should be so remunerated. The Court has a discretion, if it thinks fit, to allow him remuneration at a fixed rate.. The Receiver's remuneration must come out of the estate of the insolvent and the legal representatives of the insolvent cannot be made personally liable for the same. AIR (Vol 10) 1923 Cal 516: 76 Ind Cas 583 (DB).

——O. 40, R. 1, S. 51 — Judgment-debtor — Right to apply.

It would be stretching too far the discretion of the Court under O. 40, R. 1 in the matter of the appointment of receiver if the decree-holder is deprived of his right to sell the mortgaged property under the decree. S. 51 of the Code does not give any right to the judgment-debtor to apply for the appointment of a Receiver but prescribes the mode in which the decree-holder may seek an execution of his decree, one of the modes being by the ap-

pointment of a receiver. AIR (Vol 9) 1922 Pat 369: 67 Ind Cas 606: 1922 PHCC 66: 4 PLT 58 (DB).

——O. 40, R. 1 — Cost of application.

The appointment of a Receiver being discretionary it does not follow, that costs should follow, the granting or rejecting an application for the appointment of a receiver. (1921) 61 Ind Cas 112: 2 UPLR (A.) 389 (DB).

——O. 40, R. 1 — Discretion of Court "Just and convenient".

The words "just and convenient" in O. 40, R. 1 (1) do not mean that the Court can appoint a Receiver because it thinks it convenient to do so. The appointment should be made for the protection of property or the prevention of injury according to local principles.

The words do not confer an arbitrary and non-regulated discretion on the Court. When the allegation against the deft. trustee is that since his acceptance of office he has not paid allowances to the beneficiaries without any other allegation of waste or mismanagement there is no ground for appointing a Receiver in his place. AIR (Vol 3) 1916 Cal 882: 23 CLJ 567: 34 Ind Cas 693 (DB).

——O. 40, R. 1 — Discretion of Court — Receiver — Appointment.

The appointment of a Receiver is a matter entirely within the discretion of the Court and in exercising this discretion the Court ought to be guided by considerations of the particular case. (1911) 13 CLJ 495: 9 Ind Cas 985 (DB).

——O. 40, R. 1 — Prima facie case — Discretion of court — Dispossession of third person — Injunction.

An appointment of a Receiver and the vesting of property in him is a matter of judicial discretion which can and must be exercised according to the merits and circumstances of each case and the sole consideration being to guard against possible waste or alienation of the property. But a bona fide possessor of property should not be superseded by a Receiver except on equitable grounds. (1911) 2 MWN 75: 21 MLJ 821: 10 MLT 490: 11 Ind Cas 870 (DB).

——O. 40, R. 1 — Waste — English Law.

The discretion as regards appointing Receivers granted to Indian Courts by C. P. C. (1908), is the same as that of the English Courts. Principles of care requiring enquiry in cases of alienation and waste continue to govern the Indian Courts. (1910) 14 CWN 248: 14 CLJ 215: 5 Ind Cas 96 (DB).

6. Effect.

See also N. 14.

(a) General.

(b) Third party.

(c) Mortgage.

(a) General.

——O. 40, R. 1 — Appointment of receiver in respect of judgment-debtor's property — Mortgage by judgment-debtor — Validity.

The mere appointment of a receiver in respect of a judgment-debtor's property does not invalidate a mortgage by the judgment-debtor. AIR (Vol 38) 1951 Simla 277 : 52 PLR 304.

——O. 40, R. 1 — Receiver — Possession of — Receiver does not hold only for party at whose instance he is appointed — Lessor suing lessee for possession — Receiver appointed at plaintiff's instance taking possession — Defendant's ouster does not have effect of passing possession to plaintiff.

It is well-settled that a Receiver does not hold for the benefit only of the party at whose instance he is appointed. The Receiver is an officer of the Court, and though he holds for the ultimate benefit of the parties to the suit, the property, when it comes into his possession, becomes "in custodia legis."

Where, therefore, in a suit for possession by a lessor against his lessee a Receiver is appointed at the instance of the plaintiff, the ousting of the defendant from possession does not have effect of passing possession to the plaintiff, inasmuch as the Receiver can in no sense be regarded as the plaintiff's agent. AIR (Vol 33) 1946 Cal 357 : 50 CWN 229 : 80 CLJ 259.

——O. 40, R. 1 — The property does not vest in the Receiver appointed under O. 40, R. 1. The property is only in the custody of Court and Receiver is simply managing the estate as an officer of that Court. AIR (Vol 29) 1942 Cal 394 : 46 CWN 355 : 207 Ind Cas 461 (DB).

——O. 40, R. 1 — Transaction by party in respect of property in possession of Receiver, whether void.

The appointment of a Receiver operates as an injunction upon the parties not to interfere with the rights conferred on him by the Court. If any party deals with any of the properties in the possession of the Receiver, the transaction will not be binding on the Receiver nor can his possession be interfered with. But from this it does not follow that the transaction is void as being opposed to public policy. AIR (Vol 27) 1940 Pat 516 : 19 Pat 433 : 7 BR 283 : 192 Ind Cas 17 (DB).

——O. 40, R. 1 — Administration suit — Receiver, appointment of, whether divests estate of ownership.

The Receiver appointed in an administration suit has no better status than that of a Receiver appointed by Court under O. 40. He is not on the same footing as a Receiver appointed in the insolvency proceeding in whom the estate of the insolvent vests and the insolvent is divested of it. When a Court appoints a Receiver, the property comes in the custody of the Court. The possession of the Receiver is the possession of Court. The property passes into legal custody (custodia legis), and such custody is for the benefit of the true owner.

The Receiver thus holds the property for the benefit of the true owners. By the appointment of a Receiver the Court takes upon itself the management of the property during the continuance of the litigation, but the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the Receiver appointed. AIR (Vol 23) 1936 Pat 572 : 3 BR 73 : 18 PLT 301 : 165 Ind Cas 749 (DB).

——O. 40, R. 1 — Where the receiver's possession is wrongful ab initio the Court will not in ordering restitution take into consideration the fact that the appointment of the Receiver had been to applicant's advantage and that the applicant would have had, in any event, to incur the expenses, incurred by the Receiver. AIR (Vol 11) 1924 Rang 181 : 79 Ind Cas 724 : 1 Rang 770 (DB).

——O. 40, R. 1 — Vesting of property.

Where a person, who is to be appointed Receiver, is asked to produce security, he cannot be deemed to be appointed till he produces security. The appointment of a Receiver does not of itself vest the property in him. AIR (Vol 10) 1923 Nag 6 : 68 Ind Cas 432.

——O. 40, R. 1 — Effect of appointment — Right to sue.

After a receiver of a tenure has been appointed the landlord cannot sue a tenant for the rent. He should apply to the Court which appointed the receiver from an order that the receiver may pay the rent or that the landlord be allowed to proceed according to law for his money. (1910) 14 CWN 653 : 6 Ind Cas 214 (DB).

(b) Third party.

——O. 40, R. 1 — Appointment of Receiver — Removal of person in possession of property.

A person who is a party, but not a person who is not party to proceedings for the appointment of a Receiver, can be removed from the possession or custody of any property for which such Receiver is appointed. AIR (Vol 32) 1945 Cal 298 : ILR (1944) 2 Cal 194 (DB).

——O. 40, R. 1 — Appointment of Official Receiver, if places him in possession of property — Whether affects right of third party to execute decree by attachment and sale of that property.

It is true that when an Official Receiver is appointed, the actual appointment operates as an injunction restraining the parties to the suit from interfering with property, but it does not affect outsiders.

But the mere appointment of the Official Receiver does not place him in possession of the property in respect of which he is appointed Receiver and does not affect the right of a creditor to proceed to execute a decree by attachment of the property intended to be received until and unless the Official Receiver obtains possession of the property.

Hence unless the Receiver is in possession of the property, notice to him of the proposed sale of that property in execution of a decree of a stranger decree-holder is not necessary. AIR (Vol 30) 1943 Pat 297 : 22 Pat 256 : 10 BR 46 : 24 PLT 411 : 208 Ind Cas 275 (DB).

——O 40. R. 1 — Money lent by creditor to Court Receiver for payment of peishcush in respect of estate in possession of Receiver — No charge created on such estate — Creditor, if entitled to be paid out of assets of such estate irrespective of Receiver's right of indemnity.

Where money is lent by a creditor to a Court Receiver for payment of peishcush in respect of the estate in the management of the Receiver and the money is so utilized but no charge has been created on the estate for such a loan, the creditor is entitled to a decree personally against the Receiver and against the assets of the estate only to the extent to which the Receiver has a right of indemnity as Receiver against that estate.

He cannot claim to be paid out of the assets of such estate irrespective of the Receiver's right of indemnity, nor can he, from the mere fact that the estate belongs to a Hindu, invoke the principle of Hindu law under which a debt incurred by a manager for the benefit of the estate is binding on the estate. AIR (Vol 28) 1941 Mad 593: 53 MLW 536: (1941) 1 MLJ 586 : 1941 MWN 395 : ILR (1941) 1 Mad 675 : 201 Ind Cas 724 (DB).

——O. 40, R. 1 — Order 40 makes it clear that the Court may by order appoint a Receiver of any property, subject to the condition that the Court is not authorized to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove. The appointment of a Receiver of occupancy or ex-proprietary tenancies is certainly tantamount to the removal of these tenancies from the possession and custody of the tenant.

The appointment will have the effect of preventing the tenant from cultivating his lands or manuring it. It will be contrary to the spirit of the Ten. Act to hold that although the tenancy lands cannot be attached or sold nor can even a lease be granted for a longer period than is prescribed, the dispossession of the tenant can be brought about in an indirect way by appointing a Receiver of such tenancies and thereby dispossessing the tenants for an indefinite period until all the debts due from him have been paid up.

This may be tantamount to an ejectment of the tenant, which is not allowed except in accordance with the Act and is certainly introducing a stranger into the village which the land-holder may not like. When a simple loan is advanced on personal credit, it is not in the contemplation of the parties that the debt would be recovered out of tenancy lands in the possession of the tenant.

There is no equity in favour of the creditor which would compel a Court to order the dispossession of the tenant from his agricultural lands, which have been expressly made inalienable by statute. AIR (Vol 24) 1937 All 389 : (1937) ALJ 267 : 1937 R D 210 : ILR (1937) All 542 : 1937 AWR (H C) 197 : 169 Ind Cas 181 (DB).

——O. 40, R. 1 — Sale of property in execution of simple money-decree — Purchaser, whether acquires right to income against purchaser under mortgage decree.

A obtained a money-decree against B and attached certain properties belonging to B. C, who had a mortgage over some of these properties, sued to enforce his mortgage and got a Receiver appointed in respect of the mortgaged properties.

A obtained leave to execute his decree against the Receiver and purchased the properties in execution of his decree. D subsequently purchased the properties in execution of C's mortgage decree. A applied while the Receiver's appointment was still in force for payment to him of the income of the properties realised by the Receiver from the date of his purchase:

Held, that the effect of the order appointing the Receiver was to deprive B of his right to deal with the income and A did not, therefore, acquire any right to the income by his purchase.

Per Venkatasubba Rao, J.— The notion is utterly wrong, that in England those mortgagees only as are entitled to immediate possession, obtain an appointment of Receiver. AIR (Vol 20) 1933 Mad 293: 64 MLJ 682 : 37 MLW 788: (1933) MWN 842 : 56 Mad 546 : 141 Ind Cas 372 (DB).

——O. 40, R. 1 — Strangers cannot question his possession.

When an order has been made by Court and receiver takes possession, it is not open to third parties to question the legality of the possession of the receiver as long as the order appointing receiver is in force. AIR (Vol 16) 1929 Mad 184 : 56 MLJ 95: 118 Ind Cas 70 : 52 Mad 938: 29 MLW 664.

——O. 40, R. 1 — On persons with paramount title.

If persons with paramount rights who are not parties to the action, are actually in possession of those rights, the appointment of a receiver does not prejudice them in the enjoyment of those rights. If they are not actually in possession, then, after a receiver has been appointed, they must come to the Court for leave to exercise those rights in which case their application cannot be refused. AIR (Vol 14) 1927 Pat 397 : 104 Ind Cas 295 : 8 PLT 717.

(c) Mortgage.

——O. 40, R. 1 — The Receiver appointed in a mortgage suit holds the property for the person who can eventually make out title thereto. His appointment prima facie is for the benefit of the mortgagee. AIR (Vol 27) 1940 Cal 429 : ILR (1940) 1 Cal 197 : 191 Ind Cas 559.

——O. 40, R. 1 — Per Ba U J. — By appointing a receiver the Court neither substitutes a new contract for the one entered into by the parties nor enlarges the security. The Court simply keeps the security intact so that parties may be able to carry out the terms of their contract. Therefore a receiver can be appointed in a simple mortgage suit

even though the rents and profits are not part of the mortgage security. AIR (Vol 26) 1939 Rang 321 (FB).

——O. 40, R. 1 — Mortgagor becoming insolvent — Official Receiver impleaded — Application for appointment of Receiver granted in presence of Official Receiver and mortgagee appointed Receiver — Court directing Official Receiver to furnish mortgagee Receiver with particulars regarding leases granted by him.

In a suit on a mortgage, an application for the appointment of a Receiver was made by the mortgagee. The mortgagor became an insolvent and the Official Receiver was made a defendant. In the presence of the Official Receiver and after an objection by him, the mortgagee was appointed a Receiver. On the application by the mortgagee-Receiver, the Court directed the Official Receiver to furnish him with particulars regarding the leases granted by him (the Official Receiver):

Held, that it made no difference that the person against whom the order was made happened to be the Official Receiver: he was a party to the suit and was bound by the order made in his presence. The Official Receiver, as much as any other party to the suit, was bound by the orders of the Court. AIR (Vol 25) 1938 Mad 594 : (1938) 1 MLJ 543 : (1938) MWN 1160 : 181 Ind Cas 623 (DB).

——O. 40, R. 1 — Dispossession of person in possession.

As soon as a Receiver is appointed, and property is taken possession of by him, the property passes out of the possession and custody of the other person. Even where the person in possession is himself appointed the Receiver, the character of his possession changes and his liability is of a different nature, as he becomes an officer of the Court and holds possession of the property on its behalf. But his dispossession would be only constructive and not actual. AIR (Vol 23) 1936 All 495 : (1936) ALJ 605 : 1936 AWR (H C) 565 : 1936 ALR 595 : 58 All 949: 163 Ind Cas 481 (FB).

——O. 40, R. 1 — Appointment of Receiver at instance of mortgagee — Suit decreed — Mortgagee, if entitled to rents and profits in hands of Receiver, where he is deprived of interest between date of suit and date of sale.

The Court is entitled to appoint a Receiver under O. 40, R. 1, whenever it is deemed just and convenient to do so: for example, in a mortgage suit when interest is in arrear, the Court will normally appoint a Receiver at the instance of the mortgagee as of course, whether or not the property appears to be of sufficient value to cover the mortgage debt and interest, and whether or not the right of the mortgagee to obtain a personal decree against the mortgagor subsists or has been lost.

For more than a century it has never been doubted in England that when a Receiver is appointed, the mortgagee, if successful in the suit, will be given the accruing rents and profits in the hands of the Receiver and this equitable doctrine which is applied in England forms part of the law in India as being in accordance with equity, justice and good conscience.

It is consonant alike with reason and equity, if a mortgagee is diligent & applies that a Receiver should be appointed, and in the event he succeeds in the suit, that the rents and profits in the hands of the Receiver should be allocated to the mortgagee who, during the period between the time when he filed the suit to enforce his security and the date of the sale, has been deprived of the interest and profits which otherwise might have accrued to him if he had been in possession of the proceeds of the sale during that period. AIR (Vol 23) 1936 Rang 290: 14 Rang 922: 163 Ind Cas 850 (DB).

——O. 40, R. 1 — Appointment of — Effect — Crops, raised after appointment of Receiver but after sale of equity of redemption, whether being to mortgagee or purchaser.

When a Receiver is appointed in a mortgage action he is appointed for the benefit of the mortgagee and all proceeds from the property which are realised after he takes possession go to the credit of the mortgage-debt and are not the property of the mortgagor although he may have raised them. The position of a simple money decree-holder who has purchased the equity of redemption is in no way different from that of the mortgagor.

A simple money decree-holder purchased his debtor's property (which was subject to a simple mortgage) on April 15, 1929, but delivery of possession was taken only on January 5, 1930. On December 16, 1929, a Receiver was appointed in the mortgagee's suit and the crops were harvested on January 8, 1930:

Held, that the mortgagee was entitled to the crops in preference to the purchaser of the equity of redemption. AIR (Vol 22) 1935 Mad 410: (1935) MWN 315: 41 MLW 495: 156 Ind Cas 67 (DB).

——O. 40, R. 1 — Sums realized by him from mortgaged property, whether form part of mortgaged property.

The nature of the office of the Receiver is simply this: that he is an impartial person appointed by the Court to collect and receive, pending the proceedings the rents, issues and profits of land or personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive. The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it.

His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in custodia legis for the person who can make a title to it. The title of the real owner is in no way affected either in theory or on principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title some persons parties to the action.

The appointment of a Receiver by the Court under O. 40, R. 1 in no way diminishes or enlarges the title to the property which comes into his possession so far as the person otherwise entitled to it is concerned. It follows, therefore, that the sums of money in the hands of the Receiver are not sums payable to the mortgagor, but form part of the mortgaged property upon which the debt due to the mortgagee was secured. AIR (Vol 21) 1934 Rang 321: 12 Rang 437: 155 Ind Cas 776 (DB).

——O. 40, R. 1 — Mortgaged property — Order appointing Receiver — Clause as to insurance in mortgage deed — Oral agreement as to commission for insurance.

An order appointing a Receiver to a mortgaged property means that the property was in the custody of the Court but the parties were still governed by their contract.

In the case of an application by such Receiver for a direction as to whether they were bound to insure the mortgaged property as provided in the mortgage-deed, the Court will not enter into any question as to whether the mortgagor had an oral

agreement for an agency commission with the insurance company. AIR (Vol 19) 1932 Cal 366: 54 CLJ 566: 137 Ind Cas 623 (DB).

——O. 40, R. 1 — Mortgage — Prior and subsequent — "Just and convenient".

A receiver may be appointed at the instance of the first mortgagee when there is reason to apprehend that the property was insufficient to pay the incumbrances thereon. Whether the mortgagee is or is not entitled to possession, he may ask for a receiver, if the demands of justice require that the mortgagor should be deprived of possession.

A receiver can be appointed at the instance of a simple mortgagee. A receiver appointed in the presence of the mortgagor and the second mortgagee at the instance of the first mortgagee holds the property for his (first mortgagee's) benefit alone and must hand him over the entire income for the satisfaction of his dues.

The order for the appointment of the receiver, binds the mortgagor and the second mortgagee though the second mortgagee obtains a decree on his mortgage in the absence of the first mortgagee and purchases the equity of redemption in execution of that decree. His position in relation to the receiver at the instance of the first mortgagee is not affected. AIR (Vol 7) 1920 Cal 545: 31 CLJ 385: 47 Cal 418: 56 Ind Cas 839 (DB).

——O. 40, R. 1 — Mortgage — Execution.

An order appointing a Receiver in execution of a mortgage decree is not binding on a person not a party to the suit and claiming to be in possession in his right as prior mortgagee. AIR (Vol 5) 1918 Pat 364: 1918 Pat HCC 138: 4 Pat LW 414: 45 Ind Cas 177.

7. Grounds for appointment.

(a) General.
(a-1) Applicant having no specific claim.
(b) Ensuring regular payment.
(c) Injury to rights and interests.
(d) Insufficiency of security.
(e) "Just and convenient".
(f) Maintenance of accounts.
(g) Mismanagement of property.
(h) Mortgage.
(i) Prima facie case.
(j) Realisation of mesne profits.

(a) General.

——O. 40, R. 1 (1) and (2) and S. 51 — In view of the provisions of S. 51 and O. 40, R. 1, Civil P. C., prima facie in a case where the Court considers that it is just and convenient to execute a decree by the appointment of a Receiver, it has power to adopt that course unless there is anything in Sub-R. (2) of O. 40, R. 1 or elsewhere which prohibits it.

In deciding whether it is "just and convenient" to appoint a Receiver within the meaning of O. 40 R. 1 (1), the Court ought to consider whether by appointing the Receiver it would be doing indirectly what the statute prohibited it from doing directly. AIR (Vol 29) 1942 Pat 240 : 23 PLT 91: 3 BR 710 : 200 Ind Cas 649.

——O. 40, R. 1 — Trustees removed and Receiver appointed pending inquiry — Appointment, whether ultra vires of Civil Procedure Code when no suit is pending before Court.

Where a scheme drawn up for a public religious trust, gives the District Judge a general control over the trustees and over their management of the trust, and if in the exercise of his powers under it he finds it necessary to remove the trustees, he must be credited with the power to take emergency measures for temporary management pending reconstitution of the board of trustees.

In such a case an appointment of a Receiver is not ultra vires of the Code even though no suit or proceeding in the nature of suit is pending before the Court when the appointment order is made. Such an order, though purported to be one under O. 40, R. 1, is really one passed by him as the persona designata and the High Court cannot interfere with it in appeal. AIR (Vol 24) 1937 Bom 124 : 38 Bom LR 1137: 166 Ind Cas 577 (DB).

——O. 40, R. 1 — Section 51 in the matter of appointment of Receiver is governed by O. 40, R. 1. AIR (Vol 23) 1936 Lah 239 : 162 Ind Cas 861.

——O. 40, R. 1 — Trust — Founder taking possession of trust property in contravention of terms of deed — Co-trustees affected.

Where the appellant illegally took possession of the trust property in direct contravention of the terms of the trust deed which he himself executed and filed a suit for removal of the trustees but had anticipated the result of the suit by ousting the trustees before filing the suit and the co-trustees being deprived of possession of the trust property were unable to discharge their duties as trustees:

Held, that the co-trustees could not reasonably divest themselves of their responsibility even if it were legally open to them to do so, and hence it was just and convenient that a Receiver should be appointed in the case. Such action will be for the benefit of the beneficiaries and will not cause any loss to any of the parties concerned. AIR (Vol 23) 1936 Oudh 337: 1936 OWN (CC) 1134: 1936 OLR 339 : 12 Luck 635 : 163 Ind Cas 204 (DB).

——O. 40, R. 1 — Where a Hindu widow alienated certain property and the reversioner sued during her lifetime for a declaration that the alienation was void and therein applied for the appointment of a receiver.

Held, that a receiver should not be appointed under those circumstances. AIR (Vol 17) 1930 Bom 545: 32 Bom LR 1013 (DB).

——O. 40, R. 1 — The appointment of a receiver has often been described as a process of equitable execution. Though it is not always necessary that legal execution should be exhausted before the appointment of a receiver can be obtained, in India where there is no distinction between law and equity the rule holds good that, under ordinary circumstances, equitable execution ought not to be allowed to be resorted to when there is no impediment to execution being levied in the ordinary way as provided by the Code.

The person seeking equitable execution should make out a proper case for it. He must show that he was met by difficulties arising from the nature of the property which prevented his obtaining relief by the usual statutory modes of execution and that it is necessary and advantageous to appoint a receiver. (English cases referred to.)

By the terms of a consent decree the respondent obtained a first charge on the Chalbulpore colliery at Asansol belonging to the appellants for the payment of the decretal amount. They were also entitled to have the colliery sold in execution of the decree.

On default by the appellants, the respondents applied to the High Court at Calcutta for the appointment of a receiver. The colliery was flooded with water and it required to be carefully looked after to ensure its being sold advantageously. The best chance of finding buyers for such a concern was Calcutta.

Held, a proper case was made out for the appointment of a receiver by the High Court of Calcutta although the colliery was situate outside the limits of its jurisdiction. 51 CLJ 209: 34 CWN 238: 57 Cal 964: AIR (Vol 17) 1930 Cal 502 (DB).

——O. 40, R. 1 — Creditors' wishes.

While appointing a receiver, the wishes of the creditors are entitled to great weight, as they have virtually the right of nomination. 115 Ind Cas 881 : AIR (Vol 16) 1929 Pat 114 (DB).

——O. 40, R. 1 — Trustee — Proceedings against — No receiver.

Court cannot appoint a receiver in a proceeding for the removal of a trustee and the appointment of a new trustee under the Trusts Act, S. 74. 103 Ind Cas 816 : AIR (Vol 14) 1927 Sind 237 (DB).

——O. 40, R. 1 — The question as to the public nature of the matter has got to be taken into account in determining whether a Receiver should be appointed. 96 Ind Cas 30: AIR (Vol 13) 1926 Cal 1092 (DB).

——O. 40, R. 1 — Property in medio.

An order appointing a receiver will not ordinarily be made at the instance of a plaintiff having merely a shadowy claim where it has the effect of depriving a defendant of de facto possession, since that might cause irreparable wrong. The main object of appointing a Receiver is to protect the properties pending litigation and to preserve them for the benefit of the party lawfully entitled thereto. In an application for the appointment of a Receiver it is sufficient if a prima facie title to the property over which the Receiver is sought to be appointed is made out by the applicant.

Where property is shown to be in medio i. e., in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble, and where no one seems to be in actual lawful enjoyment of the property no harm can be done to any one by taking it and preserving it for the benefit of the litigant who may prove successful.

Per Greaves J. : Some actual interest in the property to be protected is necessary to support an appointment of a receiver in an interlocutory application but where it is doubtful whether the property which is wakf property is without a custodian or not, the Court will be justified in making the appointment simply for the protection of the property. 89 Ind Cas 183: 29 CWN 836: AIR (Vol 12) 1925 Cal 970 (DB).

——O. 40, R. 1 — For valuation not proper.

Receiver cannot be appointed for the purpose of ascertaining real income of property so that correct data may be available to an appellate Court in which an appeal from a decree for maintenance is pending for fixing the rate of maintenance. 89 Ind Cas 943: 22 MLW 316: AIR (Vol 12) 1925 Mad 1245 (DB).

——O. 40, R. 1 — Something to be said on either side.

After the death of a Mahant of a shrine there was a scramble between two persons each of whom claimed succession to the office and each of whom got himself elected as successor. There was something to be said for the claim of each party and if one of them was put into possession and appointed de facto Mahant during the pendency of the suit it would have given him a great advantage over the other.

Held, that there was pre-eminently a case for the appointment of a Receiver. 69 Ind Cas 361: AIR (Vol 11) 1924 Lah 421.

——O. 40, R. 1 — Suit under S. 92 of C. P. C. — Receiver can be appointed.

In a suit under S. 92 the Court has power to appoint a Receiver and take the management of the temple out of the hands of the trustees appointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry. 68 Ind Cas 565: 16 MLW 927 : 1923 MWN 75 : AIR (Vol 10) 1923 Mad 224: 41 MLJ 545 (DB).

——O. 40, R. 1 — Applicant should have special equity in his favour.

There is no jurisdiction in the Court to appoint a Receiver at the instance of a simple contract creditor, unless the creditor establishes a special equity in the favour of such appointment. A prior mortgagee is entitled to have the Receiver obtained by a puisne mortgagee or a simple contract creditor discharged and a nominee of his own substituted. Whenever a Court appoints a Receiver it ought to take care to protect the rights of persons other than the applicant.

The appointment of a Receiver is an equitable relief and if the applicant does not establish a special equity in his favour it is impossible to say that it is "just and convenient" that a Receiver should be appointed. The first essential condition for the appointment of Receiver is that the applicant must satisfy the Court that he has an interest in the property to be affected by the order. The fact that fraud is practised on the Court is sufficient ground for the discharge of the Receiver. 61 Ind Cas 849: 3 Pat LT 24: 6 PLJ 366: AIR (Vol 9) 1922 Pat 318 (DB).

——O. 40, R. 1 — It would be very improper under O. 40, R. 1 to take property out of the hands of ladies of culture and well capable of managing property and examining accounts where they were in possession of it for something like two years and to hand over the property to a receiver upon nothing more than mere rumours. (1911) 11 Ind Cas 703 (DB) (All).

——O. 40, R. 1 — Trust — Receiver — Appointment — Conditions.

Where a mortgagor transfers properties to trustees who take the estate subject to the mortgage and who agree to liquidate the debt by periodical payments but are unable to do so and one of them dies while the other absents himself from the country for a long time without taking effective interest in the management, of the estate a Receiver may be appointed. (1911) 13 CLJ 495: 9 Ind Cas 985 (DB).

——O. 40, R. 1 — Grounds for appointment — Declaratary suit.

An appointment of a Receiver can be made only on proof of strong grounds of necessity and an appointment without any justifying necessity, such as one made in a declaratory suit that certain widows were entitled only to maintenance, is illegal and improper. 62 PWR 1911: 11 Ind Cas 403.

——O. 40, R. 1 — Grounds for appointment — Duty of appellants who impugn the discretion of the Court below.

Where the property in dispute fetched large profits and the expenses necessary for the purposes of the trust were small, it is convenient to appoint a receiver of the property pending decision. The appellants who impugn the discretion exercised by the Court below after considering all

the facts and evidence, must prove that the discretion was exercised improperly. (1910) 7 Ind Cas 344 (All) (DB).

——O. 40, R. 1 — Receiver, appointment of — Judicial discretion of Court — "Just and convenient," what is — Defendant in possession not to be disturbed except on strong grounds — Waste — Delay in instituting suit, effect of, on receivership application by plaintiff.

The words "just and convenient," in O. 40, R. 1, are derived from the English Judicature Act which greatly enlarged the powers which the Court of Chancery formerly exercised, and the Courts in India have the fullest jurisdiction to appoint as well as to remove a receiver in the exercise of a sound judicial discretion. A receiver should not be appointed in supersession of a bona fide possessor of the property in controversy unless there is some substantial ground for interference.

Held, on the facts, that the charge of waste against the defendant in possession had not been established and that plaintiff's delay in instituting the suit was such as to disentitle him to relief by appointment of a receiver. (1910) 5 Ind Cas 27 : 14 CWN 252 (253, 254, 255) (DB).

——O. 40, R. 1 — In a suit by members of a community against the other members for the appointment of a Receiver for the management of the joint property of the community until a proper trustee is appointed by the community it is not convenient to pass a decree for the appointment of a Receiver. (1909) 19 MLJ 669 : 4 Ind Cas 1069 (DB).

(a-1) Applicant having no specific claim.

——O. 40, R. 1 — Receiver — Appointment — General creditor — Right of to obtain order appointing receiver.

It is very clear that as a general rule a receiver is not appointed at the instance of a mere general creditor over property to which he has no specific claim merely in order that if he establishes a claim as a creditor there may be assets wherewith to satisfy it. 49 Bom LR 425: AIR (Vol 34) 1947 Bom 434.

——O. 40, R. 1 — Creditor having right against specific fund or estate is entitled to get Receiver appointed on ground that he has special charge on debtor's property. AIR (Vol 23) 1936 Lah 102.

——O. 40, R. 1 — Where properties of deceased are in the possession of his widow and she is the executrix under the will left by the deceased, a mere claim to such property made by an alleged daughter of the deceased is no ground for appointment of Receiver. AIR (Vol 21) 1934 Rang 153 (DB).

(b) Ensuring regular payment.

——O. 40, R. 1 — "Just and convenient" — Mortgage suit — Appointment of receiver — Power of Court.

The Court has ample power to appoint a receiver at the instance of a simple mortgagee in proceedings in execution of a final decree for sale. Where no interest has been paid for many years and the security has consequently become inadequate it is just and convenient to appoint a receiver. 27 Pat 534: AIR (Vol 36) 1949 Pat 24 (DB).

——O. 40, R. 1 (2) (All) — Effect of amendment of R. 1 (2) on the power of appointment of a receiver — Grounds for appointment — Non-payment of interest to a simple mortgage.

The effect of the amendment of R. 1 (2) of O. 40, C. P. Code, is that in a case in which no question arises as to the dispossession of a person not a party to a suit, the Court has an unfettered discretion under R. 1 to appoint a receiver whenever it appears to it to be just and convenient to do so.

Prima facie the fact that interest is in arrear in the case of a simple mortgage will not alone be enough to render the appointment of a receiver of the mortgaged properties or of the rents and profits thereof, either just or convenient. ILR (1947) All 456 : 1947 ALJ 10 : 1947 AWR (HC) 20: 1947 ALW 64: AIR (Vol 34) 1947 All 157 (DB).

——O. 40, R. 1 — Suit on simple mortgage — Interest as well as taxes and rates in arrears — Order for sale of property after preliminary decree.

Where in a suit on simple mortgage, an application for appointment of a Receiver is made and at the time of making such application not only is the interest in arrear but also taxes and rates are in arrear and the Court has ordered the property to be sold after passing of the preliminary decree; it is in such a case just and convenient to appoint a Receiver and where the Court has made such an appointment, it has rightly exercised its discretion. AIR (Vol 26) 1939 Bom 54 : 40 Bom LR 1266 : ILR (1939) Bom 82: 179 Ind Cas 821 (DB).

——O. 40, R. 1 (1) (2) — Interest in arrears and security likely to become insufficient.

Per Full Bench.— The Court has jurisdiction to appoint a Receiver of any property where it appears just and convenient to do so. The appointment of a Receiver by the Court in case of a simple mortgage must depend upon the individual facts of each particular case. The Court must see what is the object of the application; if it is plainly that the Receiver should act in breach of sub-r. (2), it is neither just nor convenient to appoint him, since he cannot perform such a task, nor can the Court authorize him to do so.

His appointment would in such a case be nugatory. But if it be shown that there is a reason for his appointment upon the ground of justice and convenience which will enable him to preserve the security of the mortgagee without infringing the sub-rule, the power of the Court to appoint him which is unfettered, may be exercised upon these grounds. In other words, it can never be just and convenient to appoint a Receiver for the sole purpose of taking possession of rents and profits unless they have been expressly made part of the security for the debt by the instrument creating the mortgage even if, having done so, the Court could put the Receiver into possession.

The fact that interest on the mortgage debt is in arrear, or substantially in arrear, can only be a factor in deciding whether a Receiver should be appointed; the fact the security is likely for any reason to become insufficient may be another factor; but the governing words of the rule are whether it is just and convenient and in deciding this matter due weight must be given to all relevant considerations including those mentioned in sub-r. (2) of O. 40, R. 1.

(Difference between nature of English mortgage in England and simple mortgage in India explained.)

Per Ba U, J.— By appointing a Receiver, the Court neither substitutes a new contract for the one entered into by the parties nor enlarges the security. The Court simply keeps the security intact so that the parties may be able to carry out the terms of their contract. In order to keep the security intact, the Receiver must be given certain powers, such as the collecting of rents and profits and payment of such charges as are due thereon to Government or local bodies. Therefore, a Receiver can be appointed in a simple mortgage suit even though the rents and profits are not part

of the mortgage security. AIR (Vol 26) 1939 Rang 321: 1939 Rang LR 403: 12 Rang 101: 183 Ind Cas 728 (FB).

(Overrules AIR (Vol 15) 1928 Rang 176: 110 Ind Cas 620).

——O. 40, R.1 — Hindu son given house for residence on arrangement with father — Attachment of house in execution of decree against son:

Held, a Receiver should be appointed to realize rent. AIR (Vol 24) 1937 Lah 433 : ILR (1937) Lah 486 : 39 PLR 839 : 175 Ind Cas 447 (DB).

——O. 40, R. 1 — Appointment of Receiver in execution to realise income of inam fields granted for maintenance and remuneration for services rendered — Right of judgment-debtor to apply for allowance to maintain family.

A Receiver can be appointed in execution proceedings to realise the income of inalienable inam fields granted partly for maintenance and partly for remuneration for services rendered. It will be open to the judgment-debtor to apply for an allowance to maintain the family. AIR (Vol 23) 1936 Nag 288: ILR (1937) Nag 534: 167 Ind Cas 878.

——O. 40, R. 1 — Maintenance made charge on property — Arrears.

If the holder a decree for maintenance can proceed only against a house which has been made a charge for payment of maintenance and maintenance falls in arrears, it is highly desirable to appoint a Receiver for the purpose of paying off the arrears as well as for ensuring punctual payment of the maintenance in future without forcing the decree-holder to take out execution every month. AIR (Vol 20) 1933 Lah 826 : 146 Ind Cas 1024.

——O. 40, R. 1 — Protection of rights and prevention of injury according to legal principle.

The words "just and convenient" do not mean that the Court is to appoint a receiver simply because the Court thinks it convenient, but they mean that the Court should make the appointment for the protection of rights or prevention of injury according to legal principles. A simple contract creditor who has no specified charge or no right to be paid out of a specified sum cannot in general ask for the appointment of a receiver.

Where, therefore, in a suit for recovery of arrears of rent and cesses based on an ijara patta with a prayer for ejectment under S. 66 (2), Ben. Ten. Act, the plaintiff applies for the appointment of a receiver but is unable to make out a sufficient case for such appointment, the appointment should not be made. AIR (Vol 17) 1930 Cal 610 (DB).

——O. 40, R. 1 — Simple mortgage — Non-payment of interest — Fall in value — Good grounds.

While Courts would not ordinarily deprive the mortgagor of his possession in cases where the mortgage is a simple one, there may be circumstances created either by the conduct of the mortgagor or connected with the state of the property which may render it necessary in the interests of justice and for the protection of the mortgagee that a Receiver should be appointed.

It is impossible to lay down a hard and fast rule laying down under which circumstances the Court will appoint a Receiver. But ordinarily there should be some loss or detriment not foreseen by the mortgagee at the time when he chose to take a simple mortgage and allow possession to remain with the mortgagor, which loss could not be compensated except by the appointment of a Receiver.

Where a simple mortgagor makes default in paying the interest and the mortgaged property falls in value, the case is fit for the appointment of a Receiver. AIR 1926 Mad 155 and 43 Ind Cas 533, Not foll. (Case law discussed.) 115 Ind Cas 244: 52 Mad 979: 29 MLW 553 : AIR (Vol 16) 1929 Mad 138: 56 MLJ 115.

——O. 40, R. 1 — Mortgage-decree — Appointment for collection of rent is good.

Where a mortgage-decree-holder asks for the appointment of a Receiver to collect the rents of the mortgaged premises the Court should appoint a Receiver, and the appointment of a Receiver is binding not only on the parties to the suit, but also on any purchaser of the interest of the mortgagor in the mortgaged premises who stands in the shoes of those mortgagors. 110 Ind Cas 620: 6 Rang 261: AIR (Vol 15) 1928 Rang 176 (DB).

——O. 40, R. 1 — Arrears of interest and insufficiency of security — Good grounds.

Court may appoint a Receiver at the instance of a mortgagee where the action is either for foreclosure or sale if there is reason to suspect that the security is insufficient or if the interest is in arrear; and the right of the mortgagee to ask for a Receiver is not affected by the fact that a decree for sale has been passed because the suit cannot be said to terminate till the property is sold or the mortgage money paid. 95 Ind Cas 632: AIR (Vol 13) 1926 Cal 1006 (DB).

——O. 40, R. 1 — Grounds for appointment — Insolvency of administrator.

The insolvency of an administrator is a good reason for appointing a receiver in spite of the fact that the administrator has been administering the estate for a number of years and has kept proper accounts. That waste or mis-management is not alleged, and that all the persons for whom the estate has been administered have not joined in the application are not sufficient reasons for refusing to appoint one. AIR (Vol 5) 1918 Low Bur 29: 11 Bur LT 127: 48 Ind Cas 152.

——O. 40, R. 1 — Execution — "Just or convenient."

When appointment of a receiver is the only way to recover the decretal amount and when the interest of both parties can be safe-guarded, the appointment is neither unjust nor inconvenient. A Receiver can be appointed to receive rents and profits of non attachable property. AIR (Vol 2) 1915 Nag 98: 11 NLR 113: 31 Ind Cas 285.

——O. 40, R. 1 — Monthly allowance.

Right of a person to receive allowance charged on property is attachable but a receiver cannot be appointed to receive money month by month. (1912) 16 CLJ 354: 17 CWN 662: 17 Ind Cas 284 (DB).

——O. 40, R. 1 — Mortgage — Receiver — Appointment of — Guiding principles.

Though the appointment of a receiver pendente lite is within the discretion of the court such discretion must be exercised carefully having regard to the circumstances of each case. The appointment of a receiver at the instance of a mortgage will be made as a matter of course if interest payable under the security is in arrears. The right to propose a receiver belongs to the party interested in the nomination. (1912) 16 CWN 997: 17 Ind Cas 202 (DB).

——O. 40, R. 1 — Receiver — Ghatwali property.

In execution of a decree against a Ghatwal though the Ghatwali property could not be attached a Receiver of the rents and profits could be appointed so as to apply them in satisfaction of the decree. (1912) 39 Cal 1010: 16 CWN 802: 14 Ind Cas 227 (DB).

——O. 40, R. 1 — Mortgage — Suit — Interest not paid.

The appointment of a Receiver will be made generally on the application of a mortgagee, whether legal or equitable, if the interest payable under the security is in arrears. At the instance of a second or puisne mortgagee, a Receiver is appointed if it is apprehended that the property is in peril or is insufficient to pay the incumbrances thereon, or if interest is in arrear. (1910) 5 LBR 135: 3 Bur LT 20: 4 Ind Cas 1031 (DB).

(c) Injury to rights and interests.

——O. 40, R. 1 — Receiver pending suit — Remedy by the appointment of — Nature — When available.

The appointment of a receiver pending a suit is a form of specific relief and it is generally given upon the principle of quia timet, that is to say, the Court assist a party who seeks its aid because he fears some future possible injury to his rights or interests. ILR (1948) All 432: AIR (Vol 36) 1949 All 112: 1948 ALJ 518 (DB).

——O. 40, R. 1 — None of claimants in possession of property since death of owner — Possibility of waste and mis-management.

In a case where there are rival claimants to the property in dispute and the property has never been in the possession of any of the parties to the suit since the death of the deceased owner and the situation is fraught with the possibility of waste and mismanagement, it would eminently be a case for the appointment of a Receiver. AIR (Vol 28) 1941 Oudh 328: 1941 OWN (CC) 272: 1941 AWR (CC) 145: 1941 OLR 400: 194 Ind Cas 9 (DB).

——O. 40, R. 1 — Appellant-applicant successful in lower Court in small portion of property only — Bigger portion going to opposite party and enough to compensate applicant in case of waste.

Where in an appeal, the appellant who was found by the lower Court to be entitled to 2-15th of the property, prays for an appointment of a Receiver of the property pending the decision of the appeal, on the ground that the respondent may commit waste, and it is found that there would be plenty of property left with the respondent from which the appellant could obtain compensation for any loss due to acts of waste committed as regards his 2/15th share, there is no reason to grant the prayer for the appointment of a Receiver. AIR (Vol 26) 1939 Oudh 229: 1939 AWR (CC) 88: 1939 OWN (CC) 615: 14 Luck 666: 1939 OLR 464: 183 Ind Cas 16 (DB).

——O. 40, R. 1 — Mere apprehension that defendant would wrongfully dispose of property does not justify order for Receivership without further inquiry as to the basis of these apprehensions and the appointment of a Receiver merely by reason of such apprehension cannot be rendered just and convenient. AIR (Vol 23) 1936 Lah 102.

——O. 40, R. 1 — Mortgage-decree in respect of certain property — Receiver for protection of the property.

A Receiver can be appointed under O. 40, R. 1, for the protection of property in respect of which a mortgage-decree has been passed. AIR (Vol 22) 1935 Oudh 497: 1935 OWN 1118: 1936 RD 209: 11 Luck 562: 158 Ind Cas 586 (DB).

——O. 40, R. 1 — Reasonable grounds for appointment.

Where the decree-holders have ample security for the value of the lands over which they have a lien exceeding the decretal amount and there is no reason why they should not execute the decree in the ordinary manner, appointment of Receiver is not proper.

The mere fact that defendant approached the applicant to accept a smaller amount than the sum decreed or that they applied to the Manager, Sind Encumbered Estates for his aid, will not constitute a valid ground for appointing a Receiver, especially when there is no danger of waste or destruction of the property. AIR (Vol 20) 1933 Sind 231: 150 Ind Cas 473.

——O. 40, R. 1 — Co-sharers — Withholding of profits.

In all cases where a property is in the hands of one co-sharer and the share of the profits is withheld from the other, there is sufficient reason for appointing a receiver. 117 Ind Cas 375: AIR (Vol 16) 1929 Lah 497.

——O. 40, R. 1 — Certainty of mismanagement.

Though thirty years have elapsed since the widow mismanaged the property and that the other acts of waste were committed when she was out of possession and in receipt of pittance, but when it is certain that, if she is allowed to manage the property, it will be ruined.

Held, that there is ground to deprive the widow of management. 105 Ind Cas 353: AIR (Vol 15) 1928 Nag 93 (DB).

——O. 40, R. 1 — Waste — Reversioner.

A mere intention to transfer by a life-tenant does not constitute waste but may constitute danger to the reversionary interests and to protect them the Court may appoint a Receiver. AIR (Vol 7) 1920 Bom 145: 44 Bom 727: 22 Bom LR 826: 57 Ind Cas 553 (DB).

——O. 40, R. 1 — Mortgage — Suit — Receiver — Considerations that should determine the necessity of appointing.

Where a receiver is asked to be appointed in a mortgagee suit the primary question for consideration is what steps should be taken to protect the mortgagee; the fact that the application for appointment is supported by reversioners of the mortgagor (a Hindu widow) is not a matter that need be considered. AIR (Vol 3) 1916 Cal 515: 23 CLJ 440: 34 Ind Cas 405 (DB).

——O. 40, R. 1 (2) — Waste — Receiver.

Where it is clearly proved that an estate is so grossly mismanaged that the whole estate will be jeopardised it is a clear case for the appointment of Receiver. AIR (Vol 2) 1915 Cal 35: 18 CWN 537: 25 Ind Cas 406 (DB).

——O. 40, R. 1 — Grounds for appointment — Selection.

Where some provision for the management of an estate is urgently called for and there is none in effective possession of the estate and able to collect rents there is no necessity for making out a strong case for the appointment of a Receiver.

A Court of appeal will not ordinarily disturb the selection of a Receiver by the court except on some fatal objection in principle. (1913) 17 CWN 581: 18 Ind Cas 398 (DB).

——O. 40, R. 1 — Grounds for appointment — No risk of loss.

A receiver should not be appointed where no risk of loss is shown by the application. (1911) 4 Bur LT 241: 12 Ind Cas 198.

——O. 40, R. 1 — Waste — Life tenant Reversioner.

One C died leaving his widow, the first defendant: she took out Letters of Administration and continued to be in possession of the property. The plaintiff as the next reversioner sued to remove the first defendant from the management of the estate and to appoint a Receiver on ac-

count of gross mismanagement and malversation by her.

The evidence showed that (1) in granting Letters of Administration, the widow was asked to furnish sureties for a sum of three lakhs (2) She entered into a contract with her maternal uncle S, who stood surety for Rs. 88,000 and with A who stood surety for Rs. 2,25,000 (3) The sureties were to be allowed to manage the estate and the defendant should entirely abide by their advice. (4) She executed power of attorney in their favour, (5) The first defendant never concerned herself with the management of the estate and never enquired whether the expenditure was out of the capital or out of the income of the estate. (6) The defendants and her agent all disclaimed having anything to do with the management, she throwing the responsibility on the agents, who tried to shift the same on to the other. (7) The widow contracted debts not valid and binding on the reversioner.

Held, that in the interest of the reversioner a Receiver should be appointed and that as the widow was not proved to have acted with any intention to defraud, she would be paid the surplus income for her life. (1910) MWN 347: 8 MLT 189: 7 Ind Cas 534.

(d) Insufficiency of security.

——O. 40, R. 1 — Nature of remedy.

The appointment of a Receiver to take charge of the judgment-debtors' property is an exceptional remedy and when there is ample property of the judgment-debtor available for satisfaction of the decree, there is no good reason to appoint a Receiver. Besides, when the execution proceedings are to be transferred to the Collector, a Receiver cannot be appointed. AIR (Vol 27) 1940 Lah 345: 191 Ind Cas 704.

——O. 40, R. 1 — Appointment of Receiver at instance of mortgagee — Sufficiency of security, whether ground for refusal.

The Court will appoint a Receiver in a mortgage suit, as in a suit of any other nature, when it is just and convenient to do so. Normally, when the interest is in arrear, a Receiver will be appointed as of course at the instance of the mortgagee. The fact that the property is more than sufficient to cover the mortgage debt is not a ground upon which the Court ought to refuse to appoint a Receiver in such a suit. AIR (Vol 23) 1936 Rang 296 : 14 Rang 308: 163 Ind Cas 856 (SB).

——O. 40, R. 1 — Interest in arrears.

The bare fact of interest being in arrears by itself is not always a sufficient warrant for the appointment of a Receiver. In all cases the Court must hold that it is just and convenient that a Receiver should be appointed.

The most important criterion with regard to whether a Receiver should or should not be appointed in a mortgage suit is whether the mortgagee having originally been well secured, finds that the security is likely to be insufficient, either by reason of considerable accumulation of interest or by reason of depreciation of the value of the property itself. AIR (Vol 22) 1935 Rang 525: 14 Rang 16 : 160 Ind Cas 490 (DB).

——O. 40, R. 1 — Simple mortgage — Interest falling in arrears — Property insufficient to cover decretal amount.

The Court may object to appoint a Receiver in a suit which is based on a simple mortgage. A Receiver may, however, be appointed in case the mortgaged property is found to be insufficient to cover the decretal amount or where interest is in arrears. AIR (Vol 21) 1934 Lah 38 (1) : 34 PLR 950 (1): 149 Ind Cas 95 (2).

——O. 40, R. 1 — Mortgagee, not entitled to charge on income — Absence of personal covenant — Waste or mismanagement not found.

Where in a simple mortgage the mortgagee was neither entitled to a charge on the income nor had he reserved his right to a personal decree and the allegation that the mortgagor was wasting or damaging the property or not taking due care of it was found to be baseless, and the only thing to be considered was that while the interest was mounting up, the corpus of the property was becoming more and more insufficient to pay off the whole debt and the mortgagor was enjoying the rents and profits without paying anything:

Held, that under the circumstances appointment of a Receiver was not necessary:

Held, also, that to appoint a Receiver on the plaintiff's application in such a case was either to enlarge the security or proceed against the other property of the mortgagor, neither of which the Court has any right to do. AIR (Vol 20) 1933 Mad 447: (1933) MWN 29: 143 Ind Cas 650.

——O. 40, R. 1 — Impoverished state.

Where the income of a mutt (religious endowment) was not sufficient both to meet the expenses and to pay off debts contracted by its head, a receiver was directed to be appointed. 50 Mad 497: 101 Ind Cas 545: 29 Bom LR 955: 54 IA 228: 45 CLJ 613: 1927 MWN 507: 25 ALJ 697: 31 CWN 1021: 39 MLT 45: 26 MLW 829: AIR (Vol 14) 1927 PC 131: 53 MLJ 196.

——O. 40, R. 1 — Insufficiency of value — Good ground.

That the sum for which the mortgaged lands will be sold will be insufficient to pay the encumbrances or charges thereon is a sufficient ground for appointment of Receiver. 102 Ind Cas 353 : AIR (Vol 14) 1927 Sind 230.

——O. 40, R. 1 — Insufficiency of security is enough.

There is nothing in R. 1 which excludes mortgage suits from its operation and a Receiver can therefore be appointed in a mortgage suit.

Order 40, R. 1 gives the widest power to a Court to appoint a Receiver of any property whenever it appears to the Court to be just and convenient. The existence in the plaintiff of a right to receive rents and profits is not an essential pre-requisite for the exercise of this power.

A Receiver can be appointed in a mortgage suit where the security is insufficient for the realization of the decree by its sale alone. 85 Ind Cas 737: AIR (Vol 12) 1925 Lah 590.

——O. 40, R. 1 — Poverty no ground.

That the person in actual possession of the property in suit as manager is himself a poor man, from whom personally a decree for mesne profits, in the event of a decree being passed, might prove difficult of realisation, is not an adequate reason for appointing a receiver. 60 Ind Cas 901: 43 All 311: 19 ALJ 50: AIR (Vol 8) 1921 All 91 (DB).

——O. 40, R. 1 — Mortgage — Receiver — Appointment.

Though ordinarily a receiver is not appointed when mortgagee is in possession yet when he is in possession through one of the mortgagor's who became insolvent then the Court can appoint a receiver. AIR (Vol 3) 1916 Mad 1128 (2): (1915) MWN 864: 32 Ind Cas 691 (DB).

——O. 40, R. 1 — Execution — Receiver — Mortgage decree.

Mere convenience on the part of the decree-holder would not justify the appointment of a

receiver. Where the mortgagee had other mortgaged properties to proceed against and the security is adequate a Receiver to realise the rents and profits of one of the mortgaged propetries which is not easily saleable could not be appointed. (1913) 16 OC 238: 21 Ind Cas 283 (DB).

(e) "Just and convenient".

——O. 40, R. 1 — "Just and convenient" — Wakf properties — Suit for possession in the right of mutwalli against alienees — Position of alienees no better than that of tenants at sufferance after decision of Privy Council — Appointment of Receiver — Propriety.

Where in a suit brought by the plaintiff in the right of mutwalli for possession of wakf properties alienated by the earlier mutwallis, the Court is of opinion on the materials before it that the plaintiff has a prima facie case for being regarded as the rightful mutwalli and the position of the alienees after a decision of the Privy Council is that of mere trespassers or at best tenants at sufferance, the appointment of a Receiver under O. 40. R. 1, C. P. Code, would be eminently just. It is plain that as against the right of suit vesting in the plaintiff, the best claim which the alienees defendants could put forward is that, even as trespassers, they are entitled to retain possession against any person except the person rightfully entitled.

It is hardly necessary to say that on a balance the claim of the plaintiff is certainly the higher of the two claims. From another point of view the replacement of one who is a trespasser or at best a tenant at sufferance by a duly authorised Receiver, in relation to valuable properties which require care and skill in their administration, is distinctly advantageous to all concerned. Pak LR 1949 Lah 514: AIR (Vol 36) 1949 Lah 243.

——O. 40, R. 1, S. 51 (d) — Suit on simple mortgage — Receiver, if and when can be appointed — Consideration.

In a suit on a simple mortgage for sale, the Court has jurisdiction to appoint a Receiver to take possession of the mortgaged property and to realize the rents, issues and profits of the property. But this does not necessarily lead to the conclusion that a Receiver may be claimed by the mortgagee in a suit on a simple mortgage as a matter of right and as a matter of course.

Ordinarily, a Court of Justice should be disinclined to take the mortgaged property out of the possession of the mortgagor who is entitled to continue in possession of the same until ownership has passed out of his hands by a sale held in execution of the final decree in the action. A Receiver in such a suit, or in execution proceedings resulting from a decree in such a suit, can only be appointed in exceptional circumstances when a special case is made out for putting the property in charge of an officer of the Court.

It is not practicable to lay down any hard and fast rule governing the circumstances in which a Receiver in such a suit can be appointed but by way of illustration it may be said that where the Court is satisfied that the value of the security has diminished by act of the mortgagor or otherwise, or where the mortgage security is apparently insufficient to liquidate the entire dues of the mortgagee on the foot of the bond in suit, the Court would be inclined to appoint a Receiver so as to place the rents, issues and profits of the properties in the hands of the Court to be dealt with in accordance with the justice and equity of that particular case.

In discussing the question whether a Receiver should or should not be appointed, the first and foremost consideration before the Court is whether it is "just and convenient" that the properties should be taken charge of by an officer of the Court.

If, by appointing a Receiver, the Court will be doing some injustice to any of the parties to the litigation, the Court will not appoint a Receiver. The order of appointment is not meant to penalise any party to the litigation. The real intention of the Court in making such an appointment is to preserve the properties and the usufruct thereof for the benefit of such of the parties to the litigation as may ultimately be held entitled to the same. AIR (Vol 32) 1945 Pat 404: 24 Pat 282: 12 BR 304: 223 Ind Cas 56 (DB).

——O. 40, R. 1 (2) — Receiver, if can be appointed in execution of decree against trustee.

Where a certain property is dedicated as waqf property and under the terms of the deed of waqf it is not liable to attachment and sale and has to be managed by a trustee who is enjoined to perform certain religious duties, it would not be just and convenient to appoint a Receiver of such property in execution of decree against the trustee as the property does not belong to the trustee and the order of appointment would be contrary to the provisions of O. 40, R. 1 (2) and would amount to dispossession of the trustee. AIR (Vol 29) 1942 Oudh 205: 1941 OWN (CC) 1274: 1941 AWR (CC) 370: 197 Ind Cas 467 (DB).

——O. 40, R. 1 (2) — O. 40, R. 1 (2) protects third persons and not parties to suit.

Sub-rule (2) of R. 1 of O. 40, is intended only for the protection of persons who are not parties to the litigation and not persons who are parties to the suit. Section 47, Chota Nagpur Tenancy Act, only prohibits the sale of a holding in execution of a decree.

It does not prevent the execution of a decree against the agriculturists in any other way open to the decree-holder. Hence the Court can appoint a Receiver of a holding of an agriculturist in execution of a decree against him if the Court finds it just and convenient to do so even though a sale of the holding is prohibited by S. 47, Chota Nagpur Tenancy Act. AIR (Vol 29) 1942 Pat 240: 23 PLT 91: 8 BR 710: 200 Ind Cas 649.

——O. 40, R. 1 — Appointment just and convenient in circumstances.

In execution of their decree by attachment and sale of judgment-debtor's property the decree-holder asked for the appointment of a Receiver only till the properties could be sold in execution. The decree-holder wanted to get the properties sold as soon as possible but the judgment-debtor put obstacles in his way by raising all sorts of objections and thus delaying the proceedings. As the judgment-debtor in the meantime appropriated the rents and profits paying little or nothing to the decree-holder, the decree-holder hoped to get some portion of the rents and profits at any rate by the appointment of a Receiver:

Held, that in view of the circumstances of the case the appointment of a Receiver was just and convenient. AIR (Vol 27) 1940 Lah 325: 42 PLR 421: ILR (1941) Lah 590: 190 Ind Cas 451 (DB).

——O. 40, R. 1 — It is settled law that in the case of a simple mortgage without possession, the intention of parties is that the mortgagor shall ordinarily remain in possession of the mortgaged property till it is brought to sale in execution proceedings. In respect of such property, a receiver

will only be appointed if there exist special circumstances in the case. (1938) 40 PLR 541.

——O. 40, R. 1 — Receiver, appointment of — When can be made.

A Receiver will not be appointed in execution of a decree as a matter of course. The appointment of a Receiver in all cases is subject to the provisions of O. 40, R. 1 of the Civil P. C. and no Receiver can be appointed in any case unless it appears to the Court that it is just and convenient that Receiver should be appointed. Where no ground is alleged in the application for execution for such appointment, Receiver will not be appointed. It is for the applicant to show that it is just and convenient that a Receiver should be appointed and not for the opposite party to show cause why no Receiver should be appointed. AIR (Vol 24) 1937 Oudh 232: 1937 OWN (CC) 243: 167 Ind Cas 302 (DB)

——O. 40, R. 1 — Receiver — Removal from possession of property of person whom any party to suit has no present right to remove.

Although there is no objection to the mere appointment of a Receiver of any property, the Court cannot remove from the possession or custody of the property any person, whether a party to the suit or not, whom any party to the suit has no present right so to remove.

Per Rachhpal Singh J.— Under the provisions of the Civil P. C., it is competent to appoint a Receiver of a mortgaged property pending the decision of an appeal against a mortgage-decree provided the party applying for the appointment of a Receiver can establish that he has a present right to remove the opposite party from possession and custody of the mortgaged property.

Where a party to a suit, who is sought to be dispossessed, is a simple mortgagor in possession, then the Court has no power to appoint a Receiver and to order his dispossession under the provisions of O. 40, R. 1. A simple mortgagor has a right to remain in possession and to appropriate the profits of the mortgaged property till the sale has actually taken place and that right cannot be defeated by the appointment of a Receiver.

If a mortgagee who has obtained a decree finds that his mortgagor is causing injury which would diminish the value of the mortgaged property then his only remedy is to proceed under the provisions of O. 39. On the other hand, in a suit for foreclosure, the Court will have power to appoint a Receiver and to remove the mortgagor from possession. AIR (Vol 23) 1936 All 495 : (1936) ALJ 695 : 58 All 949: 1936 AWR (HC) 565: 1936 ALR 595: 163 Ind Cas 481 (FB).

——O. 40, R. 1 — The Court can appoint a Receiver whenever it appears to the Court to be just and convenient. AIR (Vol 23) 1936 Oudh 337: 1936 OWN (CC) 1134 : 12 Luck 635: 163 Ind Cas 204 (DB).

——O. 40, R. 1 — Mortgagee giving up personal relief against mortgagor.

The appointment of a Receiver is not a matter of right on the part of the mortgagee. Special circumstances have always to be proved before the Court could come to the conclusion that it is 'just and convenient' in a particular case to have a Receiver appointed over the mortgage properties. If on the other hand, it is proved to the Court's satisfaction that it is just and convenient to appoint a Receiver, there is nothing that prevents the Court from making such an order. Personal relief against the mortgagor being available is no necessary condition of such appointment. AIR (Vol 20) 1933 Mad 570: 38 MLW 96: 65 MLJ 222: 56 Mad 915 : 145 Ind Cas 449 (FB).

——O. 40, R. 1 — The proviso to O. 40, R. 1, refers to a case where the person in possession is a third party and the parties to the suit have no present right to disturb him. Where the dispute is between parties to the suit, if it is just and convenient for the purpose of enforcing or carrying out the directions in the decree, a Receiver can be appointed even where the party in possession is not liable to be removed. AIR (Vol 19) 1932 Mad 193: 61 MLJ 904: 35 MLW 22: 136 Ind Cas 771 (DB).

——O. 40, R. 1 — Supersession of executor or trustee.

Though a strong case must be made out to induce the Court to appoint a receiver so as to dispossess a trustee or executor who is willing to act yet, where the executor was to act in consultation with other heirs & the fulfilment of that condition had become impossible that was held to be a sufficient circumstance to justify the appointment of a receiver. 109 Ind Cas 759: 55 Cal 249: AIR (Vol 15) 1928 Cal 256 (DB).

——O. 40, R. 1 — Court has power to appoint a Receiver in all mortgage suits when it finds just and convenient to do so.

The law does not contemplate that a mortgagor is entitled to retain possession of the mortgaged property till sale. All that it provides is that a certain fixed time should be allowed by the Court to the mortgagor to arrange for payment of the decretal amount before his property is sold and thereby irretrievably lost to him. 43 IC 533, Diss from. 102 Ind Cas 353: AIR (Vol 14) 1927 Sind 230.

——O. 40, R. 1 — There must be some substantial ground for interfering with existing rights of possession for the appointment of a Receiver in a suit. The fact that no harm would be done by such appointment is not a sufficient ground especially where there is no danger of waste. 79 Ind Cas 561: 1924 MWN 202: AIR (Vol 11) 1924 Mad 482: 46 MLJ 133 (DB).

——O. 40, R. 1 — Where the subject of dispute between the parties to a litigation was a large impartible zemindari with valuable forests and mines and minerals and the zemindari had been long under the management of the Court of Wards.

Held, that the case was a fit one for the appointment of a Receiver pending the appeal and for stay of execution of the decree by the successful claimant. (1923) 75 Ind Cas 417 : 37 Cal LJ 417 (DB).

——O. 40, R. 1 — Execution decree.

The fact that a judgment-debtor will be reduced to poverty if his properties are allowed to be sold is no ground for, the appointment of a Receiver of his properties advertised for sale as in all cases in which a judgment-debtor's property is advertised for sale, he is liable to become poor. An appointment of a Receiver in such a case is not just and convenient within O. 40, R. 1 C. P. C. AIR (V 3) 1916 Cal 540 : 28 Ind Cas 505 (DB).

——O. 40, R. 1 — Possession — Effect on.

A Receiver should not be appointed, when there is a bona fide possessor of the property, except upon substantial grounds for interference. (1910) 14 CWN 252 : 5 Ind Cas 27 (DB).

——O. 40, R. 1 — Grounds for appointment — 'Just and convenient'.

The words 'just and convenient' in O. 40, R. 1 are very wide and were adopted from the English Judicature Act. The principle on which the English Courts act are: (1) The discretion must be guided by law and exercised with care. A Receiver is appointed on the principle of preserving property pending the litigation about it. (2) Where

a defendant seeks a relief unconnected with the subject matter of the plaint, he must, if he desires a Receiver, institute a separate suit for that purpose. (3) A Receiver will not normally be appointed at the instance of a person alleging a mere legal title against another party who is in possession and who claims to hold under a like legal title. (1910) 3 Bur LT 95 : 8 Ind Cas 1191 (DB).

——O. 40, R. 1 — Execution — Receiver — If can be appointed to receive pension of judgment-debtor.

A Receiver cannot be appointed in execution of a decree to receive the pension due to the judgment-debtor. (1909) 12 OC 323 : 4 Ind Cas 145 (DB).

——O. 40, R. 1 — Grounds for appointment — Just and convenient.

The power given to Courts for the appointment of a Receiver must be exercised with a sound discretion on a view of the whole circumstances of the case not merely circumstances which might make the appointment expedient for the protection of the property. Mere charges of waste and malversation against defendant would not be sufficient to entitle the plaintiff to have a Receiver appointed for the plaint property. 107 PR 1908 : 12 PLR 1909 : 4 Ind Cas 694.

(f) Maintenance of accounts.

——O. 40, R. 1 — Receiver — Suit for rendition of accounts — Appointment during pendency of.

There is no authority for the proposition that a receiver cannot be appointed in a suit for rendition of accounts. AIR (Vol 36) 1949 A 112: 1948 ALJ 518: ILR (1948) A 432 (DB).

——O. 40, R. 1 — Executor failing to file inventory — Good ground.

Where an executor of a Mahomedan failed to file the inventory of the property and the accounts within the time prescribed by law and has not accounted for four years' income from the Estate.

Held, that it is a good reason for appointing a Receiver. AIR (Vol 14) 1927 Rang 135: 100 Ind Cas 1020: 6 Bur LJ 13 (DB).

——O. 40, R. 1 — Mohammadan widow's possession for dower debt — Not a bar.

There is nothing in the law as laid down in O. 40, R. 1, C. P. Code which prohibits a Court from appointing a Receiver in a case where a Mohammadan widow or her heir is in possession of the estate of her deceased husband for the satisfaction of her dower-debt. The mere fact that a Receiver has not been previously appointed is not in itself a sufficient ground for refusing to appoint one. Improper accounts which indicate unsatisfactory management are good grounds for the appointment of a Receiver. AIR (Vol 10) 1923 Nag 21: 68 Ind Cas 502 (DB).

——O. 40, R. 1 — Grounds for appointment.

The late production of accounts and documents by the manager is not sufficient evidence of dishonesty to warrant the appointment of a receiver. (1912) MWN 904: 17 Ind Cas 261 (DB).

(g) Mismanagement of property.

——O. 40, R. 1 — Suit by disinterested persons for removal of shebait and for possession of debutter property alienated by him — Shebait removed — Appointment of Receiver pending appointment of new shebait.

R endowed certain properties to his family deity and appointed his daughter as the first shebait and provided in the endowment deed that any five gentlemen of the locality would be able to take up the management of the sheba-puja and of the endowment in case of any misappropriation by the shebait.

The shebait having alienated the debutter properties, alleging them to be her own secular properties, five gentleman of the locality brought a suit for a declaration that the properties alienated by the shebait were debutter, for possession of the properties and for removal of the shebait. The Court dismissed the shebait and appointed a Receiver of the suit properties pending the appointment of a new shebait:

Held, that the appointment of a Receiver of the disputed properties pending the appointment of another shebait could not be said to be wrong in the circumstances of the case. AIR (Vol 31) 1944 Cal 157: 213 Ind Cas 234 (DB).

——O. 40, R. 1 — Appointment of, against executor.

The Court does not as a rule appoint a Receiver as against executors whenever they have obtained probate, unless there is gross misconduct or mismanagement and waste on their part. If they are rightly in possession and there is no dispute as to their title they will not be replaced by the Court Receiver except on very strong grounds. AIR (Vol 20) 1933 Bom 342: 35 Bom LR 700: 146 Ind Cas 621.

——O. 40, R. 1 — The fact that if the Mohunt is left to his position he will be in a position to misappropriate the income of the personal properties if it subsequently turns out that they should be treated as debuttar properties, is not a ground for the appointment of a Receiver unless a clear and unequivocal case is made out against him. AIR (Vol 13) 1926 Cal 1092: 96 Ind Cas 30 (DB).

——O. 40, R. 1 — Misconduct of predecessor — No ground.

A suit was filed under S. 92, C. P. Code for removal of a pandarasannadhi on the ground of personal misconduct and for framing a scheme. He died leaving a successor taking his place and the Court dismissed the suit as having abated with his death. In an appeal against the order dismissing the suit as having abated an application was put in for the appointment of a Receiver.

Held the trustee against whom misconduct was alleged having died, no Receiver could be appointed. (1925) 91 Ind Cas 106 (Mad) (DB).

——O. 40, R. 1 — Grounds for appointment — Poverty.

Poverty of the defendant trustee is no ground for the appointment of a Receiver unless there be in addition some danger to the estate. Where no specific acts of mismanagement or malversation are proved against a defendant in possession, the Courts should be very slow to displace him by appointing a Receiver; so also where prima facie the title to the property in dispute is in him who is in possession of the property. AIR (Vol 2) 1915 Mad 926: 29 MLJ 209: 18 MLT 155: 29 Ind Cas 485 (DB).

——O. 40, R. 1 and O. 43, R. 1 (a).

A receiver may be appointed when the court thinks it to be just and convenient, i. e., some specific act of misappropriation or malversation, mismanagement is shown and not under a future apprehension of any of these. 53 PWR 1910: 36 PR 1910: 72 PLR 1910: 6 Ind Cas 659.

(h) Mortgage.

——O. 40, R. 1 — Execution — Decree-holder prevented from proceeding with sale by judgment-debtor.

Where the decree-holder in execution proceedings following a final decree for sale upon a simple mort-

gage has not been able to proceed with the sale because the judgment-debtors have in one way and another prevented the property from being sold on different grounds, the Court can, upon an application of the decree-holder, appoint a Receiver, O. 40, R. 1 (2) being no bar to such an appointment. AIR (Vol 29) 1942 Nag 1: 1941 NLJ 568: ILR (1942) Nag 118: 198 Ind Cas 807 (DB).

——O. 40, R. 1 — Execution — Mortgage suit — Final decree passed — Clause empowering mortgagee to appoint Receiver — Receiver, if can be appointed — Appointment of Receiver in case of English mortgage — Considerations for his appointment — Substantial portion of mortgage security outside territorial jurisdiction of Court.

The Court can in the case of English mortgages appoint a Receiver of the mortgaged property in cases where sub-Rule (2) of O. 40, R. 1, would operate to prevent such an appointment.

A Receiver cannot be appointed subsequent to the passing of the final decree in a mortgage suit on the basis of a clause empowering the mortgagee to apply for the appointment of a Receiver or empowering him to appoint a Receiver without the intervention of the Court. In any event, the clause does not give the plaintiff an unqualified right to have a Receiver appointed in the circumstances mentioned in the clause, which has the effect of taking away from the mortgagors the right to object to such an appointment. The Court has to consider the matter, and even though the defendants cannot be heard to oppose the application, it is for the Court to deal with the situation on its merits.

The Court will not appoint a Receiver in execution unless the circumstances are such as to make the sale of the properties a matter of serious difficulty. Once a Receiver in execution is appointed the mortgagee will, as a rule, have little inducement to bring the properties to sale and will tend to let matters drag on indefinitely.

If the properties are producing a good income, it is probable that the mortgagee will have a more profitable investment than he will be able to obtain from the sale proceeds if the properties are brought to sale. This does not, however mean that if there are substantial difficulties in the way of the sale, the Court will not help the mortgagee by appointing a Receiver. The Court, in considering this question, should also take into consideration the diligence of the mortgagee. The person who applies for the relief should be able to point to some actual difficulty in carrying out the sale, and not merely to a delay which he foresees on general grounds.

It would be an extremely undesirable thing if it came to be supposed that when a substantial portion of the mortgage securities are outside the local limits of the jurisdiction of the Original Side the mortgagee can almost as of right obtain the appointment of a Receiver in execution which is a form of relief which the Courts are slow to encourage. AIR (Vol 25) 1938 Cal 93: 42 CWN 266: 175 Ind Cas 908.

——O. 40, R. 1 — Simple mortgage — Mortgagee not entitled to charge on income — Absence of personal covenant — Waste or mismanagement on the part of mortgagor not found:

Held, that under the circumstances appointment of a Receiver was not necessary. AIR (Vol 20) 1933 Mad 447: (1933) MWN 29: 143 Ind Cas 650.

——O. 40, R. 1 — An equitable mortgagee is entitled to the appointment of a Receiver. AIR (Vol 19) 1932 Lah 82: 133 Ind Cas 433.

——O. 40, R. 1 — A Receiver cannot be appointed in a suit to enforce a simple mortgage of a property in the possession of a usufructuary mortgagee. AIR (Vol 19) 1932 Pat 360: 13 PLT 525: 142 Ind Cas 300 (DB).

——O. 40, R. 1 — Void mortgage — Mortgagee cannot ask for receiver.

When the properties contained in the mortgages are part of an undertaking for the supply of electric energy to which the prohibition in S. 9 (2), Electricity Act, applies, the mortgage must be held to be void ab initio and it cannot give such mortgagee who has got only a simple money decree, right to the appointment of a Receiver. AIR (Vol 17) 1930 Rang 271 (DB).

——O. 40, R. 1 — It is legally permissible to appoint a Receiver of the mortgaged property on the institution of a suit for its sale under O. 34. 43 I C 533, not Foll.; AIR (Vol 16) 1929 Lah 780.

——O. 40, R. 1 — A Receiver cannot be appointed in a suit for specific performance of a contract of simple mortgage. AIR (Vol 13) 1926 Mad 155: 22 MLW 579: 1925 MWN 802: 92 Ind Cas 599 (DB).

——O. 40, R. 1 — Where a mortgage was created by the karta of a joint family on the family properties for securing overdrafts on the banking account of limited company of which the karta was a member, and where the adult members of the family were aware of the mortgage and the money advanced was used for the family business.

Held, that in a suit on the mortgage, a Receiver could be appointed. AIR (Vol 12) 1925 Cal 664: 41 CLJ 203: 87 Ind Cas 375 (DB).

——O. 40, R. 1 — Mortgage — Floating charge — Appointment of Receiver without going into evidence.

In a suit to enforce a floating charge of the good-will and stock in trade of a business, to secure money that would be due by the mortgagor to the mortgagee, under a mortgage containing a proviso that the mortgagor should not permit the stock in trade to fall below a certain value, the court can appoint a receiver without taking any evidence after offering to allow the mortgagor to remain in possession on giving security. AIR (Vol 6) 1919 Cal 860: 46 Ind Cas 389 (DB).

——O. 40, R. 1 — Mortgage — Suit — Receiver — Appointment of.

In the case of simple mortgage the mortgagor is entitled to remain in possession of the mortgaged property until such time as the property is brought to sale in due course of law. In a suit on simple mortgage the Court has no power to appoint a Receiver during the pendency of an appeal from the preliminary decree. AIR (Vol 5) 1918 All 240: 43 Ind Cas 533 (DB).

——O. 40, R. 1 — Mortgage — Decree — Absence of personal decree — Right of mortgagee-decree-holder to have a Receiver appointed.

Per Oldfield, J. :—A mortgagee decree-holder prevented from executing the decree is entitled to have a receiver appointed if the security is not sufficient to discharge the debt and the interest has not been paid.

Per Sadasiva Iyer, J. :—A decree-holder on a mortgage who has not shown a right to a personal decree against the mortgagor cannot have a Receiver appointed even if he is obstructed in executing the decree. AIR (Vol 2) 1915 Mad 133: 1

LW 785: (1914) MWN 771: 16 MLT 407: 29 MLJ 457: 26 Ind Cas 986 (DB).

——O. 40, R. 1 — Execution — Sale — Confirmation.

A Receiver can be appointed after sale but before confirmation, for the due preservation of the property sold. (1910) 7 MLT 86: 5 Ind Cas 758 (DB).

——O. 40, Rr. 1 to 3 (S. 503) Old Code — Receiver in mortgage suit, appointment of.

A receiver can be appointed under S. 503, C. P. C., in a suit to enforce a mortgage. (1902) 7 CWN 452 (452) (DB).

(i) Prima facie case.

——O. 40 R. 1 — Defendant in peaceful possession for fifteen years.

The power conferred by O. 40, R. 1, should be exercised with great care and caution and only in cases in which the applicant for the appointment of a Receiver has proved a prima facie title of the property. Where the defendant had been in peaceful possession of the property in dispute for about fifteen years without any objection on behalf of anyone, it would not be just and convenient to deprive him of that possession and appoint a Receiver to manage the property, at the instance of the plaintiff who bases his claim on a custom which is denied by the defendant. AIR (Vol 26) 1939 Oudh 61: 1938 OWN (CC) 1153: 1938 AWR (CC) 127: 178 Ind Cas 725 (DB).

——O. 40, R. 1 — Person put in possession of properties in dispute by Revenue Court, after contest, he having prima facie title.

Where a person has been put in possession of the properties in dispute by the Revenue Courts after contest on the ground of his having a prima facie title to them, it would not be just and convenient for the High Court to deprive him of that possession and to appoint a Receiver in his place to manage the property. AIR (Vol 24) 1937 Oudh 280: 1937 OWN (CC) 197: 1937 OLR 83: 166 Ind Cas 983 (DB).

——O. 40, R. 1 — Equitable mortgage — Possession of title deeds by way of security — Presumption — Interest in arrears.

The possession of deeds under circumstances consistent with a deposit by way of security raises a prima facie case for the appointment of a Receiver on an interlocutory application and in addition to proving that there is a prima facie mortgage, it is incumbent upon the applicant to prove that interest is in fact in arrear. AIR (Vol 24) 1937 Rang 399: 173 Ind Cas 452 (1) (DB).

——O. 40, R. 1 — The plaintiff, in order to succeed in getting a Receiver appointed, must show that prima facie the defendant has no title and that he (the plaintiff) has the title. The question whether a Receiver should be appointed cannot be decided on the rulings but according to the circumstances of each case:

Held, after considering the facts, that the action of the plaintiff in filing an application under O. 40, R. 1, was not bona fide and it would not be just to appoint a Receiver of the property in dispute. (1936) 161 Ind Cas 838: 1936 OWN (CC) 466.

——O. 40, R. 1 — The essential point for the Court to consider, in order to appoint a Receiver pending suit, is whether the plaintiff has shown prima facie that he has a strong case and a good title to the property. AIR (Vol 15) 1928 Mad 813: 106 Ind Cas 167 (DB).

——O. 40, R. 1 — A Receiver of the property will not be appointed under O. 40, R. 1 unless the plaintiff satisfies the Court that he has a prima facie case, and that an order for a Receiver is necessary for the protection of the property pending litigation. In appointing a Receiver of property which is in the possession of the opposite party the Court will act with caution and exercise a discretion to be governed by all the circumstances of the case. AIR (Vol 13) 1926 Sind 83: 89 Ind Cas 413.

——O. 40, R. 1 — A plaintiff asking for the appointment of a Receiver must prove that prima facie he has an excellent chance of succeeding and that the property in the possession of the opposite party is in danger of being wasted. AIR (Vol 13) 1926 Sind 37: 89 Ind Cas 104: 20 SLR 201 (DB).

——O. 40, R. 1 — In cases where appointment of a receiver is applied for, it is settled law that the applicant should at least present a prima facie case and should convince the Court that there is a fair chance of his succeeding in the suit. AIR (Vol 9) 1922 Pat 493: 68 Ind Cas 656: 3 PLT 466 (DB).

——O. 40, R. 1 — Prima facie case — Deft. in uninterrupted possession — Effect of.

In a case of disputed title where the deft. admittedly the original owner of the property, claims to have been in uninterrupted possession of the property, the appointment of a Receiver can be justified only when a strong case is made out. AIR (Vol 5) 1918 Low Bur 10: 43 Ind Cas 550 (DB).

——O. 40, R. 1 — Plaintiff has to make a good prima facie title to obtain a Receiver; for an injunction it is enough if he shows a fair question to raise as to the existence of an alleged act. (1911) 2 MWN 75: 21 MLJ 821: 10 MLT 490: 11 Ind Cas 870 (DB).

——O. 40, R. 1 — Interlocutory — Motion — Injunction — Receiver.

It is the practice on the original side of the Bombay High Court on an interlocutory motion to require before any order for injunction or receiver is passed that the plaintiff makes a sufficient affirmative case, a strong prima facie case, to show that he is entitled to the relief which he seeks. (1905) 7 Bom LR 926 (927).

(j) Realisation of mesne profits.

——O. 40, R. 1 — Suit for recovery of possession — No prayer for recovery of mesne profits.

Where the suit was one for recovery of possession only and there was no prayer for mesne profits, past or future, and the trial Court appointed a Receiver :

Held, that as there was no prayer for recovery of mesne profits, the order appointing a Receiver was unjustified. AIR (Vol 20) 1933 Sind 364: 147 Ind Cas 606 (DB).

——O. 40, R. 1 — Under O. 40, R. 1, the appointment of a Receiver is entirely within the discretion of the Court which discretion should be exercised on sound legal principles in the interest of all the parties concerned and for the protection and supervision of the subject-matter of the litigation.

Where the only grounds urged were difficulty which the applicants might experience in (1) obtaining possession of the properties in event of their appeals being successful and (2) in realising the mesne profits which will accrue from the lands during the pendency of the appeals :

Held, these grounds were not sufficient for the appointment of a Receiver. AIR (Vol 18) 1931 Lah 688: 32 PLR 665: 134 Ind Cas 799.

——O. 40, R. 1 — Right of maintenance — Receiver is the proper remedy.

Although the right of maintenance is in point of law not attachable and not saleable under S. 60, the proper remedy lies, in a fitting case, in the appointment of a receiver for realising the rents and profits of the property paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor, and his family, and applying the balance, if any, to the liquidation of the judgment-creditor's debt. AIR (Vol 12) 1925 PC 176: 87 Ind Cas 295: 41 CLJ 383: 23 ALJ 634: 27 Bom LR 849: 3 Pat LR 142: 47 All 385: 52 IA 262: 1925 MWN 630: 22 MLW 284: 6 LRPC 138: 30 CWN 818: 49 MLJ 244.

8. **Interim receiver.**

——**O. 40, R. 1 — Appointment of interim Receiver — Suit under S. 9 of Specific Relief Act.**

Where the suit is for possession of property under S. 9 of the Specific Relief Act and the plaintiff is a tenant-at-will, it would not be just and convenient to appoint an interim Receiver. AIR (Vol 36) 1949 Ajmer 11.

——**O. 40, R. 1 — Selection of.**

Where a legatee is appointed as ad interim Receiver, the interests of whoever is ultimately found to be the rightful heir to the estate are amply safeguarded by furnishing adequate security. (1940) 42 PLR 475 (DB).

——**O. 40, R. 1 — Lower Court rejecting application for appointment of Receiver — Decision of suit on merits — Appellant asking for Receiver pending appeal — Allegations vague — Decision not likely to be upset.**

When there has been a decision on the merits deciding the rights of the parties in the respective properties concerned, the property cannot be said to be any longer in medio, and a Receivership which has come to an end by the decision of the case cannot be continued until the final decision of the appeal.

The property as to which an application for appointment of Receiver was made had been throughout in the possession of the respondent, and an application for the appointment of a Receiver made in the original suit was rejected so that this was not a case of continuing Receivership. There had been a finding of the competent Court against the appellant (applicant for the appointment of Receiver) and unless the decision was entirely upset, there was sufficient property in the hands of the respondent to satisfy any legal claim of the appellant-applicant:

Held, that there was no reason to grant the application for the appointment of a Receiver during the pendency of the appeal which appointment would have the result of depriving of possession the defendant who had possession upto the decision of the suit by the lower Court and who had continued to hold possession since, after a recognition of his title by the Judge. AIR (Vol 26) 1939 Oudh 229: 1939 OWN (CC) 615: 1939 AWR (CC) 88: 1939 OLR 464: 14 Luck 666: 183 Ind Cas 16 (DB).

——**O. 40, R. 1 and O. 34 — Suit by simple mortgagee — Interim Receiver.**

Where a mortgagee sues to realise the amount due to him on foot of a simple mortgage, the Court has jurisdiction to appoint an interim Receiver to take possession of the mortgaged property for the benefit of the mortgagee. Order 34 does not exclude the application of O. 40, to such suits. It is quite true that the only remedy, which a simple mortgagee has to realise his security is by a judicial sale of the mortgaged property. But when it is for securing that very relief that he has brought the suit, the Court has to see that the property is kept intact pendente lite.

If it finds that the suit cannot be decided without delay or the sale cannot be effected at once, though the plaintiff has a prima facie case, it is not only empowered but is bound to see that further loss is not caused to the plaintiff by the defendant appropriating the rents and profits, or otherwise wasting the property during the pendency of the suit.

In such cases, the Court may take the mortgaged property in custodia legis by the appointment of a Receiver if it finds that this course is "just and convenient". In doing so, the Court is not going beyond the terms of the contract between the parties or infringing any express or implied statutory provision. AIR (Vol 22) 1935 Lah 17: 16 Lah 366: 37 PLR 529: 157 Ind Cas 474 (2) (DB).

——**O. 40, R. 1 — Whether can be made in respect of property not subject-matter of suit — Property in possession of third party in his own right.**

Normally a Receiver shall not be appointed unless it can be shown that by not appointing a Receiver the plaintiff will not have the chance of getting his debt duly paid in case he ultimately gets a decree against the defendant. An interim Receiver can be appointed of property which need not be the subject-matter of a pending suit.

If it is found just and convenient, a Court can appoint a Receiver of any property, provided the plaintiff or the defendant has a right thereto. The Court would not, of course, and in fact cannot, appoint a Receiver to take charge of property which is in the possession of a third party and when that party claims to be in possession thereof in his own right. Consequently, a Receiver can be appointed in the case of a suit on a promissory note, even in respect of property to which defendant has a right provided it is just and convenient. A I R (Vol 22) 1935 Rang 398 : 159 Ind Cas 816.

——**O. 40, R. 1 — Suit by mortgagee without possession.**

A mortgagee without possession is entitled to move the Court to appoint an interim Receiver and the Court may pass an order if in the circumstances of the case it thinks that it is just and convenient to do so. A I R (Vol 21) 1934 Lah 717 : 15 Lah 875 : 37 P L R 183 : 154 Ind Cas 1022.

——**O. 40, R. 1 — Principle underlying power.**

As a general rule, and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory order is not a suitable subject for review.

On an interim application for a receivership the Court has to consider whether special interference with the possession of a defendant is required, there being a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the Court gives its protection. If the Court of review rightly concludes that proper discretion was not used below, it is free to exercise its own discretion in the matter. A I R (Vol 15) 1928 P. C. 49 . 54 M. L. J. 423 : 108 Ind Cas 348 : 55 Cal 720 . 55 I. A. 131 : 27 M. L. W. 333 : 5 O W N 272 : 26 A L J 481 : 47 C L J 424 : 30 Bom L R 815 : 32 C W N 681.

——**O. 40, R. 1 — Partnership action — Necessary.**

A partnership suit is not only an action in which the appointment of a receiver is usually claimed in the plaint itself, but is also one in which it is desirable, and even necessary in most cases, to appoint a receiver to preserve the property in dis-

pute during the pendency of the suit and to prevent the partner in possession of the partnership property from taking undue advantage of his position as against his co-partners who in the eye of the law are equally with him the owners of the property.

If the Court has seizin of the suit, it must of necessity have jurisdiction to pass the necessary interlocutory orders, e.g., the appointment of a receiver pendente lite to take charge of the partnership properties in a partnership suit, and it cannot be said that the Court is wrong in postponing the consideration of the point of jurisdiction though raised by the defendant. A I R (Vol 12) 1925 Rang. 287 : 89 Ind Cas 593 : 3 Rang. 196 (DB).

——O. 40, R. 1 — Grounds of appointment — Co-sharers.

The appointment of an interim Receiver pending the final appointment of a common manager under S. 95, can be made only on the adduction of evidence establishing the necessity for such appointment under O. 40, R. 1; a mere verified petition filed in support of the application for appointment of a common manager, which does not set forth the sources of the petitioner's knowledge or belief, is not sufficient. A I R (Vol 4) 1917 Cal 815 : 34 Ind Cas 83 (DB).

——O. 40, R. 1 — Interim receiver — Guardianship proceedings — Guardians and Wards Act (VIII of 1890) — Applicability.

O. 40, R. 1, C. P. C. has no application to a petition under the Guardians and Wards Act. (1912) 36 Bom. 20 : 13 Bom. L. R. 487 : 11 Ind Cas 554.

9. Jurisdiction.

(a) General.
(b) Property outside litigation.
(c) Appointment after decree.
(d) Part of subject-matter.

(a) General.

——O. 40, R. 1 — Power of Court — Property ceasing to be subject-matter of litigation — Power to appoint receiver and continue receiver to hold charge of.

Under O. 40, R. 1, C. P. Code, the Court has power to appoint a receiver only of property in regard to which litigation is pending; it has no power to direct the appointment or the continuance of a receiver to hold charge of property after the litigation has been determined, where there is no proceeding before it, when the property has ceased to be the subject-matter of litigation. ILR (1945) All 818, Not foll. AIR (Vol 37) 1950 Pat 184 : 28 Pat 989 (DB).

——O. 40, R. 1 — Application under — Maintainability — Application for transfer of suit to High Court — Notice served on defendant — Order for transfer not made. AIR (Vol 36) 1949 Mad 283 : (1948) 2 MLJ 251.

——O. 40, R. 1 — Powers of Receiver — Compromise of actions — Sanction of Court given without proper reason — Abuse of jurisdiction.

The right of a receiver to settle claims and compromise actions with the sanction of the Court cannot be disputed; of course, if the Court sanctions any such settlement without, proper reason, it would amount to an abuse of its jurisdiction, and the action of the Court can be questioned before the appellate or revisional tribunal. AIR (Vol 33) 1946 Cal 304 : 227 Ind Cas 543 (DB).

——O. 40, R. 1 — Jurisdiction and duty of Court to protect property — Appointment of Receiver for safeguarding property.

Per Braund and Wali Ullah, JJ., Allsop, J., contra.—Jurisdiction to protect property pending the ascertainment of rights is inherent in any Court which once has cognizance in any form of a dispute involving the execution of a trust or the administration of assets, and the Court has not merely jurisdiction, but a duty to safeguard them. For this purpose, a Receiver can be appointed under O. 40, R. 1 in proceedings other than suits. Where the High Court, holding that the order of the District Judge removing a mutwalli and appointing a new one under Ss. 73 and 74 was without jurisdiction, sets aside the order, it can appoint Receiver under O. 40, R. 1 so as to protect the waqf property and enable the parties to compose their differences or to launch such further proceedings as would be necessary. AIR (Vol 32) 1945 All 261 : 1945 AWR (HC) 262 : (1945) ALJ 492 : ILR (1945) All 818 : 221 Ind Cas 515 (FB).

——O. 40, R. 1 — Execution of decree against property of deceased judgment-debtor in hands of son — Property situate in State — Court appointing Receiver and directing him to take possession — No law in State by which son was not liable for father's debts — Order appointing Receiver, if ultra vires.

On the death of the judgment-debtor the decree-holder sought to make the son of the judgment-debtor personally liable in execution of the decree, to the extent of the assets of the deceased father in his hands. Assets included immovable property situate in a Native State and the Court appointed a Receiver and directed him to take possession of such property and to realize the rents. It was contended that the order directing Receiver to take possession of the property was ultra vires as the property was situate in State. There was no evidence that there was any law prevailing in that State to the effect that the son of a deceased father could not be made liable for the debts of his father to the extent of the property coming in to his hands:

Held, that the order appointing a Receiver was not ultra vires.

Held, also that the order directing the Receiver to take possession was not proper as the Court could only act in the exercise of its jurisdiction in personam over the defendant and could not empower the Receiver to take possession of the property as it could in British India. The proper course in such case would be to direct the son (who was in possession of the property) to hand over the property to the Receiver. AIR (Vol 25) 1938 Lah 93 : 39 PLR 415 : ILR (1938) Lah 305 : 175 Ind Cas 734.

——O. 40, R. 1 — An order in a suit for possession under S. 9, Specific Relief Act (I of 1877) for appointment of a Receiver for collection of mesne profits is without jurisdiction. AIR (Vol 24) 1937 Sind 161 : 31 SLR 28 : 170 Ind Cas 12 (DB).

——O. 40, R. 1 — Application for appointment of Receiver in one Court — Defendants collusively getting Receiver appointed in another suit in another Court — Power of first Court to appoint Receiver — Transfer of second suit to be tried by first Court.

When a Receiver is appointed by one Court to take charge of certain properties, another Receiver cannot as a rule be appointed by a different Court to take possession of or exercise any control over the same properties without the leave of the former Court.

Even the appointment of the same person as Receiver in two Courts is improper.

Where in a mortgage suit, instituted at Lahore the mortgagee applied for the appointment of a Receiver and the defendant's sons collusively filed a suit for partition at Delhi and got a Receiver

appointed by the Delhi Court to defeat the mortgagee:

Held, the High Court had power to transfer the suit filed at Delhi to Lahore so that the question of appointment of a Receiver might be dealt with by the same Court. AIR (Vol 20) 1933 Lah 671 : 14 Lah 779 : 35 PLR 124 : 146 Ind Cas 966.

——O. 40, R. 1 — Though a simple mortgage does not carry with it right to possession and though a simple mortgagee's remedy is only by way of sale of the mortgaged property, yet the Court has jurisdiction in a suit brought by a simple mortgagee to recover money, to appoint a Receiver, in a proper case. A simple mortgagee is not disentitled to obtain the appointment of a Receiver if the other circumstances are such as to justify it, merely on the ground that no personal remedy subsists to proceed against the other properties of the mortgagor. AIR (Vol 20) 1933 Mad 570 : 38 MLW 96 : 66 MLJ 222 : 56 Mad 915 : 145 Ind Cas 449 (FB).

——O. 40, R. 1 — The High Court has jurisdiction to appoint a Receiver of immoveable property situate outside its ordinary Original Jurisdiction, but it is the duty of the Court, on its Original Side, to be both careful and sparing in the exercise of its power to make such appointments, where the primary subject-matter is immoveable property outside its jurisdiction. (History of the jurisdiction of the High Court traced in the judgment of Ghose, J.) AIR (Vol 17) 1930 Cal 502 : 34 CWN 238 : 51 CLJ 209 : 57 Cal 964 (DB).

——O. 40, R. 1 — As an application under S. 12, Guardians and Wards Act is a proceeding in Court of civil jurisdiction, it is competent to the District Judge to appoint a receiver in such a proceeding under C. P. Code, O. 40, R. 1. AIR (Vol 16) 1929 Nag 119 : 116 Ind Cas 642.

——O. 40, R. 1 — Reference to arbitration — Power to appoint receiver not lost.

The Court has jurisdiction to entertain the application for the appointment of a receiver even after a dispute has been referred to arbitration in accordance with the prayer of all the parties. The words in the petition for reference to arbitration "to do all works in connection with the subject-matter of the suit and to decide the suit" do not include the passing of orders for interim protection. AIR (Vol 15) 1928 Cal 256 : 109 Ind Cas 759: 55 Cal 249 (DB).

——O. 40, R. 1 — Many rival claimants — Appointment is proper.

The appointment of a Receiver is proper when there are many rival claimants to the property in dispute, and the situation is fraught with possibilities of waste and mismanagement; even if there is no allegation of waste and mismanagement, the fact that the property is more or less in medio is sufficient to vest a Court with jurisdiction to appoint a Receiver. AIR (Vol 14) 1927 Pat 220 : 8 PLT 455 : 101 Ind Cas 640 (DB).

——O. 40, R. 1 — Company — Receiver for.

There is no jurisdiction in a Court to appoint a Receiver of a Company except in a debenture holder's action when the business and assets of the Company are charged with payment of the claims of the debenture holder. If it is necessary to protect the assets of a company other means must be sought which are provided by the provisions of the Companies Act. AIR (Vol 12) 1925 Cal 817 : 52 Cal 513 : 88 Ind Cas 826 (DB).

——O. 40, R. 1 — A Judge before whom an application for the appointment of a guardian is pending has power to appoint a Receiver but that order is to be under the Code of Civil Procedure, and not the Guardians and Wards Act. Such an order therefore does not come under the Guardians and Wards Act but under O. 40, R. 1 of the Code. 90 Ind Cas 611: 26 PLR 576: 7 Lah LJ 281: AIR (Vol 12) 1925 Lah 489.

——O. 40, R. 1 — Where after the appointment of a Receiver in a suit for recovery of crops and other things, the defendant removed the crops, held that the Court could pass a decree against the defendant for the value of the crops so removed. 71 Ind Cas 413: AIR (Vol 10) 1923 Nag 70.

——O. 40, R. 1 — Under the C. P. Code of 1908 an executing Court has jurisdiction to appoint a Receiver for realisation of property outside jurisdiction. 61 Ind Cas 753: 1921 MWN 106: 13 MLW 150: AIR (Vol 8) 1921 Mad 119 (DB).

——O. 40, R. 1 and O. 45, R. 13 (d) — Privy Council appeal — Receiver — Appointment of.

R. 13 of O. 45 applies where an application for appointing a Receiver is made after leave to appeal is granted but the principle for appointing a Receiver shall be the same as laid down in O. 40, R. 1. (1911) 4 Bur LT 241: 12 Ind Cas 198.

——O. 40, R. 1 (3) — Possession — Rights of parties — Title paramount claimed — Jurisdiction of Court.

The Court must adjudicate upon a question of paramount title if a person other than the parties raises it. (1909) 36 Cal 713: 9 CLJ 563: 13 CWN 654: 1 Ind Cas 356 (DB).

——O. 40, Rr. 1, 3 (S. 503, old Code) — Accounts — Jurisdiction of Subordinate Court to call upon Receiver appointed by High Court to furnish accounts.

A Subordinate Court has no jurisdiction to call upon a receiver appointed by a High Court pending an appeal before it to furnish account or to make any order or give any direction as supplementary to those given by the High Court without authority given by the High Court. (1908) 18 MLJ 589 (589) (DB).

(b) Property outside litigation.

——O. 40, R. 1 — If limited to property over which plaintiff has lien.

The words 'just and convenient' in O. 40, R. 1, construed according to the ordinary rules, do not limit the appointment of a Receiver to property over which the plaintiff has a lien and if the appointment is in fact just and convenient, a receiver can be appointed. AIR (Vol 25) 1938 Lah 12: 177 Ind Cas 612.

——O. 40, R. 1 — Property not subject-matter of suit.

A Court has no power to appoint a Receiver in respect of the property which is not the subject of any suit nor of any execution application. AIR (Vol 20) 1933 Sind 231: 150 Ind Cas 473.

——O. 40, R. 1 — Property not in suit — No personal decree likely to be passed against owner — Receiver unnecessary.

Where there is no personal decree against the person and when there is no reasonable chance of a personal decree being passed against him in the near future, there is no reason why the person should be deprived of the possession of the estate which is not in any way connected with the property in the suit and a Receiver appointed for it. 96 Ind Cas 194: 23 MLW 650: 1926 MWN 937: AIR (Vol 13) 1926 Mad 797 (DB).

——O. 40, R. 1 — Possession — Property not within subject matter of suit.

A property outside the pending litigation cannot be made over to a Receiver appointed by the Court without jurisdiction. AIR (Vol 7) 1920 Pat 501: (1920) Pat HCC 231: 5 Pat LJ 513: 1 Pat LT 643: 58 Ind Cas 405 (DB).

——O. 40, R. 1 — Powers of Receiver — Properties not comprised in suit.

O. 40, R. 1 does not permit of the appointment of a Receiver in respect of properties not comprised in suit. (1912) 17 Ind Cas 16 (Mad) (DB).

——O. 40, R. 1 — Powers of Receiver — Property not subject of litigation — Sp. Rel. Act, S. 42.

In spite of the general terms of O. 40, C. P. C., (1908) a Court cannot appoint a receiver of property not the subject of litigation in a suit for a declaration that all the property of the deceased belongs to the plaintiff. A Receiver cannot, therefore, be appointed in such a suit to recover the debts and outstandings due to the estate of the deceased. (1909) 3 SLR 118: 4 Ind Cas 605 (DB)

——O. 40, R. 1 — District Court — Powers of to appoint receiver and to take over management of estate of private individuals with their consent — Minor sharers.

A District Judge has no inherent jurisdiction to appoint a receiver to manage an estate (not the subject-matter of a suit), with a view to protect the interest of minor sharers, though with the owner's consent. (1901) 28 C 680 (683, 684): 6 Cal WN 114.

(c) Appointment after decree.

——O. 40, R. 1 — Partition — Plaintiff's suit share specified but undivided — Receiver can be appointed of entire property until partition by Collector. AIR (Vol 29) 1942 Sind 60: ILR (1941) Kar 563: 200 Ind Cas 74 (DB).

——O. 40, R. 1, S. 151 — Decree-holder, if can apply to executing Court before decree becomes executable, for attachment.

It is doubtful whether the decree-holder can apply under S. 151, Civil P. C., merely for attachment & that too before the decree becomes executable, but in any case, such an application would, if at all, lie to the Court passing the decree. The executing Court will have jurisdiction only after the decree becomes executable. If the decree-holder wants relief for attachment, he cannot go to the executing Court. The Court passing the decree might give him the proper relief by the appointment of a Receiver under O. 40, R. 1, as a Receiver can be appointed even after the passing of a decree. AIR (Vol 28) 1941 Bom 395: 43 Bom LR 727: ILR (1941) Bom 652: 197 Ind Cas 422.

——O. 40, R. 1 — Receiver, if can be appointed after passing of mortgage decree.

A Receiver may be appointed before as well as after the passing of a decree. The question as regards the appointment of Receiver has to be decided on the facts of each case and taking into consideration all the circumstances.

A mortgage suit was decreed on the basis of a compromise; the judgment-debtors, however, failed to pay anything in satisfaction of the decree. Thereafter an application was made for the appointment of a Receiver on the ground that the judgment-debtors were delaying execution by various tactics and the application was granted.

Held, that in the circumstances of the case the appointment of Receiver was amply justified. AIR (Vol 27) 1940 Lah 125: 189 Ind Cas 729.

——O. 40, R. 1 — Receiver in case of simple mortgage either before or after preliminary decree.

In the case of a simple mortgage, the Court has jurisdiction to appoint a Receiver before or after the making of a preliminary decree and it makes no difference whether the application for the appointment of a Receiver is made before or after the making of a preliminary decree. The appointment of a Receiver does not affect anybody's rights. The Court, when it appoints a Receiver, merely takes charge of the property which is the subject-matter of the suit in order to protect it until it is decided who is entitled thereto. The mere appointment of a Receiver cannot affect the ultimate rights of the parties in any property which the Receiver may collect. AIR (Vol 26) 1939 Bom 54: 40 Bom LR 1266 : ILR (1939) Bom 82 : 179 Ind Cas 821 (DB).

——O. 40, R. 1 — Receiver after decree — Lapse of time.

In action for foreclosure or for sale if there is reason to suspect that the security is or would become insufficient or if the interest is in arrear, the Court may appoint a Receiver to safeguard the interest of the mortgagee. The right that the mortgagee has in this respect is not affected by the mere fact that a decree for sale has been passed.

But whether the appointment is regarded as made in the suit or in execution, what the Court has to see is whether the appointment appears to the Court to be just and convenient within the meaning of O. 40, R. 1 of the Code and when the question arises after a mortgage-decree for sale whether a Receiver should be appointed in respect of the property to be sold, in order to see whether it would be just and convenient to make the appointment one must consider what impediment there is or may be for the sale to be held.

An order holding that a Receiver should be appointed, cannot be carried into effect after the expiry of a long time without taking into account the events that have since happened and the position of the affairs at the time. AIR (Vol 19) 1932 Cal 194: 35 CWN 141: 137 Ind Cas 127 (DB).

——O. 40, R. 1 — Can be appointed till realisation.

When a decree has been finally satisfied the Court cannot appoint a Receiver. A mortgage suit is considered to be pending even after the final decree until the mortgage money is realized, and therefore Court can appoint a Receiver before the money is realized. 95 Ind Cas 6: AIR (Vol 13) 1926 Cal 978 (DB).

——O. 40, R. 1 and S. 51 — Mortgage — Suit for sale — Decree.

A Receiver can be appointed in a mortgage suit for sale, although a receiver has been appointed in a prior partition suit. A receiver need not be appointed if the mortgagee has obtained a decree for foreclosure, and cannot recover even the costs of the litigation from the mortgagors personally. The only right of the mortgagee is to foreclose and take the property for his dues on his security, but after the final decree had been passed and the decree-holder applies for possession then a Receiver may be appointed, if the judgment-debtor wants to remain in possession. (1912) 16 CWN 126: 14 CLJ 526: 12 Ind Cas 165 (DB).

——O. 40, R. 1 — Mortgage — Termination of suit.

A Mortgage suit does not terminate on the sale of the mortgaged properties as such a sale is liable to be set aside on successful objections by the judgment-debtor. (1911) 13 CLJ 487: 15 CWN 672: 9 Ind Cas 1027 (DB).

(d) Part of subject-matter.

——O. 40, R. 1 — Decree-holder complaining that tress on property consisting of cultivated land are being cut by judgment-debtors — Receiver appointed for whole property.

Where the mortgaged property in respect of which a decree for sale had been obtained consisted, not merely of the jungle and the trees thereon but also of certain cultivated land and

the decree-holder's complaint was only with reference to the trees in the jungle which were being cut by the judgment-debtors:

Held, that the decree-holder's grievance being only with reference to the cutting of the trees in the jungle, it would be sufficient to appoint a Receiver to take charge of the trees in the jungle so as to ensure that no further trees should be cut, pending the sale of the property, and that there was no real necessity for putting the Receiver in possession of the whole of the mortgaged property including the cultivated land. AIR (Vol 22) 1935 Oudh 497 : 1935 OWN (CC) 1118 : 1936 RD 209 : 1935 OLR 605 : 11 Luck 562 : 158 Ind Cas 586 (DB).

——**O. 40, R. 1 — Plaintiff having no right to personal decree — Appointment of Receiver.**

Where a plaintiff in a mortgage suit has no right to a personal decree he cannot apply for enforcement of personal remedies. His remedy is limited to bringing the mortgaged property to sale and he can only obtain a remedy from the date of the auction sale. Until that auction sale he has no right to take possession of the property or any income of the property. That being so, there is no jurisdiction for a Court to appoint a Receiver under O. 40. AIR (Vol 21) 1934 All 772 : (1934) ALJ 561 : 4 AWR (HC) 594 : 1934 ALR 811 : 150 Ind Cas 1035 (DB).

——O. 40, R. 1 — Where a money-decree against the assets of the deceased debtor was sought to be executed only against the property of the deceased in possession of only one of the many heirs holding deceased's assets and the decree-holder asked for the appointment of a receiver in respect of the whole of the property of such heir so as not to leave anything for the maintenance of his family, although the heir was willing to place certain property under the management of the receiver and allow the appropriation of the profits thereof towards payment of the decree:

Held, that it would not be just or convenient to appoint a receiver in respect of the whole of the property in possession of the heir. AIR (Vol 15) 1928 Oudh 40 : 4 OWN 98 : 2 Luck 408 : 99 Ind Cas 897 (DB).

——**O. 40, R. 1 — Joint ownership — Appointment for whole bad.**

Where the parties to a suit were sisters-in-law living together for many years and enjoyed jointly the property of which they were joint owners.

Held, that it was improper to oust the defendant from the enjoyment of her admitted half share of the property by appointing a Receiver for the whole property. AIR (Vol 14) 1927 Rang 179 : 5 Rang 70 : 101 Ind Cas 717 (DB).

10. Mortgage.

See N. 6, 7.

11. Partition suit.

——**O. 40, R. 1 — Partition decree — Appointment of receiver pending execution.**

Some time is necessary for effecting the partition after a decree is passed, but when it is delayed very much an application for a receiver may be made and unless it is supported by an affidavit that the party in possession is sequestering it or wasting it, it will not be granted. AIR (Vol 37) 1950 Kutch 27.

——**O. 40, R. 1 — Receiver — Appointment — Principles governing — Suit for partition of joint family property.**

Generally speaking, in a partition suit between the members of a joint family the Court will not appoint a receiver except by consent and especially where the family property consists of land. In such a case, special circumstances like waste, etc., have got to be proved in order to obtain an order for the appointment of a receiver.

But if the conduct of the member in possession has been such as to give room to a reasonable suspicion of his honesty and integrity and the feelings between the parties have become embittered, the party in possession may be appointed a joint receiver along with a third party. It cannot be said that the resistance by the managing member of the joint family properties of the attempt of another member to take forcible possession of the properties in his possession would amount to ouster of the other member so as to justify the latter in asking for the appointment of a receiver in a suit by him for partition. AIR (Vol 35) 1948 Pat 195 (DB).

——**O. 40, R. 1 — Bank, creditor of family, appointed Receiver in suit for partition of family estate between members of family — Family executing conveyance in favour of bank for liquidating its debts.**

Where in a suit for partition of joint estate between members of a family, the bank which is the creditor of the family is appointed Receiver, the title remains vested in the family and if the parties have got to execute a conveyance in favour of the bank for the purpose of liquidating their debts, the bank qua Receiver might be called upon to join in the conveyance because he is in possession of the property but that fact cannot substantially alter the nature of the transaction. AIR (Vol 29) 1942 Cal 556: 46 CWN 910: 204 Ind Cas 222 (DB).

——**O. 40, R. 1 — Receiver — Suit referred to arbitration — Award — Receiver to be discharged and another person to be appointed common manager — Decree passed accordingly — In spite of order of discharge in award decree and formal order of Court, Receiver continuing to act as such.**

The parties to the partition suit referred their dispute to arbitration. According to the award the acting Receiver appointed by the Court was to be discharged and another person appointed as common manager. The award then vested the common manager with all the powers of a Receiver appointed by Court and directed that "he is to be governed by all the provisions laid down in the Civil P. C. applicable to Receiver".

A decree was passed in terms of the award. But in spite of the order of discharge in the award and in the decree and the formal order of the Court dated December 21, 1917, the Receiver continued in possession for 14 years up to 1931, with the knowledge and consent of the parties and managed the estate and the Court all along functioned as if the estate was still in its custody by virtue of the order appointing the Receiver. Both the order of discharge in the award and the order of the Court dated December 21, 1917, were understood by the parties including the Receiver and the Court as mere conditional orders. No final order of the Court terminating the functions of the Receiver was made and the parties also never attempted to get the custody of the Court terminated by such final order:

Held, that the estate continued to be in the custody of the Court and the receivership also continued till 1931. In the circumstances of this case the Court did not cease to have jurisdiction over the estate and it acted within its competence when it permitted the Receiver to raise the loan in 1921. The terms of appointment of the common manager given in the award, indicated that the parties contemplated thereby the continuation of the Court's custody though the person through whom the Court will continue in custody of the estate was to

change from the then Receiver to the common manager named in the award. AIR (Vol 29) 1942 Cal 394: 46 CWN 355: 207 Ind Cas 461 (DB).

——O. 40, R. 1 — Payment of land revenue by Receiver.

Payment of land revenue by the Receiver in the partition suit is a payment by the persons entitled to the properties in respect of which it is paid. AIR (Vol 29) 1942 Mad 456: (I942) 1 MLJ 418: 1942 MWN 274 : 202 Ind Cas 538 (DB).

——O. 40, R. 1 — Appointment of Receiver — When proper.

It is just and convenient to appoint a Receiver during a suit for partition of immovable and movable property, if it is likely that debts may be realised by the defendants without the knowledge of the plaintiff or the defendants may arrive at a settlement in respect of the debts to the prejudice of the plaintiff. AIR (Vol 25) 1938 Lah 10: 176 Ind Cas 919.

——O. 40, R. 1 — General Rule — Held on facts that order appointing Receiver was justified.

In a partition suit the plaintiff who was a minor was entitled to as much as a half of the property: and the quarrels in the family and the conduct of defendant had made it impossible for him in the past during the pendency of the suit to get his fair share of the harvest: and it was probable that in spite of any precaution taken by the Court, the plaintiff would not be able to secure his fair share in the income from the property so long as it remained in the hands of defendant. The Court appointed a Receiver only to harvest the existing crops:

Held, that although in general, a Receiver will not be appointed merely because a member of a family files a suit for partition, yet in the circumstances of this case the order was justified. AIR (Vol 25) 1938 Mad 730: (1938) 1 MLJ 863: (1938) MWN 515: 178 Ind Cas 519.

——O. 40, R. 1— Sale of property for decree against sharer after appointment of Receiver — Purchaser, whether entitled to possession as against Receiver.

Where after the appointment of Receiver in a partition suit, a third person obtained a mortgage-decree against one of the sharers and in execution purchased the property and obtained symbolical delivery of possession:

Held, that as the purchase in execution was after the appointment of the Receiver, the purchaser was not entitled to claim delivery of possession from the Receiver. AIR (Vol 22) 1935 Mad 624: 68 MLJ 620: 41 MLW 760: (1935) MWN 603: 156 Ind Cas 724.

——O. 40, R. 1 — There is no authority for the proposition that ordinarily when a partition suit has been filed in respect of a joint Hindu family, a Receiver should be appointed even without proof of waste or mismanagement or apprehended fear of the same. AIR (Vol 22) 1935 Mad 402: 1935 M WN 277: 41 MLW 353: 156 Ind Cas 229.

——O. 40, R. 1 — Plaintiff owning largest number of shares — Dispute as to whether certain lands belong to plaintiff.

In a suit for partition, in which there is a dispute as to whether certain lands belong to the plaintiff's share or not, and in which there is likely to be a scramble for the property, and the plaintiff owns individually the largest number of shares while a very large number of defendants held little more than half the shares in the village:

Held, that a Receiver might be appointed to collect rents on behalf of the melwaramdars. AIR (Vol 19) 1932 Mad 542: 139 Ind Cas 670.

——O. 40, R. 1 — The Court is competent to appoint a Receiver in a pending partition suit between co-owners or co-sharers for the protection of the property in suit or the prevention of an injury to such property. AIR (Vol 13) 1926 Sind 37: 89 Ind Cas 104: 20 SLR 201 (DB).

——O. 40, R. 1 — Prima facie case — Danger of waste — Other considerations.

The Court should not appoint a Receiver, merely because of strained relations, except by consent and upon proof by the plaintiff that prima facie he had a very excellent chance of succeeding in establishing the case made out in the plaint and that the property in possession of defendants, the opposite party, was in danger of being wasted especially where one of defendants is presumably manager.

In any case the facts, that a mere declaration is sought for the land that the Civil Court cannot divide it, that the plaintiffs appear from the materials on the record to be out of possession and that the Court has no jurisdiction over the apportionment of the produce, make the order of the appointment of a Receiver for the agricultural lands still less justifiable than that regarding the other property. AIR (Vol 10) 1923 Lah 48: 72 Ind Cas 569.

——O. 40, R. 1 — Partition suit — Appointment of receiver — Joint family property — Practice.

The Court will not appoint a Receiver, in a partition suit between members of a joint family except by consent and especially where the family property consists of land. Thus in order that a Receiver should be appointed of joint family property in a partition suit, special circumstances will have to be proved before the Court will be entitled to appoint a Receiver.

When an application is made to the Court to take the property into its hands by appointing a Receiver the plff. must prove that prima facie he has a very excellent chance of succeeding in establishing the case made out in his plaint, and in the next place he must satisfy the Court that the property in possession of the opposite party is in danger of being wasted. The mere fact that there is a dispute is no reason whatever for appointing a Receiver. AIR (Vol 7) 1920 Bom 321: 22 Bom LR 217: 55 Ind Cas 827 (DB).

——O. 40, R. 1 — Partition suit — Court ordering parties to have control and management of different portions pending suit — Order if covered by O. 40, R. 1, C. P. C.

An order directing the parties in a partition suit to have the control and management of different portions of property pending suit, is not ultra vires but is covered by O. 40, R. 1 of the C. P. C. even if made without an application for the appointment of a Receiver. AIR (Vol 1) 1914 All 4: 36 All 19: 11 ALJ 973: 22 Ind Cas 59 (DB).

——O. 40, R. 1 — Receiver, appointment of — Court's discretion — Partition suit — Exclusion of co-owner if ground for appointment when no waste established — Change of law.

Under O. 40, R. 1, of the Civil Procedure Code, the Court has been given precisely the same discretion in questions of appointment of a receiver that the Courts in England have. The condition in the old Code that to justify such appointment in any case it should be found necessary to preserve property from waste and alienation having been removed, there has been a substantial widening of the Court's discretion. Where therefore, in a suit for partition of joint family property, it was proved that a co-owner admittedly entitled to a half share in a considerable portion of the pro-

perties in suit was being kept out of possession by the co-owner, with the result that all supplies were cut off from his branch of the family:

Held, that although no case of waste might have been established against the co-owner in possession, the case was eminently a proper one for the appointment of a receiver. (1895) 22 C 459, not foll. (1910) 14 CWN 248 (250, 251) : 14 CLJ 215 : 5 Ind Cas 96 (DB).

——O. 40, R. 1 and O. 43 R. (1) S. — Hindu Law — Position of elder brother.

A receiver may be appointed when the court thinks it to be just and convenient, i.e., where some specific act of misappropriation or malversation, mismanagement is shown and not under a mere future apprehension of any of these.

This principle is particularly to be applied in a case where partition of joint family property is the subject of suit between the plaintiff and the manager of the joint family property. 53 PWR 1910 : 36 PR 1910 : 72 PLR 1910 : 6 Ind Cas 659.

12. Partnership.

——O. 40, R. 1 — Acknowledgment by Receiver — suit for dissolution of partnership — Defendant partner appointed Receiver with consent of plaintiff to realize assets, to pay debts and to do other acts — Such Receiver, if has power to make acknowledgment of partnership debt — Such acknowledgments, if save time against other partner.

In a suit for dissolution of partnership, the defendant partner was appointed Receiver for collecting the assets due to the partnership from others and for payment of the debts due to others and to do other acts and to this the plaintiff partner agreed. During the course of the office of such Receiver, a creditor pressed for payment on ground that the debt would be barred by limitation and the Receiver made an acknowledgment of the debt due to partnership to prevent the creditor from filing a suit and to avoid unnecessary expense to the partnership.

Held, that the order appointing Receiver distinctly authorised the Receiver to make payments of the debts due to others by the firm and it was certainly within the scope of his authority to make acknowledgment on behalf of partnership though the effect of it might be to stop the statute of limitation from running. Such acknowledgment, therefore, saved the suit of the creditor from being barred even against the other partner. A I R (Vol 24) 1937 Mad 764 : (1937) 2 M L J 627 : (1937) M W N 747 : 46 M L W 407 : 174 Ind Cas 22.

——O. 40, R. 1 — Partnership — Receiver — Guiding principles for partnership.

The principles guiding the appointment of a Receiver are the preservation of the estate pending litigation and proper management. The court is always reluctant to dispossess a party who is in actual possession under prima facie title. The English and Indian Law are now the same.

An appellate court will be slow to interfere with the discretion of the lower court in appointing a Receiver unless it is satisfied that the discretion has not been properly exercised. In the absence of proof of waste or mismanagement a receiver should not be appointed. An order directing the appointment of a Receiver in a suit where all the partners are not parties to the suit is ultra vires. A I R (Vol 5) 1918 Sind 61 : 11 S L R 115 : 45 Ind Cas 224 (DB).

——O. 40, R. 1 — Partnership — Effect of appointment — Transfer of ownership.

The application of a Receiver to take charge of the partnership assets does not transfer the ownership therein from the partners to the Receiver. A I R (Vol 3) 1916 Lah 78 : 91 P R 1917 : 36 Ind Cas 980.

——O. 40, R. 1 — Partnership — Dissolution — Appointment of Receiver.

Where a dissolution is inevitable and the partners are on bad terms the usual way of guarding their interests is by appointing a Receiver and ordering the goodwill of the business and the stock-in-trade to be sold, the partners being at liberty to bid at the sale. AIR (Vol 1) 1914 Low Bur 209 : 8 Bur LT 57 : 5 L B R 332 : 29 Ind Cas 684 (DB).

——O. 40, R. 1 — Partnership — Suit for dissolution and accounts.

In a suit to wind up a partnership business brought by one partner against the representatives of a deceased partner, it is necessary to join as party deft. the Receiver appointed by a competent Court to take charge of the estate of the deceased. Specially where property in the hands of the Receiver is intended to be affected by the result of the litigation, he is not merely a proper but also a necessary party to the proceedings. (1910) 12 C L J 368 : 7 Ind Cas 75 (DB).

13. Position of.

(See also Notes 17 and 18.)

——O. 40, R. 1 — Suit by or against Receiver — Capacity of Receiver — If represents owner of estate.

When a Receiver brings a suit, or is sued, that is done with the permission of the Court and as a result of specific provision in law. It is wrong to consider him as representing the owner of the estate in the way the guardian of a minor represents him in a suit brought on behalf of the minor. The Receiver, as a party to the suit, has a distinct capacity, apart and separate from the owners of the estate. (1949) 53 C W N 713 (DB).

——O. 40, R. 1 — The position of a common manager appointed under S. 95, Ben. Ten. Act is analogous to that of a Receiver appointed under O. 40, Civil P. C A I R (Vol 28) 1941 Cal 643 : 73 C L J 356 : 197 Ind Cas 869 (DB).

——O. 40, R. 1 — Receiver, if requires succession certificate to file suit for debt due to deceased person.

A Receiver who is an officer of the Court, although he represents the estate of the deceased, does not claim by right of succession. Therefore, he can maintain a suit for a debt due to a deceased person to whose estate he has been appointed a Receiver without succession certificate. A I R (Vol 28) 1941 Cal 579 : I L R (1941) 2 Cal 221 : 197 Ind Cas 437.

——O. 40, R. 1 — Receiver giving notice to debtor who admitting claim — Title of Receiver.

The property in the case was a contingent debt which at the time when the Receiver was appointed had not accrued. The Receiver gave notice to the debtor who admitted his claim.

Held, that the admission plus the notice already given immediately perfected the title of the Receiver. AIR (V 28) 1941 Cal 579 : ILR (1941) 2 Cal 221 : 197 Ind Cas 437.

——O. 40, R. 1 — Administrative suit — Receiver appointed — His position.

The position of a Receiver appointed in an administrative suit is similar to that of a Receiver appointed under O. 40, R. 1. Unlike in the case of a Receiver in Insolvency, property does not vest in him. A I R (Vol 27) 1940 Bom 273 : 45 Bom L R 534 : 213 Ind Cas 146.

——O. 40, R. 1 — Receiver appointed by the Court under O. 40, R. 1, has a legal position different from

that of the Official Trustee or the Administrator-General. (Point further discussed). A I R (Vol 27) 1940 Cal 1 : 44 C W N 74 : 186 Ind Cas 584 (DB).

——O. 40, R. 1 — A Receiver is an officer of the Court, and his functions are executive and not judicial. A I R (Vol 27) 1940 Rang 151 : 189 Ind Cas 177.

——O. 40, R. 1 — Receiver, appointment of, to realise future rents and profits.

A mortgagor under a simple mortgage is entitled to remain in possession of the property till it is actually sold in satisfaction of the mortgage decree, and a Receiver cannot be appointed of the mortgaged property to realise all future rents and profits so as to remove the mortgagor from possession of such property. AIR (Vol 25) 1938 All 80: (1937) ALJ 1316: 1938 RD 23: 1938 ALR 205: 1937 AWR (HC) 1125: 173 Ind Cas 922 (DB).

——O. 40, R. 1 — Whether legal representative or assignee of decree-holder — Estate to which he is appointed including decree to be executed — Receiver, if should be brought on record.

Receivers appointed by the Court are officers of the Court, and are not the legal representatives or assignees of all or any of the parties to the suit nor is it the practice of the Court to bring Receivers on the record in a suit, and subject them to liability as to costs.

The proper form of procedure in a case where an estate of which a Receiver has been appointed includes a decree to be executed, is for the Receiver (unless he already possesses the power) to apply in the suit in which he was appointed for liberty either to file a fresh darkhast in his own name, or to continue the existing darkhast in the name of the darkhastdar on giving him a proper indemnity as to costs. AIR (Vol 25) 1938 Bom 458: 40 Bom LR 932: 178 Ind Cas 395 (DB).

——O. 40, R. 1 — Two persons asserting rights as landlords — Receiver appointed to take charge of property during dispute — His position.

Where during a suit regarding a dispute between two persons asserting rights as landlords, a Receiver is appointed, he is the landlord for the time being and where he makes a bona fide settlement in the interest of the estate, in the ordinary course of management, it is binding on the rightful owner. AIR (Vol 25) 1938 Pat 613: 19 PLT 570: 5 BR 149: 17 Pat 594: 178 Ind Cas 849 (DB).

——O. 40, R. 1 — A Receiver is an officer of the Court and must comply with orders given by the Court exactly as they are given. (1937) 66 CLJ 70 (DB).

——O. 40, R. 1 — Receiver, if can be made party to suit.

Speaking generally, it is a wrong thing to make Receivers parties in a case unless there are special reasons. AIR (Vol 21) 1934 Cal 421: 38 CWN 124: 151 Ind Cas 454 (DB).

——O. 40, R 1. — Receivers appointed by Baroda Courts, whether entitled to sue in British Courts.

Receivers appointed by the Baroda Courts can be recognised for the purpose of filing suits in the British Courts. AIR (Vol 18) 1931 Bom 251: 55 Bom 309: 33 Bom LR 258: 132 Ind Cas 512 (DB).

——O. 40, R. 1 — Dealing with property — Permission necessary.

Graham, J.— A receiver by his appointment does not become the representative of the party, but is an officer and representative of the Court which appoints him. Indeed he is frequently spoken of as "the hand of Court" and is merely in possession of the property on behalf of the party who may be ultimately declared to be entitled thereto. One or other of the parties must eventually be declared to be entitled to the securities in question or at all events to retain possession of them.

A receiver appointed by the Court is merely a temporary custodian of the properties on behalf of the Court, & holds them for the benefit of the party successful in the litigation. He cannot deal with the properties in any way without the consent and approval of the Court, so that no apprehension need arise that the interest of either of the contesting parties is likely to suffer in any way by reason of his temporarily retaining possession of the properties. AIR (Vol 15) 1928 Cal 402: 107 Ind Cas 738 (DB).

——O. 40, R. 1 — Officer of Court — Appointment by — Subordinate Court — High Court — Powers over — Accounts.

A High Court has no jurisdiction to examine the accounts in order to ascertain his liability of a Receiver appointed by a Subordinate Court, he not being an officer of the High Court. AIR (Vol 7) 1920 Pat 220: 4 Pat LJ 636: (1920) Pat HCC 35: 54 Ind Cas 207 (DB).

——O. 40, R. 1 — Officer of Court — Receiver's position.

A receiver is not a representative of parties but is an officer and representative of Court. (1910) 37 Cal 754: 12 CLJ 252: 6 Ind Cas 416 (DB).

——O. 40, R. 1 — Offier of Court — Assignment of right to collect rents — Right of assignee.

A receiver is merely an officer of the Court and has no proprietary rights over the property of which he is appointed as receiver. When a receiver is authorised to bring suits for the collection of rents due to the estate of a deceased person and he transfers for valuable consideration his right to collect such rents the assignee cannot maintain a suit against the persons by whom such rent is payable. (1910) 5 LBR 213: 3 Bur LT 89: 8 Ind Cas 976 (FB).

14. Possession.

See also N. 6.

——O. 40, R. 1 (2) — 'Any person', meaning.

'Any person' does not include a party to the suit. AIR (Vol 32) 1945 Oudh 25: 1944 OWN (CC) 303: 1944 AWR (CC) 211 (DB).

——O. 40, R. 1 — Possession not taken — Decree-holder or creditor can proceed against such property without leave of Court.

No decree-holder or creditor can proceed against property for which a Receiver is appointed by Court and of which he has taken possession, without leave of that Court. If he does so, he will be guilty of contempt of Court. The rule that possession of the Receiver may not be disturbed without leave, does not apply, so far as third parties are concerned, until a Receiver has been actually appointed and is in actual possession.

The mere order of the appointment of a Receiver may not affect third parties until the appointment is perfected and possession is actually taken by the Receiver. His omission to take leave is only an irregularity and does not render the auction sale null and void. AIR (Vol 30) 1943 Bom 273: 45 Bom LR 534: 213 Ind Cas 146 (DB).

——O. 40, R. 1 — Receiver's possession — Nature of.

The possession of a Receiver pendente lite must be deemed to be the possession of the party who is ultimately declared successful. AIR (Vol 27) 1940 Mad 850: (1940) 2 MLJ 47: 52 MLW 214: (1940) MWN 723: 194 Ind Cas 486.

——O. 40, R. 1 (2) and (1) — Court, if can remove property from possession or custody of third person who has good title as against parties to suit.

The meaning and effect of sub-rule (2) of Rule 1 of Order 40, Civil P. C., is prefectly plain. It is an enactment for the benefit of third parties and means that the wide-words of sub-r. (1) are not to be construed to justify the Court in removing from the possession or custody of property, a third party who has got a good title to such possession or custody as against the parties to the suit. The words "whom any party to the suit has not a present right so to remove" merely mean whom no party to the suit has a right so to remove. AIR (Vol 26) 1939 Bom 54: 40 Bom LR 1266: ILR (1939) Bom 82: 179 Ind Cas 821 (DB).

——O. 40, R. 1 (2) — Per Ba U, J. — Sub-rule (2) of O. 40, R. 1, refers to a third party and not to a party to the suit. AIR (Vol 15) 1928 Rang 176: 6 Rang 261 : 110 Ind Cas 620, Overruled on another point. AIR (Vol 26) 1939 Rang 321: 1939 Rang LR 403 : 183 Ind Cas 728 (FB).

——O. 40, R. 1 — A Receiver can take possession of a debt by writing to a tenant and serving him with notice of the order appointing him Receiver. (1937) ILR (1937) 2 Cal 440: 41 CWN 1074.

——O. 40, R. 1 — One of the powers contemplated under Order 40, R. 1 (a) is realisation of property which would also include reduction of property into Receiver's possession. AIR (Vol 24) 1937 Mad 589: 45 MLW 771: (1937) MWN 262: 171 Ind Cas 220.

——O. 40, R. 1 — Mortgage suit — Receiver of mortgaged property can be appointed only if party applying, has present right to remove opposite party from possession and custody.

Where a party to a suit, who is sought to be dispossessed is a simple mortgagor in possession then the Court has no power to appoint a receiver and to order his dispossession under the provisions of Rule 1, O. 40. A simple mortgagor has a right to remain in possession and to appropriate the profits of the mortgaged property till the sale has actually taken place and that right cannot be defeated by the appointment of a receiver. If a mortgagee who has obtained a decree finds that his mortgagor is causing injury which would diminish the value of the mortgaged property, then his only remedy is to proceed under the provisions of Order 39. Under the provisions of Civil P. C., it is, therefore, competent to appoint a receiver of a mortgaged property pending the decision of an appeal against a mortgage decree only if the party applying for the appointment of a receiver can establish that he has a present right to remove the opposite party from possession and custody of the mortgaged property. 1933 ALJ 51: 1933 All 227: 146 Ind Cas 451, Overruled. AIR (Vol 23) 1936 All 495 (FB).

——O. 40, R. 1 (b) — Any person.

The words 'any person' in Order 40, Rule 1 (b) are general and include even parties to the suit. Likewise the same words in Sub-Rule (2) are equally general and include parties to the suit. AIR (Vol 23) 1936 All 495: (1936) ALJ 605: 1936 AWR (HC) 565: 58 All 949: 163 Ind Cas 481 (FB).

——O. 40, R. 1 (2) — Dispossession of party from property and appointment of Receiver in respect of it.

It is doubtful whether any distinction can be drawn between the dispossession of a party from property, and the appointment of a Receiver in respect of that property. AIR (Vol 23) 1936 Oudh 370: 1936 OWN (CC) 595: 164 Ind Cas 159 (DB).

——O. 40, R. 1 (2) and S. 51 — Decree for sale of mortgaged property — Execution stayed and receiver appointed — Appointment of receiver is just and fair.

Appointment of receiver is one of the modes of execution allowed under S. 51.

An application for execution of a decree for sale of certain property was sought to be stayed by an application by the judgment-debtor whereupon the decree-holder put in an application for appointment of a receiver. The Court stayed the execution for sale and appointed a receiver.

Held, in the circumstances of the case that the appointment of receiver was just and proper and did not militate against sub-rule (2) Order 40, R. 1. AIR (V 20) 1933 All 227.

(Overruled in AIR 1936 All 495 (FB).)

——O. 40, R. 1 — Of Receiver — Nature.

It cannot be said that a Receiver is the agent of a judgment-creditor in execution of whose decree he is appointed; nor can it be said that the moneys realized by the Receiver become ipso facto moneys belonging to the judgment-creditor, and, as moneys paid to the credit of the judgment-creditor's suit the moment the Receiver comes into possession of the same. AIR (Vol 17) 1930 Mad 4.

——O. 40, R. 1 — Of receiver — Nature of.

The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in custodia legis for the person who can make a title to it. The title of the real owner is in no way affected either in theory or principle by his appointment.

He collects and receives the rents, issues and profits not upon his own title but upon the title of some other persons, parties to the action. A Receiver is aptly described as the hand of the Court and is not the representative or agent of the party or parties but of the Court in the sense that he acts in the interest of neither plaintiff not defendant but, for the common benefit of all parties interested. AIR (Vol 13) 1926 Cal 385: 90 Ind Cas 851: 52 Cal 914: 41 CLJ 571 (DB).

——O. 40, R. 1 — Of receiver — Is that of the true owner.

When the Court has appointed a receiver and the receiver is in possession, his possession is the possession of the Court and the possession of the Court by its receiver is the possession of all parties to the action according to their titles. The property passes into legal custody as the receiver is in the position of stake-holder and such custody is for the benefit of the true owner. AIR (Vol 11) 1924 Cal 600: 79 Ind Cas 520: 39 CLJ 40 (DB).

——O. 40, R. 1 — Of third parties — No disturbance without enquiry.

Where the Court without inquiry held that the sale by the defendant to a third person was not one likely to be entered into by any prudent person and refused to direct the receiver to desist from dispossessing the stranger vendee.

Held, that the action was very summary and unjustified. AIR (Vol 10) 1923 Mad 129: 69 Ind Cas 393: 1922 MWN 725: 16 MLW 833: 32 MLT 96 (DB).

——O. 40, R. 1 — A Court can remove a party from possession though the other party has no present

right to remove him. AIR (Vol 9) 1922 Lah 444: 67 Ind Cas 383 (DB)

——O. 40, R. 1 (2) — Possession — Right to dispossess stranger — Suit for declaration without possession — Appointment of receiver.

Order 40, Rule 1 of the Code prevents the Court from ejecting a person not a party to the suit unless one or other of the parties to the suit has such a right. But the court has always the power to appoint a Receiver to take possession of the properties from the parties to the suit itself and this has nothing to do with the fact that plaintiff, even if he succeeds can only get possession and does not seek to eject the defendants.

Per Spencer J. — The words "any person" in O. 40 R. 1 (2) are not confined to persons who are not parties to the suit. A plantiff who does not sue and is not entitled to eject the defendant could not, through an interlocutory application for appointment of a Receiver deprive the defendant of his possession of the lands in suit. AIR (Vol 7) 1920 Mad 896: 61 Ind Cas 605: 12 LW 254 (DB).

——O. 40, R. 1 — Possession — Receiver — Possession for rightful owner

The possession of the Receiver although in a sense the possession of the Court is also the possession of all the parties to the suit according to their title. During the continuance of the Receivership it is incompetent for the Receiver to set up a title in himself adverse to that of the parties. Even if the receiver is discharged he would still hold the property on behalf of the rightful owner. AIR (V 6) 1919 Mad 8 : 8 LW 551 : (1918) MWN 683 : 24 MLT 424 : 49 Ind Cas 89 (DB).

——O. 40, R. 1 — Possession — Effect on adverse possession.

The possession of the Court through its Receiver is possession on behalf of the party finally held to be entitled to the properties in dispute and does not suspend the operation of adverse possession, if the successful party is holding it by adverse possession. AIR (Vol 5) 1918 Mad 974: 21 MLT 62: 5 LW 690: 32 MLJ 85: 40 Ind Cas 50 (DB).

——O. 40, R. 1 — Execution — Maintenance decree — Attachment of immoveable properties — Sale in execution of mortgage decree — Purchaser.

Where properties, attached in execution of a maintenance decree and in respect of which a Receiver had been appointed by the Court, are sold in execution of mortgage decrees and the purchasers are put in possession thereof, the Receiver cannot be allowed to continue in possession. AIR (Vol 2) 1915 Mad 924: (1915) MWN 245: 2 LW 326: 28 Ind Cas 551 (DB).

15. Powers of Court.

(a) General.
(b) Appointment.

(a) General.

——O. 40, R. 1 — Appointment of Receiver in respect of judgment-debtor's property — Receivership, if may be limited to receipt of rents and profits from judgment-debtor.

A Court appointing a receiver in respect of a judgment debtor's property can order the judgment-debtor to realise the rents and profits himself and hand them over to the Receiver with an account of those rents and profits. Nothing in law prevents the Court from limiting the receivership to the mere receipt of the rents and profits of the property in possession of the judgment-debtor. AIR (Vol 38) 1951 Simla 277 : 52 PLR 304.

——O. 40, R. 1 — Applicability — Application for leave to sue as pauper — Appointment of receiver pending decision — Power of Court to order.

O. 40, R. 1, C. P. Code, applies to all proceedings in which the appointment of a receiver is just and convenient; an application for leave to sue in forma pauperis is not excluded from such proceedings. Hence a receiver can be appointed pending the decision of an application for leave to sue as a pauper. AIR (Vol 35) 1948 Bom 139 : ILR (1947) Bom 784 : 49 Bom LR 762 (DB).

——O. 40, R. 1 — Party applying for appointment of Receiver in suit — Court must consider whether appointment is just and convenient — It is not bound to allow withdrawal of application on ground that applicant does not desire to press it.

The powers of a Civil Court under O. 40 are not controlled by Advocates' statements withdrawing an application for the appointment of a Receiver.

When an application for the appointment of a Receiver is made by a party to the suit supported by affidavits which are not challenged by the opponents, the only question for consideration of the Court is whether it was just and convenient to appoint a Receiver and if the Court is satisfied that it would be just and convenient to appoint a Receiver it is not bound to permit a withdrawal of the application for the appointment of the Receiver on a statement by the applicant's Counsel that he does not desire to press it. AIR (Vol 33) 1946 Sind 141: ILR (1946) Kar 21 (DB).

——O. 40, R. 1 — Quaere.—In an action on a mortgage executed with the Court's sanction by the Receiver appointed under O. 40, R. 1, whether it is within the competence of the Court to make an order sanctioning the suit against the Receiver alone and directing him to represent fully the right of redemption. AIR (Vol 29) 1942 Cal 394 : 46 CWN 355 : 207 Ind Cas 461 (DB).

——O. 40, R. 1 — Wording of R. 1 is of such a nature as to give Court a very wide power. AIR (Vol 26) 1939 Oudh 116 : 1939 OWN (CC) 206 : 14 Luck 538 : 180 Ind Cas 29 (DB).

——O. 40, R. 1 — Administration suit between mortgagors — Court administering estate through Receiver — Priority of mortgages already created, if can be altered in favour of debts incurred by Receiver under its orders except in cases of salvees — Question of priority, how to be decided.

Under the T. P. Act, a mortgage is a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan. Therefore, after a mortgage has been created, what is left in the owner of the property is his original full rights minus the right which he has already transferred in favour of the mortgagee, and if thereafter the property of the owner comes under the administration of a Court and the Court administers it through a Receiver, what is being administered is not the entire interest of the owner but only what is left in him after his transfer in favour of the mortgagee.

What has already been transferred is not the subject-matter of administration and is therefore, not under the control of the Court. Consequently, a Court, while administering an estate through a Receiver, has no power to order that the priority of the mortgages already created on the estate should be altered in favour of a debt incurred by the Receiver under its orders except in favour of salvees. It makes no difference that the money was utilized by the Receiver towards the payment of the instalment of the decree-holders.

The proper course would plainly be to allow the creditors to proceed with their execution and face proceedings in which the question of priority could, in the ordinary course, be decided by an order having the force of a decree and thus subject to appeal.

The question of priority, to say the least, is controversial and ought to be decided in the ordinary way and not in a summary proceeding for leave under the inherent powers of a Court taken by a mortgagee-decree-holder to execute the decree against the property in the hands of a Receiver appointed by the Court in administration suit between the mortgagors inter se. (AIR V 26) 1939 Pat 467 : 18 Pat 279 : 5 BR 986 : 183 Ind Cas 770 (DB).

——O. 40, R. 1 (2) — Occupancy or ex-proprietary tenant.

Order 40, R. 1 (2), does not authorise the Court to remove occupancy or ex-proprietary tenants from possession of their tenancies and the Court has no right to appoint a Receiver. AIR (Vol 24) 1937 All 389 : (1937) ALJ 267 : 1937 AWR (HC) 197 : 1937 RD 210 : ILR (1937) All 542 : 169 Ind Cas 181 (DB).

——O. 40, R. 1 — The authority to appoint a Receiver is prescribed in O. 40, R. 1. A Civil Court cannot act outside that rule. AIR (Vol 23) 1936 All 495 : (1936) ALJ 605 1936 AWR (HC) 565 : 58 All 949 : 163 Ind Cas 481 (FB).

——O. 40, R. 1 — Expenditure incurred without sanction — Power of Court to give sanction subsequently.

Failure to obtain the previous sanction of the Court for disbursement of salaries, nothing further being shown, is not a sufficient reason for disallowing such expenditure. The Court's sanction may be given even after the thing is done provided the Court is satisfied that it has been well and properly done and if the Receiver shows the expense incurred upon his own responsibility to have been necessary and such as would have been authorised by the Court had application been previously made, he will be reimbursed for such outlay as if previous authority had been given.

The points to be considered in such a case are: (a) Did the Receiver actually incur the expenditure or any part of it and (b) In view of the nature and extent of the work, was he justified in incurring any expenditure, and if so, what would be the proper amount to be allowed. AIR (Vol 23) 1936 Mad 221 : 43 MLW 460 : (1936) MWN 131 : 70 MLJ 282 : 163 Ind Cas 968.

——O. 40, R. 1 — Appointment of Receiver in execution — Application by judgment debtor for directions to Receiver to pay him money for conducting appeal — Power of Court to give directions.

Where a Receiver was appointed by the Govt. Agent and the High Court dismissed an appeal against the order appointing him and the judgment-debtor applied to the Agent praying that the Receiver might be directed to pay him a certain sum of money for the purpose of enabling him to appeal to the Privy Council:

Held, that it was the Agent who was the proper authority to give directions to the Receiver and not the High Court.

Held, further that Receiver appointed in execution is, quite as much a Receiver appointed in the suit, an officer of the Court and holds moneys collected by him subject to the orders of the Court and the Court had power to give directions to him in respect of the disbursement of the money and in proper circumstances, such directions may also be for the benefit of the judgment-debtor. AIR (Vol 22) 1935 Mad 1046 : (1935) MWN 1078 : 69 MLJ 534 : 42 MLW 615 : 158 Ind Cas 709 (DB).

——O. 40, R. 1 — Summary jurisdiction.

Where Receiver appointed by Court in proceedings under S. 146, Criminal P. C., applied to Court for permission to lease the properties without disclosing the fact that he intended to lease the properties to one of the parties and on getting permission leased the properties to one of the parties until decision of Civil Court:

Held, that the Receiver committed a fraud upon Court and that Magistrate had power to set aside the lease summarily. AIR (Vol 20) 1933 Mad 67 (2) : 33 Cr. L J 956 : (1932) MWN 1154 : 36 MLW 651 : 140 Ind Cas 281.

——O. 40, R. 1 — Party can be removed.

Sub-rule (2) of R. 1 refers to the case of removal of a person other than a party to the suit and does not debar the Court from removing one of the parties to the suit from the possession of the property. 43 Ind Cas 533, Diss. AIR (V 12) 1925 Lah 590 : 85 Ind Cas 737.

——O. 40, R. 1 — Receiver pending final acceptance of award.

The Court is competent to appoint a Receiver in the interva. between the submission of an award and the final acceptance or rejection of it and also where an arbitrator is proceeding with a reference. But in the latter case the power of the Court should not be exercised save in exceptional circumstances. AIR (Vol 12) 1925 Sind 102 : 78 Ind Cas 84 : 18 SLR 303.

——O. 40, R. 1 and S. 141 — Miscellaneous proceedings — Receiver — Appointment of — When allowable — Notice to parties — Difference in the old and new Code.

O. 40, R. 1 does not restrict the appointment of Receiver only in the case of suits. S. 141 extends the procedure to all proceedings. A Court may pass an order without notice to the parties concerned in cases of emergency. S. 503 C. P. C. (1882) speaks of the appointment of a Receiver in a suit while O. 40, R. 1 is general. AIR (Vol 3) 1916 Cal 427 : 43 Cal 936 : 20 CWN 1009 : 36 Ind Cas 177 (DB).

——O. 40, R. 1 — Powers of Court to help receiver.

A judgment-debtor took a sum of money from the receiver and refused to pay it back. The Court ordered repayment.

Held, that the Receiver being an officer of the court the Court could pass an order to help him in his duties, and that the orders could be executed as a decree. (1912) 15 CLJ 254 : 10 Ind Cas 898 (DB).

(b) Appointment.

——O. 40, R. 1 — Ordinarily a decree-holder would be entitled to execute his decree but the execution may be stayed under O. 41, R. 5 or it may proceed under O. 41, R. 6 or whether it is stayed or proceeded with, a Receiver may be appointed under the Court's powers under the provisions of O. 40. (1938) 65 CLJ 127 : 41 CWN 374.

——O. 40, R. 1 — Power to appoint Receiver in declaratory suits — Power to appoint Receiver when appeal is pending.

If there is property in dispute between the parties and the Court thinks it expedient that the property should be protected for the benefit of the party ultimately entitled to it pending the suit, the Court can properly appoint a Receiver of it even in a suit which prays for no other relief than a declaration of some particular right or title.

The Court's power to appoint a Receiver is, however, limited to the case where the proceedings are still pending before it, and the Court of first instance cannot, after the passing of a decree and the filing of an appeal therefrom, appoint a Receiver where no further proceedings are pending before it. AIR (Vol 24) 1937 Mad 163 : (1936) MWN 1125: 45 MLW 519 : (1937) 1 MLJ 605 : 168 Ind Cas 80.

——O. 40, R. 1 — The Court has no power to appoint a Receiver in execution of a mortgage decree. AIR (Vol 20) 1933 Lah 687 : 14 Lah 457 : 34 PLR 815 : 143 Ind Cas 574.

——O. 40, R. 1 (2), deals with cases in which the property is in possession of a person who is not a party to the suit.

Where a creditor, who had purchased the rights of a person in execution of a decree, is made a party to a suit brought by the person's wife and son for partition and declaration that certain decrees, mortgages and attachments were not binding on them, a Court can on creditor's application appoint a Receiver although such creditor has no present right to possession of the property. AIR (Vol 16) 1929 Nag 283 : 119 Ind Cas 687.

——O. 40, R. 1 — Declaratory suit — Receiver can be appointed.

The powers of a Court to appoint a receiver are not limited to suits of a possessory nature only, and where the object of the appointment of a receiver is to protect the property and to maintain its status quo ante the appointment is not invalid merely because the suit in which the appointment was made was one for a mere declaration.

It is nowhere provided that where both house and agricultural properties are in dispute, a receiver with regard to the house property should be appointed by a Civil Court and with regard to the agricultural property by a Revenue Court. AIR (Vol 10) 1923 Lah 623 : 73 Ind Cas 600 : 5 Lah L J 533.

——O. 40, R. 1 — Execution — Maintenance allowance.

A mere right to maintenance not being liable to attachment and sale, a court has no power to appoint a Receiver to receive such maintenance and apply it in satisfaction of the decree. AIR (Vol 4) 1917 Mad 79 : 40 Mad 302 : 30 MLJ 361 : 34 Ind Cas 381 (DB).

——O. 40, R. 1 — Grounds for appointment.

The pendency before the District Judge of the question of appointment of a common manager under the B. T. Act, is no bar to a Civil Court appointing a Receiver in respect of a certain property. (1913) 17 CWN 581 : 18 Ind Cas 398 (DB).

——O. 40, R. 1 — Scheme suit — Receiver appointment of.

O. 40, R. 1 (2), C. P. C. is intended to protect third persons and not parties to the suit and does not debar the court from appointing a Receiver in a scheme suit. (1913) 24 MLJ 658 : 20 Ind Cas 767 (DB).

——O. 40, R. 1 and S. 92 — Scheme suit — Appointment of Receiver — No prayer for removal of trustees.

In a suit for the management of a temple without any application for the removal of trustees the property of the temple is the subject of the suit. Hence the Court has the power to appoint a Receiver pending the appointment of the new trustees. (1910) 4 MLT 88 : 20 MLJ 638 : 7 Ind Cas 900 (DB).

——O. 40, Rr. 1, 3 (S. 503, old Code) — Receiver — Appointment of receiver to realise amounts of decrees under attachment.

Where a decree-holder had in execution of his decree attached two decrees held by the judgment debtor against third parties,

Held, that S. 503, C. P. C., gave power to the Court to appoint a receiver to realise the amounts of the attached decrees where it appeared that by so doing the interests of both decree-holder and judgment-debtor would be better protected. (1908) 5 ALJ 583 (584) : 1908 AWN 164 : 30 All 393 (DB).

——O. 40, Rr. 1, 3 (Ss. 503, 505, old Code) — Receiver, appointment of, by Sub-Judge — Ratification by District Judge — Validity — Receiver, suit by, in his own name.

An appointment of a Receiver can be made by a Subordinate Judge only after he had been authorised to do so by the District Judge. The question whether the appointment is invalidated, if it is made by the Subordinate Judge without the previous sanction of the District Judge but is subsequently approved by him, is a question rather of power than of jurisdiction of the Court.

Where the order for the appointment of a Receiver was made by a Subordinate Judge, and the nomination was subsequently approved by the District Judge, the requirements of the law were substantially complied with, and whatever defect there was in the form of the proceeding, it was remedied by the subsequent order of the Subordinate Judge, although it was made after the institution of the suit in which the question of the validity of the appointment was raised.

S. 503, C. P. C., authorizes the Court to grant to the Receiver all such powers as to bringing and defending suits as the owner himself has. When an appointment has been made under that section, and full powers are granted to the Receiver, powers are conferred upon the Receiver to bring and maintain suits in his own name, always supposing that the ownership of the property is completely represented in the suit in which the Receiver is appointed. It is competent to a Court to authorise a receiver to sue in his own name, and a Receiver who is authorized to sue though not expressly in his own name, may do so by virtue of his appointment with full powers under S. 503. (1907) 5 CLJ 270: 34 C. 305 (310, 312, 313, 318) (DB).

16. Procedure.

——O. 40, R. 1 — Prayer should be for appointing a named person.

In applying for the appointment of a Receiver, it is preferable for the applicant to ask for the appointment of a named Receiver. Whether that person will be appointed or not does not matter. The Court may appoint him, or may direct the appointment of somebody else. But if the application does not name any receiver, then the proper course to take is not to make an order stating that a Receiver is appointed, leaving at large who shall be; nor is it proper to make an order granting the application and still leaving the matter at large as to who the Receiver ought to be. The proper course to take is to adjourn the matter for the name of a Receiver to be placed before the Court so that the Court can appoint a Receiver on the adjourned date.

In other words, there should not be two orders, one stating that the Court finds it just and convenient to appoint a Receiver and stopping at that and then a later order appointing a particular person as Receiver. There should be one order appointing a Receiver.

An order stating that a Receiver will be appointed but leaving at large who shall be, or the order that an application is granted, when the application is merely an application for appointment of a Receiver unnamed is not such an order as O. 40, R. 1(a) contemplates. AIR (Vol 25) 1938 Nag 540 : ILR (1938) Nag 174 : 174 Ind Cas 148 (DB).

——O. 40, R. 1 — The applications for the appointment of receivers should be made in the ordinary way by notice of motion in open Court and not in Chambers. AIR (Vol 14) 1927 Bom 256 : 29 Bom LR 214 : 100 Ind Cas 1031 (DB).

——O. 40, R. 1 — An application for the appointment of a Receiver should always be promptly

made. AIR (Vol 13) 1926 Cal 1092 : 96 Ind Cas 30 (DB).

——O. 40, R. 1 — Necessity of notice.

Rule 1 of O. 40 does not lay down that notice should issue and it is obvious that in many cases the object of the appointment of a Receiver might well be nullified if notice were issued. The question that the Courts have to see in dealing with applications under O. 40, R. 1, is, whether, in the circumstances of the case, the appointment of the Receiver is just and convenient, the main object being to preserve the property. AIR (Vol 10) 1923 Lah 239 : 71 Ind Cas 743.

——O. 40, R. 1 — Whether the Court refused to direct its officer, the Receiver not to interfere with the possession of the appellant, a third party, to the crops, it in effect removed him from the possession or custody of the property:

Held, an appeal lies. When property of a third party is interfered with by an officer of the Court like the Receiver, the party has ordinarily two remedies. He may apply to the Court for a summary order restraining the Receiver from interfering or he may ask leave of the Court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. AIR (Vol 10) 1923 Mad 129 : 1922 MWN 725 : 16 MLW 833 : 32 MLT 96 : 69 Ind Cas 393 (DB).

——O. 40, R. 1 — Decree directing appointment — Form of.

A decree directing the appointment of a receiver to manage the properties belonging in common to the members of a community until a suitable manager is appointed by the community is bad. The proper decree to be passed in such cases is one awarding possession to the plaintiffs on behalf of the whole community including the defendants and other members thereof. (1907) 19 MLJ 669 (670) : 4 Ind Cas 1069 (2) (DB).

——O. 40, R. 1 — Receiver — Retiring receiver — Application to appoint new one — Application in chambers or in Court.

An application for the appointment of a receiver in place of a retiring receiver cannot be made in chambers, but must be made in Court. (1900) 28 C 250 (250).

17. Proceedings by or against.

See also Notes 13, 16, 18 and Civil P. C., S. 80.

(a) General.
(b) Criminal proceedings.
(c) Execution.
(d) Leave.
(e) Necessary party.
(f) Sale.
(g) Proceedings by third party.

(a) General.

——O. 40, R. 1 — Where a Receiver has been appointed under O. 40, R. 1 of the Civil P. C., the permission of the Court appointing him is absolutely necessary to proceed with a suit against him. AIR (Vol 31) 1944 All 220 : 1944 AWR (HC) 118 (2) : (1944) ALJ 248 : ILR (1944) All 255 (DB).

——O. 40, R. 1 — Order sanctioning loan at simple interest, if included compound interest.

The Receiver in his application for permission to mortgage the property mentioned the rate of interest of the proposed loan as 18 per cent per annum. The Court granted permission but pointed out that the interest was rather too high and directed that an attempt should be made to have a loan at a lower rate of interest. On this permission, the Receiver took the loan, the interest stipulated for being compound interest at 18 per cent. per annum with six monthly rests and reported the loan to the Court, stating that interest at a rate lower than 18 per cent. per annum could not be had. In this report, however, he did not mention that the loan taken by him was to bear compound interest:

Held, that the order sanctioning the loan could not be construed to include a sanction to the compound interest and hence the estate was not liable for the compound interest. AIR (Vol 29) 1942 Cal 394 : 46 CWN 355 : 157 Ind Cas 461 (DB).

——O. 40, R. 1 — Agreement to receive interest — Decree declaring charge on property and lien on fire insurance policies but providing no interest on decretal amount — Decree-holder appointed Receiver of property and to collect insurance money — Very low offers made by Insurance Companies — Judgment-debtor expecting higher offers and asking Receiver to wait and in consideration agreeing to pay interest on decretal amount — Agreement not communicated to Court — Receiver claiming interest after realising money but Court disallowing it — Suit by him for interest based on agreement.

No secret agreement can be enforceable which put the Receiver in a position which might affect his advice to the Court and consequently, the Court's decision as to whether time should be granted.

A compromise decree passed in a suit declared a charge on certain properties and a lien on fire insurance money to be obtained under some policies. The decree did not provide for interest on decretal amount. The decree-holder was appointed as Receiver to take charge of the property and to collect the fire insurance money. The Insurance Companies in the course of these proceedings made offers of certain amounts in respect of the policies.

The judgment-debtor, however, expected a still better offer and, therefore, requested the Receiver by a letter to wait for some time and in consideration agreed to pay the decretal amount with interest at certain rate. This agreement was accepted by the Receiver but was not communicated to the Court. When the money was recovered and paid into the Court, the decree-holder Receiver asked the Court to be allowed to deduct interest according to the agreement but this was disallowed. He then filed a suit to recover the interest under the agreement:

Held, that as the Receiver undoubtedly got something more by way of interest out of the agreement to which he was not entitled under the decree, it was his plain duty to report the agreement to the Court and get it ratified by the Court. The act of the Receiver in keeping the agreement from the knowledge of the Court was clearly a fraud on the Court and the agreement was not enforceable by law. AIR (Vol 26) 1939 Rang 217 : 1940 Rang LR 129 : 183 Ind Cas 868.

——O. 40, R. 1 — Sanction of Court.

It is necessary to obtain sanction of the Court before bringing an action for possession of property in possession of a Receiver appointed by the Court. AIR (Vol 25) 1938 Pat 487 : 19 PLT 35 : 5 BR 129 : 178 Ind Cas 762 (DB).

——O. 40, R. 1 — Court, if empowered to authorise Receiver to bring suit in his own name.

The language of O. 40, R. 1, is wide enough to empower the Court to authortize a Receiver to bring any suit in his own name, the object of which is to preserve, collect or realize the property in suit, and where the Receiver is authorized in this behalf, he may sue in his own name. The grounds upon which the suit is based are immaterial.

If the owner can bring a suit to recover his own property and has a cause of action to do so, it is difficult to see why the Receiver, who has the same powers as the owner has to bring a suit and who is authorized by the Court in that behalf, cannot bring such a suit. The Receiver appointed, when properly authorized, would have the same powers as the owner as regards the property; and if the owner could not have sued for possession of the property, the Receiver could not.

But if the owner could bring a suit and has a cause of action, then the Receiver would be entitled to sue on the cause of action, subject, of course, to his being authorized by the Court in that behalf. The objects for which a Receiver is appointed are the preservation and realization of the subject-matter of the litigation pending the determination of the rights of the parties. He is appointed for the benefit of all the parties concerned in the litigation and is the representative of the Court and the parties interested in the litigation. AIR (Vol 24) 1937 Bom 244 : 39 Bom LR 224 : 170 Ind Cas 172 (DB).

——O. 40, R. 1 — A Receiver appointed in a mortgage suit is not entitled to institute a suit for possession in respect of the mortgaged properties after they have been sold in execution of a decree on the mortgage and purchased by the mortgagee and the sale certificate has been issued. The person who is entitled to sue for possession after the sale is the auction-purchaser and not the Receiver. When such a suit is instituted by the Receiver the Court ought not to exercise the jurisdiction vested in it under O. 1, R. 10. AIR (Vol 19) 1932 Rang 11 : 9 Rang 565 : 135 Ind Cas 863 (DB).

——O. 40, R. 1 — Suit against — Procedure.

The procedure to be adopted in a case where a receiver is sued with the leave of the Court appointing him is that, if a decree is obtained, against a receiver such decree cannot be enforced in execution as against the receiver without the leave of the Court appointing him. The party in whose favour the decree is passed cannot enforce that decree in execution, but the proper procedure for him to adopt is to go to the Court which appointed the receiver with his decree and to ask him to direct the receiver to act in accordance with that decree

It would clearly amount to a conflict of jurisdiction if contradictory orders are passed against the receiver by the Court appointing him and by the Court in which he is sued with leave of the Court appointing him. AIR (Vol 15) 1928 Pat 321 : 7 Pat 684 : 9 PLT 279 : 110 Ind Cas 722 (DB).

——O. 40, R. 1 — Property in decree-holder's possession by arrangement — Receiver can sue to recover.

By an agreement the decree-holder remained in possession of certain properties of judgment-debtor and applied the income which was then Rs. 1,600 per year towards part satisfaction of the debt due to him. Subsequently a Receiver was appointed, who was specially directed to take charge of all the properties.

Held, that the Receiver was entitled to sue for possession of the property in decree-holder's possession, and ought to be directed to take charge of the property especially when its income had increased to Rs. 2,700 per year. AIR (Vol 11) 1924 PC 206 : 20 MLW 437 : 35 MLT 179 : 5 LRPC 188 : 26 Bom LR 1161 : 40 CLJ 444 : 29 CWN 420 : 3 Pat LR 190 : 47 MLJ 294 : 82 Ind Cas 794.

——O. 40, R. 1 — A receiver is entitled to bring a suit for recovery of rent which accrued due prior to his appointment. AIR (Vol 9) 1922 Pat 480 : 69 Ind Cas 858 (DB).

——O. 40, R. 1 — Party's remedies against receiver.

A suit for account is not maintainable by the owner of an estate against a Tahsildar appointed by a Receiver to his estate. Such a suit is really on the same basis as a bill of discovery and it can be sustained only on proof of fiduciary relation between the parties; but the Receiver is not a representative of the owner, he is an officer of the Court. A suit however may be maintained against the Receiver if it is established that he has moneys belonging to the estate still in his hands, notwithstanding his discharge. AIR (Vol 8) 1921 Cal 516 : 26 CWN 992 : 62 Ind Cas 768 (DB).

——O. 40, R. 1 — Does not operate as stay of execution.

A order appointing a Receiver of the property of the judgment-debtor does not operate as a stay of execution and therefore the mere fact that the decree-holder consented to the appointment of a Receiver does not estop him from afterwards seeking to enforce his decree by execution. AIR (Vol 8) 1921 Pat 131 : 2 PLT 628 : 6 PLJ 208 : 62 Ind Cas 469 (DB).

——O. 40, R. 1 — Leave to sue — Payment of revenue by purchaser — Sale set aside — Right to recover money paid — Receiver of the properties — Receiver appointed by the High Court, effect of.

A receiver was appointed in a mortgage suit and the mortgaged properties were subsequently sold in execution but the receiver was not discharged. The auction purchaser continued to pay the Government revenue the receiver at the same time also paid the revenue on behalf of the judgment-debtor. The sales was set aside subsequently and the auction purchaser applied for an order on the receiver to re-imburse him for the amounts of renewal.

Held, that the receiver, having been appointed by the High Court to which he had submitted his accounts must be regarded as an officer subject to the orders of that Court and that the proper order was to give the auction purchaser leave to sue the Receiver in respect of his claim. AIR (Vol 6) 1919 Pat 554 : 51 Ind Cas 706 (DB).

——O. 40, R. 1 (d) — Powers of Receiver — Extent of — Suit by Receiver.

A Receiver appointed to collect outstandings can file suits in that behalf even though the suit in which he was appointed has terminated in a decree or an appeal is pending from that decree. AIR (Vol 4) 1917 Mad 806 : 33 Ind Cas 69.

——O. 40, R. 1 (d) — Powers of Receiver — Right to sue.

Though ordinarily a suit can be brought only by a person in whom there is a present title to sue and though property does not vest in the Receiver on his appointment, this rule is subject to modification by legislature and the C. P. C. empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits, as the owner himself has, even if it involve the setting aside of a voidable instrument executed by one of the co-owners who purports to deal with the entire estate. AIR (Vol 3) 1916 Cal 51 : 19 CWN 45 : 27 Ind Cas 459 (DB).

——O. 40, R. 1 — Powers of Receiver — Right to sue.

A Receiver is a person appointed to receive and there is no vesting of any cause of action in him and he cannot institute a suit even with the previous sanction of the Court which appointed him. The general powers of the Re-

ceiver who can sue and defend a suit with the express permission of the Court do not necessarily contain a power to sue and liability to be sued. 56 PR 1913 : 247 PLR 1913 : 17 Ind Cas 751 (DB).

——O. 40, R. 1 — Powers of Receiver — Right to sue.

On the appointment of a Receiver the estate vests in him and thereafter the Receiver is the only person competent to conduct suits and obtain decrees. (1912) 15 CLJ 339: 11 Ind Cas 102 (DB).

——O. 40, R. 1 — Leave to sue — Application to set aside.

A receiver can only be sued with the leave of the Court appointing him. A decree against a receiver without permission must be set aside. (1912) 5 Bur LT 163: 17 Ind Cas 916.

——O. 40, R. 1 — Powers of Receiver — Lease granted by — Application to set aside — If a summary order can be passed on an application — Remedy — Suit against Receiver.

Where a Receiver authorised by Court to grant leases grants a lease and possession is given to the lessee, a summary order setting aside the lease cannot be made on an application and the remedy will be to bring a suit against the Receiver and collusion is alleged against the lessee also. (1906) 33 Cal 52: 12 CWN 1023: 1 Ind Cas 470.

——O. 40, Rr. 1, 3 (S. 503, old Code) — Receiver — Vesting of interest in.

Though S. 503 says nothing about the vesting of any interest in receivers appointed thereunder, it does not follow that the law necessarily implies absence of all interest in the subject of the litigation, as, apart from any express power to sue conferred by the Court, Receivers have a right of action by virtue of mere possession or by virtue of their being contracting parties themselves. (1904) 28 M 157 (160) (DB).

(b) Criminal proceedings.

——O. 40, R. 1, — Continuance of receiver appointed in criminal proceedings.

Where in pursuance of proceedings started under Cr. P. Code, S. 145, certain property was entrusted to Receiver and parties were referred to Civil Court, and the title of one was declared by Board of Revenue and none of the parties was residing on the estate to manage it.

Held, that the Receiver's custody should be continued till the disposal of the civil suit. AIR (Vol 13) 1926 Oudh 504: 95 Ind Cas 561 (DB).

——O. 40, R. 1 — Leave of Court — Prosecution — Receiver.

To charge a receiver for the breach of the ordinary criminal law of the country the sanction of the court is not necessary. (1912) 13 Cr LJ 491: 15 Ind Cas 491 (Cal).

——O. 40, R. 1 — Leave of Court — Criminal proceedings.

It is not a general rule of law that sanction of court appointing a Receiver is not necessary in the case of Criminal proceedings against him (e.g., a charge for defamation) arising out of his office. (1912) 13 Cr LJ 489 : 15 Ind Cas 489 (Cal) (DB).

(c) Execution.

——O. 40, R. 1 (d) and S. 51 (d) — Wakf property — Receiver appointed — Suit by landlord for arrears of rent — Mutawalli not made party — Decree against Receiver alone — Decree is not binding on wakf estate and cannot be executed by attachment and sale of wakf property or by appointment of Receiver under S. 51 (d) — Receiver also cannot be made personally liable.

Simply because a Receiver is authorised to defend suits, it does not give a new privilege to a third party plaintiff and so does not entitle him to bring a suit against the Receiver alone ignoring the persons who are the owners of the property and who are in law necessary parties to such suit. The appointment of a Receiver does not in any way affect the rights of a third party creditor who has claims against the persons over whose property the Receiver has been appointed.

If such creditor files a suit, he must make his debtors parties to the same. The only difference that the appointment of a Receiver makes is that if the property in the hands of the Receiver is intended to be affected by the result of such a suit, the Receiver has got to be made a party after obtaining leave from the Court, and this is to be by way of addition to and not in substitution for the parties who are primarily responsible.

In the case of wakf property consisting of a tenure, the person primarily responsible for payment of the rent due to the landlord in respect of the wakf estate is the mutawalli, and consequently he is a necessary party to the rent suit. Unless he is made a party defendant in the suit, the decree cannot bind the wakf estate and it cannot be executed either by attachment and sale of the wakf property in arrears or by the appointment of a Receiver as contemplated by S. 51 (d). So also the Receiver being sued by virtue of the office cannot be made personally liable. AIR (Vol 33) 1946 Cal 127: 49 CWN 808 (DB).

——O. 40, R. 1 — Execution — Trust property — 'Just and convenient' — Decree against Waqf property — Receiver — Disinterested person.

As a trust property cannot be sold in execution of a decree against the trustee, the only method by which a judgment debtor may be compelled to satisfy the claim of the execution creditor is by the appointment of a receiver. AIR (Vol 7) 1920 Cal 724: 30 CLJ 231: 57 Ind Cas 70 (DB).

——O. 40, R. 1 — Execution — Receiver — Possession of — Disturbance by third person — Creditor whether can proceed in execution.

The rule that the possession of Receiver may not be disturbed without leave, does not apply, so far as third persons are concerned until a receiver has been actually appointed, and is in possession. It is not enough that an order has been made directing the appointment of a Receiver. Until the appointment has been perfected and the Receiver actually is in possession, a creditor is not debarred from proceeding to execution.

Property in the hands of a receiver is exempt from judicial process and the purchaser of such property at an execution sale buys at his peril for the sale may be cancelled upon an application to the execution Courts. Where property is in the hands of a Receiver appointed by a Court, a sale under an execution issued by another Court may be avoided by an appropriate process. AIR (Vol 6) 1919 Cal 269: 23 CWN 952: 29 CLJ 424: 51 Ind Cas 394 (DB).

——O. 40, R. 1 (d) — Powers of Receiver — Notice to quit.

Special leave of the Court is not necessary for giving notice to quit, or to sue for compensation for use and occupation when the Receiver is given full powers. AIR (Vol 4) 1917 Low Bur 9: 10 Bur LT 244: 38 Ind Cas 92.

——O. 40, R. 1 — Leave of Court — Receiver — Execution of decree against — Application for rateable distribution — Prohibitory order against Receiver, if amounts to grant of leave.

Leave of court is necessary both for execution of a decree against the Receiver of the property of the judgment-debtor as well as for prosecuting an application for rateable distribution against the Receiver; such leave may be obtained at a subsequent stage of the proceedings. A prohibitory order under S. 272 of the C. P. C., of 1882 against the Receiver is not equivalent to the grant of leave to the decree-holder to execute the decree against the property of the judgment-debtor in his hands. (1911) 14 CLJ 55: 15 CWN 925: 11 Ind Cas 187 (DB).

——O. 40, R. 1 — Leave of court — Receiver — Execution sale of properties vested in.

Purchaser of property in the hands of a Receiver, and sold in execution of a decree, purchases it at his peril for the sale is likely to be cancelled on an application to the executing Court. Property in the hands of a receiver is exempt from Judicial process, except to the extent permitted by the appointing Court. (1910) 14 CWN 560: 11 CLJ 489: 5 Ind Cas 390 (DB).

(d) Leave.

——O. 40, R. 1 — Court coming to conclusion that enquiry into Receiver's management should be conducted not by itself but in separate suit — Leave to sue given — Right to sue when accrues — Nature of such leave.

At any time before the Receiver is finally and unconditionally discharged, the Court which had appointed him can require him to give an account. That Court has full jurisdiction to enquire not only into the question whether he has shown in his accounts the credits and debts correctly but can enquire into the question as to whether he has been negligent in his management, and if so, what loss he has caused thereby. It is only as a matter of convenience and practice that the Court generally confines itself to the first-mentoined question in exceptions to the Receiver's account and leaves the other question to be gone into in a suit, on the footing that the investigation in the suit would be thorough and more satisfactory and fair to all the parties and the Receiver, for there would be the opportunity afforded to them to appeal to a higher tribunal from the decree passed in the suit.

Where the Court has come to the conclusion in a particular case that an enquiry into the Receiver's management should be conducted not by itself in the proceedings started on exceptions but in a suit, leave to sue to a named individual or to a group of named individuals is and must be given, for the Court not being a juridical person, cannot sue in its name.

The right to sue accrues within Art. 120 when the leave to sue the Receiver or the ex-Receiver is given by the Court which had appointed the Receiver. The leave to sue in such cases stands on a different footing from the leave to sue the Receiver given to a person who could have sued any one or all the parties to the litigation in which the Receiver has been appointed in respect of any of the items of property committed to the charge of the Receiver. In such cases the cause of action was already there and the leave to sue the Receiver only obviates contempt proceedings to which the plaintiff in that suit would have been otherwise liable to but it does not add to, modify or become a part of the cause of action.

The "right to sue" accrues only when a person becomes clothed with a legal character entitling him to a relief which a Court of law is competent to grant. AIR (Vol 29) 1942 Cal 483: 75 CLJ 1: 46 CWN 294: ILR (1942) 1 Cal 577: 202 Ind Cas 389 (DB).

——O. 40, R. 1 — Leave to sue — Duty of Court — Bona fide claim.

On an application for leave to sue a Receiver, the proper course for a Judge is merely to satisfy himself that the applicant has a bona fide claim and then on being satisfied in regard to that one point, to grant permission for the suit to be brought leaving all the issues of law between the applicant and the Receiver to be decided in the regular suit.

Where on the facts the applicant clearly has a bona fide claim either against the former Receiver or against the estate as represented by his successor or against both, permission to sue the Receiver as representing the estate ought to be granted, and in refusing to grant such permission, the Judge acts illegally in the exercise of his jurisdiction. AIR (Vol 27) 1940 Rang 59: 186 Ind Cas 854 (DB).

——O. 40, R. 1 — Leave to sue — Court, if can grant it conditional.

In certain cases application for leave to sue a Receiver is necessary on the assumption that the Receiver being the officer of the Court, the action would interfere with the possession granted to the Receiver by the Court and, therefore, the plaintiff in such an action would be guilty of contempt. And where it is necessary to apply for leave, the Court would be quite within its jurisdiction if it makes that leave conditional. AIR (Vol 24) 1937 Pat 523: 3 BR 798: 18 PLT 932: 171 Ind Cas 124.

——O. 40, R. 1 — Permission of Court, whether essential.

A Receiver appointed by the Court does not represent the owner of the estate for which he is Receiver, but is merely an officer of the Court, and as such, cannot sue or be sued, except with the permission of the Court. AIR (Vol 23) 1936 Sind 132: 164 Ind Cas 716.

——O. 40, R. 1 — Pre-existing contracts — Personal liability — Tests — Suit after discharge — Leave to sue, whether necessary.

On December 18, 1923, the second defendant was appointed Receiver of the 1st defendant firm with power to work their coal mines. On December 25, 1923, the 1st defendant firm authorised the plaintiff to tender coal on their behalf to the E. I. Ry. Co. and agreed to pay a certain rate of commission to the plaintiff on the quantity of coal delivered by them. In February, 1924, the 2nd defendant took possession as Receiver and he supplied coal to the E. I. Ry. Co. in pursuance of the contract. In 1925 he was discharged and a new Receiver was appointed. The plaintiff brought a suit for his commission against the 1st and 2nd defendants and the new Receiver:

Held, (i) that no leave of Court was necessary to sue the 2nd defendant as he had been discharged before the suit:

(ii) that as the contract was made before the Receivership came into existence and was not entered into on the faith of the credit of the 2nd defendant was not personally liable for the plaintiff's claim. AIR (Vol 18) 1931 Pat 298: 10 Pat 379: 13 PLT 142: 133 Ind Cas 459.

——O. 40, R. 1 — Party receiver — Omission to sue as receiver — Not fatal.

The omission as to the description of the plaintiff as receiver does not render a suit or proceeding

incompetent if under the letter of appointment he has the power to institute the suit and it has been instituted in the course of the management of the property over which he has been appointed receiver. A proprietor appointed as receiver does not lose his character as a party to the suit nor a fortiori does he lose the right that he possesses as proprietor of the property in respect of which he is appointed a receiver. Leave of Court is strictly necessary in the case of appointment of a person who is not a party to the suit or who is not interested in it. AIR (Vol 16) 1929 Cal 110 : 114 Ind Cas 485: 55 Cal 1216: 49 CLJ 70 (DB).

——O. 40, R. 1 — Permission necessary — Absence — Procedure.

A Receiver cannot either sue or be sued without the permission of the Court which appointed him. When permission has not been obtained before the institution of the suit the proper course is for the Court to stay the proceedings for a sufficient time to allow the plaintiff to apply for that permission. Opportunity to apply for permission was refused in second appeal where the case was proceeded with in both the lower Courts without such permission. AIR (Vol 15) 1928 Rang 175: 110 Ind Cas 622: 6 Rang 268.

——O. 40, R. 1 — As the representative of the Court he is subject to its orders and accountable to such persons and in such manner as the Court may direct. It is not, however a proposition which can be accepted as universally correct under all circumstances; its correctness or otherwise would depend upon the nature of the cause in which and the party on whose behalf he is appointed and also on the nature of the transaction which he enters into.

The person who is prejudiced by the conduct of a Receiver appointed in an action ought not, without the leave of the Court, to commence an action against him for adequate reliefs; more ordinarily would his remedy lie in an application to the Court in the course of the action itself. Where the accountability of a Receiver depends upon debatable questions not easy to be dealt with at the passing of the receiver's accounts the Court often declines to go into the matter in such proceedings. AIR (Vol 13) 1926 Cal 385: 90 Ind Cas 851: 52 Cal 914: 41 CLJ 571 (DB).

——O. 40, R. 1 — Principle underlying necessity of permission.

It is not the object of appointing a Receiver to keep a third party out of possession who may be entitled to possession; and the Court will readily give leave to sue its Receiver if satisfied that there is a case to be tried so that the claim of the third party may be tried in the presence of the Receiver. A Receiver is merely the officer of the Court through whom the Court takes possession of property, the subject of a litigation; by giving leave to sue its officers the Court does not relinquish possession of the properties to the Court were the claim of the third party may be asserted.

Further leave to sue out execution if the plaintiff succeeded in the action against the Receiver is necessary. It is well established that parties whose rights are interfered with by having a Receiver put in their way may on making a proper application to the Court appointing the Receiver obtain all that they may justly require. AIR (Vol 11) 1924 Pat 491: 78 Ind Cas 620: 3 Pat 357: 5 PLT 243: 1924 PHCC 54 (DB).

——O. 40, R. 1 — Subsequent validation — Interim bona fide transferee not affected.

An act done without the Court's sanction to proceed against a Receiver can subsequently be validated. Where no step had been taken to validate the irregular attachment by the time that the Receiver assigned his interest as decree-holder to the innocent purchaser, the appellant's right as an attaching creditor cannot be allowed to prevail over the rights of a bona fide transferee for consideration of the decree-holder's interest. AIR (Vol 10) 1923 Mad 567: 73 Ind Cas 456: 18 MLW 280: 44 MLJ 427 (DB).

——O. 40, R. 1 — Leave to sue — Receiver — Suit against, without leave of Court — Application for such leave after filing of suit.

Failure to obtain the leave of the Court prior to the institution of the suit against a receiver appointed by it could not be cured by leave subsequently granted. Where a receiver is sued without leave of the court appointing him the defect can be cured by leave subsequently granted. AIR (Vol 7) 1920 Bom 11: 22 Bom LR 319: 56 Ind Cas 424.

——O. 40, R. 1 — Permission to conduct a suit implies permission to institute a suit as well permission granted by Court to sue a Receiver relates back to the time of the institution of the suit. AIR (Vol 7) 1920 Cal 778: 63 Ind Cas 843.

——O. 40, R. 1 — Absence of sanction — Cure of — Subsequent sanction.

The omission to obtain the previous sanction of the Court to a suit against a Receiver appointed by the Court does not affect the jurisdiction of the Court trying the suit, but is an illegality which can be cured by obtaining it during the course of litigation. AIR (Vol 7) 1920 Mad 709: 59 Ind Cas 568: 43 Mad 793: 12 LW 331 (DB).

——O. 40, R. 1 — Leave to sue — Grant of, after institution of suit.

A Court will grant leave to continue a suit instituted by or against a Receiver of the Court commenced without such leave, provided a proper case is made on the merits. The grant of subsequent leave will cure the defect. 32 Cal 270: 14 Cal 104 and 13 Cal 393, Diss. AIR (Vol 6) 1919 Cal 426: 46 Cal 352: 23 CWN 496: 51 Ind Cas 486.

——O. 40, R. 1 — Leave to sue — Refusal — Receiver.

There is no statutory provision which requires a party to obtain the leave of a Court to sue a receiver. The rule is based on public policy and the grant of leave is made not in the exercise of any power conferred by statute but the exercise of the inherent power, which every court possesses to prevent acts which constitute or are akin to an abuse of its authority. A court should not refuse leave to sue ordinarily. AIR (Vol 5) 1918 Pat 100: (1918) Pat HCC 337: 4 Pat LJ 20: 47 Ind Cas 719 (DB).

——O. 40, R. 1 — Leave to sue — Not obtained — Effect.

A suit against a Receiver without leave of Court could be dismissed and not remanded to Lower Court for obtaining the necessary leave, especially where the defendant had objected and the plaintiff had disregarded the objection. AIR (Vol 1) 1914 Mad 66: 24 Ind Cas 622.

——O. 40, R. 1 — Leave to sue — Subsequently obtained — Valid.

The consent of the Court to an action against a Receiver appointed by the Court may be obtained by a subsequent application for leave to continue an action brought without such permission. 32 C 270, diss. If a suit has been brought against a Re-

ceiver without the permission of the Court appointing him, the Court in which the suit has been brought may allow the plaintiff to obtain necessary leave and then to continue the suit. (1911) 15 CWN 54: 8 Ind Cas 1 (DB).

(e). Necessary party.

——O. 40, R. 1 — Permission to make Receiver party to suit — Test of.

On the application for permission to make the Receiver a party to the suit, it is open to the Court to consider the question on the merits. But the object of appointing a Receiver is not to keep a third party out of possession who may be entitled to possession, and the Court will readily give leave to sue its Receiver if satisfied that there is a case to be tried, so that the claim of the third party may be tried in the presence of the Receiver.

In such a case not to make the Receiver a party to the suit may lead to the conflict of jurisdiction. The test in such a case is whether the property in the hands of the Receiver is going to be affected. AIR (Vol 24) 1937 Cal 671: 41 CWN 1342: 174 Ind Cas 584 (DB).

——O. 40, R. 1 — A Receiver appointed under the Code of Civil Procedure merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is necessary in order that by impleading him the estate may be bound. A receiver under the Insolvency Act holds a different capacity altogether.

He is more than a mere officer of the Court. Under S. 28 (2) the insolvent's estate vests in him. He alone, and no one else, represents the estate. He therefore is the proper party to be impleaded in the action. No leave is accordingly necessary for suing him. AIR (Vol 11) 1924 All 40: 77 Ind Cas 57: 21 ALJ 737: 4 LRA (Civ.) 483: 46 All 16 (DB).

——O. 40, R. 1 — Receiver becomes a proper party to proceedings affecting property.

When a receiver is appointed by a Court, he takes possession of the property on behalf of the Court and he is not a party in the sense in which O. 1, R. 10 is understood. The Court having taken possession of the properties it appoints an officer to look after the properties on behalf of all the parties and a Receiver is not a legal representative of any party; nor is he a new party to the proceedings. But he represents all the parties for the same purpose and his duty is that which is assigned to him by the Court.

Considering the fact that the very object of the appointment of the Receivers is to safeguard the interests it is the duty of the Court to make them parties even in the execution proceedings for the sale. It is liable to be defeated for want of necessary parties and in any case possession of properties sold by Court could not be obtained without the leave of the Court which appointed the Receivers. AIR (Vol 10) 1923 Mad 144: 43 MLJ 211: 71 Ind Cas 293: 1922 MWN 745: 16 MLW 322: 31 MLT 290: 47 Mad 47.

——O. 40, R. 1 — Leave to sue — Receiver.

In a suit against a receiver, parties ordinarily liable must be joined with him. The Court cannot of its own motion join a receiver as a party; permission of the court which appointed him is necessary. (1910) 14 CWN 653: 6 Ind Cas 214 (DB).

(f). Sale.

——O. 40, R. 1 — Sale in execution without leave of Court — Validity.

Where property is in possession of a Receiver its sale in execution without the leave of the Court which appointed the Receiver is voidable and not void; such leave can be given retrospectively. AIR (Vol 31) 1944 Mad 372: 1944 MWN 76: 57 MLW 121: (1944) 1 MLJ 129: ILR (1944) Mad 717.

——O. 40, R. 1 — Property exempt from judicial process — Limits.

The general rule is well settled that property in the hands of a receiver is exempt from judicial process, except of course to the extent permitted by the appointing Court. Though an attachment was levied on property before the appointment of the receiver it is within the sound discretion of the appointing Court to refuse to permit a sale of the property thereunder. A purchaser in Court auction, without previous leave to sell, buys at his peril for the sale may be cancelled. AIR (Vol 12) 1925 Mad 51: 79 Ind Cas 632: 19 MLW 681 (DB).

——O. 40, R 1 — Sale of property in receiver's hands — No leave — Voidable.

The rule that possession of a Receiver may not be disturbed without leave, does not apply. so far as third parties are concerned, until a Receiver has been actually appointed and is in actual possession. A sale of properties for which a Receiver has been appointed, without leave of the Court which appointed him, is not void, but only voidable, liable to be set aside by appropriate proceedings. AIR (Vol 10) 1923 Cal 121: 76 Ind Cas 241: 27 CWN 38: 37 CLJ 265 (DB).

(g). Proceedings by third party.

——O. 40, R. 1 — Preliminary decree — Nature of.

In a suit for account of his management against the Receiver appointed under O. 40, if the Court found him guilty of negligence in the management of the property committed to his charge, the correct form of the preliminary decree would be to call upon him to give an account of his management for the whole period of his Receivership. Neither the Commissioner appointed to take accounts nor the Court at the final stage of the suit would be limited to an enquiry in regard to those items only which are specified in the two schedules, and the plaintiff would have been entitled to have a decree for other sums of money not specified therein but which on enquiry at the final stage would be found to have been lost by his default or negligent management. AIR (Vol 29) 1942 Cal 433: 75 CLJ 1: 46 CWN 294: ILR (1942) 1 Cal 577: 202 Ind Cas 389 (DB).

——O. 40, R. 1 — Suit against Receiver on money claim by creditor of estate — Leave to defend.

In a suit on administration of an estate, a Receiver was appointed. A suit was instituted on a money claim against him by a creditor of the estate. The Receiver obtained leave to defend this suit and further applied to the Court trying the administration suit for future directions with regard to his conduct in the creditor's suit:

Held that the application for leave to defend should be made renewable as soon as occasions should arise and the directions of the Court may be asked for from time to time and that a notice of the application to the creditor was not essential:

Held, also that the Receiver was entitled to the guidance of the Court which should properly be sought but before doing this, he should take the written opinion of leading Counsel not briefed in the case and place it before the Court. In respect of the costs of and incidental to obtaining the opinion, the Receiver will be indemnified out of the estate. AIR (Vol 28) 1941 Cal 267: ILR (1940) 2 Cal 208: 195 Ind Cas 240.

——O. 40, R 1 — Remedy of third party.

The third party being an outsider to the proceedings, had no right of appeal against the order appointing the Receiver. When his property was seized, he could only apply to the Court to direct the Receiver to release the property. AIR (Vol 28) 1941 Rang 236: 1941 Rang 300: 196 Ind Cas 768.

——O. 40, R. 1 — Authority to Receiver by High Court to institute suit can be filed at any stage of suit.

Where a person who has been appointed a Receiver of an estate by the High Court, institutes a suit on behalf of the estate, an authority from the High Court to institute the suit may be filed by the Receiver at any stage of the suit, the authority being required as a question of the bona fides of the Receiver. AIR (Vol 23) 1936 Cal 289: 166 Ind Cas 821.

——O. 40, R. 1 — Similarly property over which a receiver has been appointed could also be attached assuming that the permission of the Court should be necessary before such attachment, in the same way as permission of the Court is necessary to file a suit against a receiver. AIR (Vol 17) 1930 Mad 4.

——O. 40, R. 1 — Stranger can act on the defensive — To take action against receiver permission necessary.

The rule is firmly established that as against a stranger to the action who is in actual possession, the appointment of a Receiver is of no effect and it is also equally well settled that you cannot sue a Receiver except with the leave of the Court. The conclusion arrived at on a consideration of these different principles is this: so long as the stranger whose possession is challenged by the Receiver acts strictly on the defensive, the Receiver cannot touch him in any way, but that, if he comes as a complainant and asks the Court to investigate the conduct of the Receiver, he must obtain the leave of the Court by which the Receiver was appointed. AIR (Vol 14) 1927 Pat 297: 102 Ind Cas 797: 8 PLT 629 (DB).

——O. 40, R. 1 — Mortgage decree — Inexecutable without leave.

A mortgage decree cannot be executed against properties in the hands of a Receiver without sanction of the Court. The mere fact that there is a mortgage on the property would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of the Receiver without the sanction of the Court which appoints him. 26 C. 127 Diss. AIR (Vol 10) 1923 Mad 144: 43 MLJ 211: 71 Ind Cas 293: 1922 MWN 745: 16 MLW 322: 31 MLT 290: 47 Mad 47.

——O. 40, R. 1 — Redress may be in the same or separate proceeding.

It is clear law that, as a Receiver is an officer of the Court, he cannot be sued for acts done in his official capacity by a third party, except with the leave of the Court. Ordinarily the party feeling aggrieved by the Receiver's conduct should seek redress against him in the very proceeding in which he was appointed as receiver, and any separate proceedings taken against him either in that Court on elsewhere, should be with the leave of the Court under whose authority the Receiver was acting. AIR (Vol 10) 1923 Rang 208: 76 Ind Cas 441: 1 Rang 138.

——O. 40, R. 1 — Claim of strangers — Adjudication prior to receiver taking possession.

On an objection being made by persons who were no parties to the suit, claiming the properties to be theirs and in their possession, the Court is bound by clause (2) of Rule 1 of Order 40 to come to a definite finding as to the truth of these allegations before it can make an order directing the Receiver to take possession of the properties. The allegations in the petitions cannot be disposed of on the ground of a discrepancy between them and the contents of earlier petitions filed by one of the petitioners and others when they applied to be added as parties to the suit.

It is not the duty of the Receiver of a property to enquire into the claim of title made by third parties, and the Court has no power under the Code to delegate an enquiry on this point to the Receiver. AIR (Vol 8) 1921 Cal 298: 65 Ind Cas 837: 34 CLJ 123 (DB).

——O. 40, R. 1 — Leave to sue — Receiver.

In every case a receiver as such need not be sued but where any right is established by a decree in the suit to the property in the hands of a Receiver the Court may on an application by the party in whose favour the right is established make an order directing the receiver to satisfy the decree. (1911) 9 MLT 300: 10 Ind Cas 673.

17A. Property outside subject matter of suit.
See Notes 9 and 19.

18. Rights and liabilities of.
See also Notes 13, 17.

(a) General.
(a-1) Account.
(b) Income.
(c) Lease.
(d) Pledging credit.
(e) Rent.
(f) Sale.

(a) General.

——O. 40, R. 1 — Receiver in possession of mortgaged property — Duty of mortgagor to pay revenue — Duty of Receiver.

After the Receiver appointed in a mortgage suit has taken possession of the mortgaged property, the mortgagor is under no duty to pay the revenue in respect of such property. It is the duty of the Receiver to preserve the properties by paying the public demands. AIR (Vol 28) 1941 Cal 305: 199 Ind Cas 728 (DB).

——O. 40, R. 1 — Breach of contract — Personal liability — Act done without sanction of Court — Third party, if bound — Receiver's right to be indemnified.

The defendant firm were appointed Receiver of a Colliery Co. Under the terms of the appointment they were to carry on the business but they were to secure sanction of the Court for contracts for sale of coal. The defendants committed breach in respect of a contract with the plaintiff, for which sanction of the Court had not been obtained. The plaintiff having sued to recover damages:

Held, (1) that the position of the defendants was that of principals and not that of agents of persons under a disability;

(2) questions to which the want of sanction might give rise were matters as between the Receivers and the Court which appointed them and not between the Receivers and third parties entering into contract with them;

(3) the plaintiff was entitled to recover against the defendants, though the defendants might be able to obtain an indemnity by an order of Court enablintg them to recoup themselves out of the assets as they had duly accounted for money received for coal sold to other persons.

Receivers appointed by the Court are not in the position of agents of the Court or anybody else in respect of transactions entered into by them and are "personally liable to persons dealing with them in respect of liabilities incurred or contracts

entered into by them in carrying on the business unless the express terms of contract exclude, as they may do, any personal liability." AIR (Vol 18) 1931 Cal 491: 58 Cal 174: 134 Ind Cas 1266.

——O. 40, R. 1 — Personal liability for costs decreed.

A Receiver suing or being sued is in the same position as a litigant and is personally bound to pay the costs decreed against him, though he can reimburse himself out of the estate. AIR (Vol 18) 1931 Nag 143: 134 Ind Cas 272.

——O. 40, R. 1 — It is doubtful whether in India a Receiver put into mere possession under O. 40, R. 1 (c) can arrogate to himself powers to be conferred under O. 40, R. 1 (d). 93 Ind Cas 271: 23 MLW 145: 1926 MWN 159: 50 MLJ 239: AIR (Vol 13) 1926 Mad 357.

——O. 40, R. 1 — Receiver has none but expressly granted powers.

A Receiver has no power except what the Court grants him. He is only an officer of the Court and whatever powers he exercises are delegated powers of the Court which it expressly gives him. 82 Ind Cas 793: AIR (Vol 12) 1925 Mad 318 (DB).

——O. 40, R. 1 — Powers of Receiver.

The powers of a Receiver appointed by a Civil Court under O. 40, R. 1, C. P. C., are entirely conditioned by terms of his appointment, subject to any subsequent notification by the Court under which he holds the appointment. Where an appointment order confers on a Receiver general powers of management authorising him to do such acts as may be necessary for the efficient administration of the property subject to the control of the Court, he has all the powers of a proprietor within S. 4 of Madras Act 2 of 1894 and is entitled to nominate persons to 'Karnamships' under S. 15. AIR (Vol 4) 1917 Mad 746: 30 MLJ 456: 32 Ind Cas 207 (DB).

——O. 40, R. 1 — Powers of Receiver.

In the absence of any mention as to what powers are conferred on a particular Receiver, there is no presumption that all the powers allowed by O. 40, R. 1 are conferred. AIR (Vol 2) 1915 Low Bur 139: 8 Bur LT 164: 30 Ind Cas 678.

——O. 40, R. 1 — Powers of Receiver — Discretion to spend on litigation — Security for restitution.

A Receiver's discretion to spend money on litigation ought not to be interfered with by an Appellate Court. The Court of First Instance will if necessary, take security from him for restitution of such expenses in certain events. 25 Ind Cas 645: AIR (Vol 2) 1915 Mad 355 (DB).

(a-1) Account.

——O. 40, R. 1 — Right to take account from Receiver.

The estate does not vest in a Receiver appointed under the provisions of O. 40. While functioning he is not a trustee, much less a trustee for a specific purpose. His position is that of an officer of the Court appointing him and his official duty is to preserve and manage the subject-matter of the litigation. He is not the agent of the parties to the litigation in which he is appointed or of any one of them. He acts for the benefit of the party who ultimately becomes successful. The property is in 'custodia legis' and through him the Court discharges its functions of preserving the subject-matter of the litigation.

He is only accountable to the Court which appointed him in his capacity as its officer. The right to take account from him or to take account of his management is primarily in the Court which appointed him and the right of an individual to sue him for accounts or in matters respecting his management is a right derived from the Court by reason of the leave given to him by the Court to sue. AIR (Vol 29) 1942 Cal 483: 75 CLJ 1: 46 CWN 294: ILR (1942) 1 Cal 577: 202 Ind Cas 389 (DB).

——O. 40, R. 1 — Accounts filed by Receiver — Objections by parties referred to Commissioner and dealt with by him and subsequently considered by Court — Discharge — Liability of Receiver after discharge.

Where before the Receiver was discharged, objections were taken by the parties to the propriety of the entries in the accounts filed by the Receiver and they were referred to the Commissioner and were dealt with by him and the objections were also subsequently considered by the Court, it cannot be said that the propriety of the accounts was not considered by the Judge at the time when the Receiver's accounts were passed and he was discharged.

It is true, however, that if there is any liability attached to the Receiver other than which appears on the face of the accounts and if such liability is not inquired into or determined by the Court at the time of discharging the Receiver, a separate suit for determination of such liability will lie. AIR (Vol 25) 1938 Cal 597: 69 CLJ 237: 179 Ind Cas 279 (DB).

(b) Income.

——O. 40, R. 1 — Receiver appointed at instance of mortgagee — Official Assignee of mortgagor's estate — Receiver's right to income.

A mortgagee who procures a Receiver to be appointed in a mortgage suit is entitled to the income from the mortgaged properties in the hands of the Receiver in preference to the Official Assignee of the estate of the mortgagor who has subsequently been adjudicated an insolvent. AIR (Vol 19) 1932 Sind 82: 26 SLR 61: 137 Ind Cas 338 (DB).

——O. 40, R. 1 —, Equitable mortgage — Mortgagee's right to rent realised by Receiver in preference to other creditors.

Whether a mortgagee is, or is not, entitled to possession, he may invite the Court to appoint a Receiver if the demands of justice require that the mortgagor should be deprived of possession.

The possession of a Receiver in a mortgage suit is 'prima facie' for the benefit of the party who obtained the appointment. On this principle where a Receiver is appointed in a mortgage suit at the instance of the mortgagee, he holds the properties for the mortgagee's benefit alone and is bound to make over the entire income to the satisfaction of the mortgagee's dues in preference to the claims of the other creditors of the mortgagor. AIR (Vol 18) 1931 Mad 626: 61 MLJ 111: 54 Mad 565: 34 MLW 165: 133 Ind Cas 504.

——O. 40, R. 1 — Mortgage — Receiver — Appointment after decree — Injunction restraining sale of property.

A Court, after passing a mortgage decree can appoint a receiver to collect and hold the income of mortgaged property pending further orders even where the decree-holder has been restrained by injunction from selling the mortgaged property in execution of his decree. (1909) 6 MLT 238: 3 Ind Cas 437 (DB).

(c) Lease.

——O. 40, R. 1 (d), S. 51 — Lease auctioned by Receiver subject to sanction of Court — Court allowing lease money to be paid to decree-holder — Sanction is implied.

Where the Receiver appointed by the executing Court auctions a lease subject to the sanction of the Court, the Court must be taken to have sanctioned the lease if it allows the lease money to be paid to the decree-holder. AIR (Vol 29) 1942 Lah

126: 44 PLR 74: ILR (1943) Lah 179: 201 Ind Cas 87 (DB).

——O. 40, R. 1 — Reveiver entering into contract of lease — Breach of such contract — Suit by lessee for damages — Whether Receiver or owner of estate personally liable.

Receiver appointed by the Court is personally liable for the contracts entered into him in the absence of an express or clearly implied term of the contract itself that the personal liability of the contracting Receiver is to be excluded. Where, therefore, a Receiver of an estate has granted a lease and a lessee brings a suit for damages upon the breach of the contract of lease, the Receiver is personally liable. The lessee has no right of suit against the owner of the estate in respect of such breach. The Receiver cannot bind the estate by lease and no relationship of landlord and tenant is created between the owner of the estate and the lessee. It may be that the Receiver will be able to establish his right to indemnity against the estate and that through him the lessee will be able to resort to the estate to satisfy its dues, but these matters cannot arise for decision in a suit by the lessee for damages for breach of contract. AIR (Vol 26) 1939 Rang 12: 1938 Rang LR 611: 180 Ind Cas 819.

——O. 40, R. 1 — Receiver, whether can eject mortgagor.

As a Receiver can be appointed on behalf of a simple mortgagee, it is a necessary concomitant of his office that he should be able to lease the property, and that if he is obstructed by the mortgagor, he can seek the aid of the Court to remove it. AIR (Vol 25) 1938 Mad 325 : (1938) 1 MLJ 249 : (1938) MWN 1140 : 182 Ind Cas 87.

(d) Pledging credit.

——O. 40, R. 1 — Title to property does not vest in Receiver — Court sanctioning loan on mortgage — Receiver can validly bind shares of parties by execution of mortgage.

The title to properties does not vest in the Receiver appointed under O. 40, Civil P. C., for the management and preservation of the properties in suit. The parties, therefore, have power to deal with their shares without reference to Court provided that their acts do not interfere with possession of the Receiver. The Receiver can exercise the powers of the owners in the matter of execution of documents and if the Court sanctions a loan on mortgage he can validly execute the mortgage instrument so as to bind the shares of the parties.

In those cases where the order of the Court simply sanctions a loan by the Receiver on a first charge of the properties but does not indicate the purpose for which the loan is sanctioned, the creditor who advances the money is entitled to assume that everything was in order and so he ought to get what the Court had promised to give him, namely, precedence over earlier encumbrances created by the parties. In such cases the Court cannot break faith with him. He is not bound to look beyond the order.

If the purpose of the loan as set out in the order is for preservation or protection of the property committed to the care of the Receiver, or is an order in an administration suit or one in a partition suit made for working out the rights, liabilities and obligations of the co-sharers of the joint properties in the course of partition, the mortgagee from the Receiver would have first charge in accordance with the order.

The power of the Court to sanction a loan for protection or preservation of the property is incidental to and necessary for the performance of its duty to protect and preserve the subject-matter of the suit, which it has taken upon itself by appointing a Receiver, and must be measured and limited by its duty, where its exercise comes into conflict with the rights of third parties which are not before it and to whom no notice had been given, or who had not consented.

In such a case the principle of breach of faith cannot be the decisive factor. It is a question of power or jurisdiction of the Court. If the Court arrogates to itself a power which it does not possess—and such usurpation appears on the face of the order—and does an act affecting persons not parties to the suit, its acts cannot prejudice the rights of such persons. In such a case, the mortgagee from the Receiver cannot protect himself on the presumption that the Court had acted within its powers, for the order on the basis of which he acted ex facie would indicate want of power in the Court.

In a suit for partition the Court sanctioned a loan to be raised by the Receiver on a mortgage, for payment to one of the parties. The order originally did not mention the purpose of the loan nor make it a first charge. The Receiver who has personally interested in raising the loan on the basis of the order raised an amount in excess of that sanctioned by the Court on the basis of promissory notes and on the assurance to the creditor that the loan would be a first charge on the property. The parties subsequently agreed that their property should be mortgaged for the loan and by suppressing the fact that it was already heavily encumbered, misled the Court into making the mortgage by Receiver a first charge on the property. No notice were issued to the prior mortgagees. On the basis of the second order the Receiver mortgaged the aforesaid property to the creditor already mentioned on two mortgages for amounts far in excess of that sanctioned by the Court.

Held, that no priority could be claimed by the mortgagee from the Receiver, over the prior mortgagees. AIR (Vol 28) 1941 Cal 163 : 72 CLJ 427 : ILR (1941) 1 Cal 155 : 45 CWN 68 : 194 Ind Cas 650 (DB).

——O. 40, R. 1 — Cannot pledge credit of individual party.

Generally speaking a person who is appointed by Court as the manager of the property in dispute, has no power to pledge the credit of an individual party. While in law it is more usual to have that doctrine applied to a receiver and manager the doctrine is equally applicable to any person appointed by the Court as an officer of the Court. AIR (Vol 16) 1929 Cal 659 (DB).

——O. 40, R. 1 — Power to mortgage.

Where the Receiver was given power to collect outstandings and do all things necessary for the realisation and preservation of the assets of a firm.

Held, the Receiver had no authority to mortgage the property of the firm. AIR (Vol 10) 1923 PC 50 : 44 MLJ 602 : 50 IA 77 : 32 MLT 184 : 2 Bur LJ 25 : 25 Bom LR 582 : 1 Rang 66 : 50 Cal 338 : 38 CLJ 41 : 18 MLW 446 : 28 CWN 1 : 1923 MWN 762 : 71 Ind Cas 650.

(e) Rent.

——O. 40, R. 1 — Receiver, whether vested with title to property against owner.

It is not the law that a Receiver, unless he be a Receiver in insolvency, is vested with title to the property itself as against the owner. And so far as the right to realize the rents is concerned, such right depends entirely on the terms of the appointment of the Receiver. AIR (Vol 23) 1936 Cal 639 : 168 Ind Cas 405 (DB).

——O. 40, R. 1 — Receiver appointed to collect rents — Lessee paying rent to mortgagee of judg-

ment-debtor — Receiver, if entitled to follow rent in the hands of the mortgagee.

Where a lessee pays the rent to the mortgagee of the landlord judgment-debtor or his agent, a Receiver appointed in execution with authority to recover the rent, is entitled to follow this rent in the hands of the mortgagee either on the footing that it was rent had and received to the use of the Receiver of the estate or as being held by the mortgagee in trust for the estate. AIR (Vol 21) 1934 Rang 84 : 149 Ind Cas 1042 (DB).

——O. 40, R. 1 — Appointing Court's permission necessary.

A Court appointed a receiver in a suit to take charge of the properties and to receive the rents and profits and distribute the same among the co-sharers. A person interested in the property applied in another Court with the permission of the first Court for an injunction restraining the Receiver from distribution of the rents and profits of the property in his possession to the co-sharers. The receiver stated that he had no objection to granting the injunction.

Held, that the receiver was not competent to do so. AIR (Vol 15) 1928 Pat 321 : 7 Pat 684 : 9 PLT 279 : 110 Ind Cas 722 (DB).

——O. 40, R. 1 — Powers of Receiver — Partition suit.

A Receiver in possession of the estate, is entitled to require payment of rent from the party who is in possession of an important item of the family property in suit. AIR (Vol 7) 1920 Cal 319 : 58 Ind Cas 301 (DB).

——O. 40, R. 1 — Powers of Receiver — Collection of rents.

Receiver can collect only such assets as become due to the estate after his appointment. Rents falling due prior to his appointment are not such assets. AIR (Vol 3) 1916 Pat 133 : (1917) Pat HCC 311 : 42 Ind Cas 785 (DB).

(f) Sale.

——O. 40, R. 1 — Receiver — Purchase by, of property under his Receivership — Sale should be set aside — Sale, whether by Court or Official Receiver is immaterial.

It is against public policy that a Receiver who has special means of knowing during the course of his Receivership the peculiarities and the value of the property, should be allowed to take advantage of that knowledge at a sale by purchasing the property himself. The principle applies equally to a sale by a Court or by the Official Receiver. AIR (Vol 30) 1943 Mad 414 : 56 MLW 135 : (1943) 1 MLJ 193 : 1943 MWN 165 : 209 Ind Cas 240.

——O. 40, R. 1 — Sale of immovables by, under direction of Court — Receiver should follow rules laid down in Civil Procedure Code and give not less than 30 days' notice of sale, in absence of special circumstances or direction of Court.

In cases where immovable property is to be sold by order of the Court, far more than a week's notice should be given. Receiver selling immovable property under the directions of the Court, should, unless there are special circumstances or otherwise directed by the Court, follow the rules laid by the Civil P. C. and give not less than 30 day's notice. Of course, the parties may agree to a lesser period:

Held, that the sale in question was not properly advertised and no sufficient notice was given. AIR (Vol 26) 1939 Mad 519 : 49 MLW 538 : (1939) MWN 309 : (1939) 1 MLJ 712 : ILR (1939) Mad 597 : 184 Ind Cas 861 (DB).

——O. 40, R. 1 — Power of sale.

Where under the terms of appointment a Receiver was vested with powers of "realisation, management, production", etc., of the properties.

Held, that a power of sale is not taken away from but is still vested in, the Receiver, but the order does not mean that even contrary to the Receiver's own ideas of prudence or advantage, the power of sale must be exercised; and that if it is not exercised at once or promptly, then the basis of the receivership has gone and it ought to be declared at an end. AIR (Vol 11) 1924 PC 202 : 5 Pat LT 491 : 20 MLW 456 : 35 MLT 182 : 22 ALJ 968 : 5 LRPC 175 : 26 Bom LR 1153 : 40 CLJ 431 : 29 CWN 413 : 3 Pat LR 180 : 47 MLJ 286 : 81 Ind Cas 576.

——O. 40, R. 1(d) — Powers of Receiver — Partition suit — Empowered to sell share of infant — Sale certificate.

In a partition suit in which a Receiver is authorised to sell properties there can be no difficulty in directing him to convey the properties. Under O. 40, R. 1, Cl. (d), C. P. C., the Court may confer on a Receiver all such powers for the realization of properties and the execution of the documents as the owner has. A certificate reciting the order of the Court authorising the Receiver to sell and stating that the sale has been effected thereunder and also reciting that sale has subsequently been confirmed by the Court, when so confirmed, can be granted, when the purchaser applies for it and is content to take it as evidence of his title without asking for a conveyance. AIR (Vol 3) 1916 Cal 319 : 43 Cal 124 : 19 CWN 817 : 30 Ind Cas 406.

——O. 40, R. 1 — Powers of Receiver — Suit by Receiver to recover property sold prior to his appointment.

The functions of a Receiver appointed under O. 40, R. 1, being to take possession from parties to the suit of any moveable and immoveable property in respect of which he has been appointed Receiver to manage it, to realise its income and to be in custody till removed, he cannot recover property acquired before his appointment from a stranger to the suit, nor does his appointment affect any rights previously by third persons, nor has he right to recover property sold away by the judgment- debtor as being void under S. 53, Transfer of Property Act or on the ground that the sale was not binding on the creditors of the judgment-debtor. (1912) 35 Mad 578 : 17 Ind Cas 233 (DB).

19. Scope.

——O. 40, R. 1 (a) — Appointment of Receiver — Property other than subject-matter of suit — Power of Court.

The words of O. 40, R. 1, C. P. Code, are very wide and there is no reason why the meaning of the expression "appoint a Receiver of any property", in O. 40, R. 1 (a) should be confined only to property which is the subject-matter of a suit. Of course normally a Court would not appoint a Receiver of properties other than the subject-matter of the suit but there may arise circumstances rendering such a course necessary. (1949) 53 CWN 1 D. R. 81.

——O. 40, R. 1 (2) — Application under S. 38, Companies Act — Director is stranger to these proceedings in his capacity as director — Sub-r. (2) applies.

The provisions of Sub-R. (2) of O. 40, R. 1 cannot have application to cases of dispossession of a party to a suit by the appointment of a Receiver. That sub-rule has been made for the protection of third parties who are not parties to the suit.

To the application under S. 38, Companies Act, the directors are neither necessary nor proper par-

ties and the mere fact that one of them as managing director transferred his shares in favour of the applicant and in that capacity was impleaded as a party does not make him a party in his capacity of a director. For the purposes of Sub-R. (2) of O. 40, R. 1, he is a stranger to these proceedings in his capacity as a director. Sub-R. (2), therefore, has full application to such a case. AIR (Vol 33) 1946 Lah 193: 48 PLR 1 (DB).

——O. 40, R. 1 — It is wrong to say that Receiver cannot be appointed to conduct business of company except in debenture-holders' action.

(Obiter) — It is wrong to say that the appointment of a Receiver is unheard of to conduct the business of a company except in a debenture-holders' action. Several cases can be visualized when a company Judge may exercise such a power under the provisions of O. 40, R. 1 read with S. 141, Civil P. C., or ex debito justitiae.

It is possible in suitable cases under the Companies Act to appoint a Receiver who may take up the business of the company and the management of its property and its affairs pending the decision of the Court in a litigation. AIR (Vol 33) 1946 Lah 193: 48 PLR 1 (DB).

——O. 40, R. 1 — Appointment is ordinarily confined to pendency of suit or appeal — Exception.

The appointment of a Receiver of landed property is confined to the pendency of a suit or an appeal although in exceptional cases, such direction in a final judgment is permissible. AIR (Vol 31) 1944 Nag 82: 1943 NLJ 571: ILR (1944) Nag 166: 212 Ind Cas 289.

——O. 40, R. 1 (2) — Amendment clarifying interpretation of O. 40, R. 1 (2), suggested.

The question whether cl. (2), of R. 1, of O. 40 has application only to properties in the possession of third parties or is also applicable to properties in the possession of one of the parties to the litigation, is beset with considerable difficulty. In order to set the doubt at rest, the rule should be so amended as not to leave any doubt as to the true interpretation of cl. (2) of R. 1, of O. 40, Civil P. C. AIR (Vol 30) 1943 All 1: 1942 AWR (HC) 337 (2): 204 Ind Cas 210 (FB).

——O. 40, R. 1 (1) and (2) — Appointment of Receiver in respect of judgment-debtor's raiyati holding governed by Chota Nagpur Tenancy Act.

The general power under O. 40, R. 1 (1), Civil P. C., is curtailed by O. 40, R. 1 (2), and hence R. 1 (2) is a clear bar to the appointment of a Receiver of the judgment-debtor's raiyati holding, the sale of which is prohibited by S. 46, Chota Nag. Ten. Act as the decree-holder cannot be said to have a present right to remove the judgment-debtor from the possession of the raiyati holding. AIR (Vol 29) 1942 Pat 52 (2): 22 PLT 798: 8 BR 464: 198 Ind Cas 818.

——O. 40, R. 1 (2) — Object of appointment of Receiver.

Per Braund, J.— The appointment of a Receiver is neither a measure of punishment nor does it operate to enlarge or to restrict existing beneficial rights of property. AIR (Vol 15) 1928 Rang 176 : 6 Rang 261: 110 Ind Cas 620 overruled on another point. AIR (Vol 26) 1939 Rang 321 : 1939 Rang LR 403: 183 Ind Cas 728 (FB)

——O. 40, R. 1 — An order allowing the objection of judgment-debtor to the attachment of certain property as wakf property and appointing a Receiver for the property is one under O. 40, R. 1. AIR (Vol 25) 1938 All 3: (1937) ALJ 1103 : ILR (1938) All 35 : 1937 AWR (H C) 903 : 173 Ind Cas 127.

——O. 40, R. 1 — Order 40, R. 1 has to be read with S. 51, Civil P. C. AIR (Vol 24) 1937 Lah 738: 39 PLR 646 : 175 Ind Cas 601.

——O. 40, R. 1 (2) — Judgment-debtors in present lawful possession — Decree-holder not having right to remove them.

Where the judgment-debtors are in present possession of property by virtue of their having furnished the security bond demanded from them by the High Court as a condition of execution being stayed, the decree-holder has no present right to remove them from possession and the appointment of a Receiver would be tantamount to the removal of the judgment-debtors from the property and hence O. 40, R. 1 (2), is a bar to the appointment of Receiver. AIR (Vol 23) 1936 Oudh 370 : 1936 OWN (C C) 595: 164 Ind Cas 159 (DB).

——O. 40, R. 1 — Even in the case of a simple claim for money a receiver may be appointed. AIR (Vol 16) 1929 Mad 184 : 56 MLJ 95 : 118 Ind Cas 70 : 52 Mad 938: 29 MLW 664.

——O. 40, R. 1 — A receiver can be appointed in a declaratory suit. AIR (Vol 14) 1927 Lah 65: 94 Ind Cas 39: 27 PLR 138.

——O. 40, R. 1 — The word "person" in sub-S. (2) refers to persons interested in the property and in possession or custody of it prior to the passing of an order appointing a Receiver. AIR (Vol 13) 1926 Cal 593: 92 Ind Cas 940 : 53 Cal 319 (DB).

——O. 40, R. 1 — The word "person" in Cl. (b) refers to a person other than a "Receiver" for Cl. (c) shows that the property removed from the possession or custody of the person referred to in Cl. (b) is to be committed to the possession, custody or management of the "Receiver" by Cl. (c). AIR (Vol 11) 1924 Mad 614 : 46 MLJ 196: 78 Ind Cas 625: 19 MLW 247: 34 MLT 6 (DB).

——O. 40, R. 1 — Manager is but a receiver.

There is no provision for appointing a manager under the Code. When a manager is appointed it is really another name for the appointment of Receiver under O. 40. AIR (Vol 11) 1924 Mad 614 : 46 MLJ 196: 78 Ind Cas 625: 19 MLW 247: 34 MLT 6 (DB).

——O. 40, R. 1 — Of mortgagee decree-holder under arrangement.

There was an arrangement between the parties by which the holder of an ordinary mortgage-decree remained in possession of the properties and applied the income towards part satisfaction of the debt due to him. Subsequently a Receiver was appointed and that Receiver was specifically directed to take charge of all properties.

Held, that under these circumstances the decree-holder could not claim protection of O. 40. R. 1 (2). AIR (Vol 8) 1921 Pat 43: 61 Ind Cas 67: 6 PLJ 37: 2 PLT 593 (DB).

——O. 40, Rr. 1 to 3 (Ss. 92, 503, 539 old Code) — Subject of suit — Scheme suit for temple without a prayer for removal of trustees.

In a suit for a scheme in respect of the management of a temple without a prayer for the removal of the trustees, the property of the temple is the subject of the suit within the meaning of S. 503, C. P. C., and the Court is competent to direct the appointment of a receiver. (1910) 20 MLJ 638 (639) : 4 MLT 88: 7 Ind Cas 900 (DB).

19-A. Termination of appointment.

See Notes 3, 4.

20. Who may be appointed.

——O. 40, R. 1 — Receiver — Appointment of — Limited liability company, if can be appointed Receiver — Such company business rival of judgment-debtors — Effect.

Obiter — It is not desirable that a limited liability company should be appointed as Receiver because a Receiver is an officer of the Court and there are inconveniences in having a limited liability company as an officer of the Court. Similarly, a business rival of the judgment-debtors should not be appointed as Receiver. AIR (Vol 29) 1942 Nag 64: 1942 NLJ 191 : ILR (1942) Nag 671 : 199 Ind Cas 874 (DB).

——O. 40, R. 1 — Person found entitled to letters of administration.

Ordinarily it is a person who has an interest in property who may be expected to see that it does not go to waste.

Consequently, a person who has been found to be a fit person to be granted letters of administration in respect of the estate is also a fit person to be appointed a Receiver of the estate. AIR (Vol 29) 1942 Rang 12: 198 Ind Cas 621 (DB).

——O. 40, R. 1 — Partnership — Order that Receiver was to carry on proper management of firms — Appointment of party to suit as Receiver — Receiver forfeiting confidence of opposite party.

In all cases of partnerships, the true rule as to the appointment of a Receiver is that a Receiver is generally appointed for the purpose of realising the assets of the karbar with a view to its winding up and for such purpose, namely, with a view to the winding up of such business, to carry on the business in so far as is necessary and incidental to such winding up. There is no warrant for an order that the Receiver is to carry on the proper management of the firms. The Court will not interfere for the management of a partnership except as incidental to the object of an action to wind up the concern and divide the assets.

The ordinary rule that no party should be appointed as a Receiver except by consent can be departed from only in exceptional cases, as for instance, in a case of partnership where there are no allegations of fraud and where the carrying on of the business depends on the personal credit of one of the members of the firm.

Where a party to the suit has been appointed Receiver, if it is found that he has forfeited the confidence of the opposite party, the order appointing him a Receiver should be set aside. AIR (Vol 21) 1934 Cal 444 : 148 Ind Cas 459 (DB).

——O. 40, R. 1 — No bar to party or agent.

There is no hard and fast rule that a party or his agent should not be appointed a receiver. That is a question which must be determined under the peculiar circumstances of each case. AIR (Vol 16) 1929 Lah 780.

——O. 40, R. 1 — Third party — No locus standi to apply.

The property of a judgment-debtor being attached, a Receiver was appointed by order of the Court. The judgment-debtor had never questioned the propriety of this order. A stranger made an application pointing out certain defects in the order appointing the Receiver alleging that the judgment-debtor had executed an agreement in his favour, under which the decretal amount was made payable from him and the judgment-debtor had promised to sell the property to him. He asked the Court to appoint himself the Receiver for the purpose of paying off the debt due to the decree-holder. He also prayed that the judgment-debtor might be given power to sell the property to him.

Held, that he had no locus standi to make such an application, and had no right to file an appeal from the order rejecting his application, as he was no party to the suit or the execution proceedings. He was a stranger to the proceedings and had no right to ask the Court to appoint him Receiver or to permit the judgment-debtor to transfer the property to him simply because he entered into the agreement with the judgment-debtor as alleged by him. AIR (Vol 15) 1928 Oudh 295: 110 Ind Cas 410: 5 OWN 463(DB).

——O. 40, R. 1 — Party.

One of the parties to a cause should not be appointed Receiver without the consent of the other party unless a very special case is made out. AIR (Vol 13) 1926 Cal 593: 53 Cal 319: 92 Ind Cas 940 (DB).

——O. 40, R. 1 — Party.

If a case for the appointment of a Receiver is made out, the Court will not appoint a party to the action as Receiver unless by consent or unless there are special circumstances justifiying such appointment. AIR (Vol 13) 1926 Sind 37: 89 Ind Cas 104: 20 SLR 201 (DB).

——O. 40, R. 1 — Full enquiry.

The jurisdiction to appoint a Receiver must not be lightly, but must be most cautiously, exercised. The relief is not one ex debito justitiae, but one which is purely within the judicial discretion of the Court. The power to appoint a Receiver is not to be generally exercised as a matter of course, and it is not a reason for allowing an application that it can do harm to appoint a Receiver. Before appointing a Receiver in any particular case the Court must take the whole circumstances of the case into consideration and then decide whether it would be just and convenient to appoint a Receiver. Where a Receiver was appointed without opportunity being given to the defendants to produce evidence to rebut the case put forward by the plaintiff.

Held, that the appointment of the Receiver, should be set aside. AIR (Vol 12) 1925 Lah 349 : 6 Lah 74: 88 Ind Cas 562: 26 PLR 228 (DB).

——O. 40, R. 1 — Party Receiver — Considerations.

Except in special cases, a party shall not be appointed Receiver without the consent of the opponent. But in cases of partnership and partition exception is made to the general rule. But the exception does not apply where the Court cannot rely on honest and disinterested management on the part of the party seeking to be appointed. AIR (Vol 12) 1925 Pat 293: 85 Ind Cas 93 : 3 Pat 964: 6 PLT 778 (DB).

——O. 40, R. 1 — Disinterested person.

The Receiver appointed in an action should as a general rule be a person wholly disinterested in the subject-matter. But the Court may upon the consent of the parties and in a proper case without such consent, appoint as Receiver a person who is mixed up in the subject matter of the litigation if it is satisfied that the appointment will be attended with benefit to the estate. AIR (Vol 11) 1924 Cal 456: 77 Ind Cas 783 : 28 CWN 86 (DB).

——O. 40, R. 1 — Private Receiver — Appointment of, by mortgagee.

A private Receiver deriving his power from the appointment of a mortgagee is almost unknown to the Indian people. AIR (Vol 5) 1918 Cal 557 : 40 Ind Cas 865 (DB).

——O. 40, R. 1 — Selection of Receiver — Appeal — Ground for.

A person who is guardian of an incapacitated deft. in a suit is not always disqualified to be a Receiver. The Court has to consider the whole circumstances of the particular case in making such appointments and the Appellate Court will not interfere unless a general principle can be shown to have been infringed. AIR (Vol 4) 1917 Mad 1009 : (1916) 2 MWN 256 : 4 LW 285: 35 Ind Cas 939 (DB).

——O. 40, R. 1 — Selection of Receiver — Appointment of party.

A Court has jurisdiction to appoint one of the parties, a receiver even without the consent of the other. AIR (Vol 2) 1915 Mad 336: 25 Ind Cas 602.

——O. 40, R. 1 — Selection of Receiver — Party to a litigation, if can be appointed, Receiver.

Ordinarily a party to a litigation should not be appointed a receiver unless very exceptional circumstances are established to justify such an appointment. The Court can appoint a receiver until the hearing of a partition suit wherever it is just and convenient and the necessity for a Receiver will be greater when one party is in exclusive occupation in which case the Court may also allow the party in sole occupation to elect to pay to other an occupation rent or may require him to furnish security for the account for the share of the rents and profits to the other party. AIR (Vol 1) 1914 Cal 439 : 18 CLJ 638 : 18 CWN 533: 22 Ind Cas 601 (DB).

——O. 40, R. 1 — Selection of Receiver — Parties.

The selection and appointment of a Receiver is a matter of judicial discretion to be determined by the Court according to the circumstances of the case and the exercise of this discretion will rarely be interfered with by the Appellate Court. Unless a special case is made out one of the parties to a suit will not be appointed without the consent of the other.

When a non-resident is appointed Receiver, there must be adequate guarantee that he will be subject to the effective control of the Court. The fact that the Receiver resides at a great distance from the property to be managed, is not an absolute disqualification but is an important circumstance to be taken into consideration. (1913) 17 CWN 974: 19 Ind Cas 873 (DB).

——O. 40, R. 1 — A receiver should be an impartial person and wholly disinterested in the subject-matter of the suit. (1913) 17 CWN 581: 18 Ind Cas 398 (DB).

——O 40, R. 2.

——O. 40, R. 2 — Tests — Business rival proposing itself for Receivership and acting in its own interest.

When a party interested proposes himself as Receiver he is usually required to act without salary unless by consent. There is nothing to show that the rule is different in India. Where a business rival company of the judgment-debtor proposes itself as the Receiver and it is acting to a large extent in its own interests and does not ask that it should be paid any remuneration, the usual rule ought to apply and it ought to be taken that the officer is to act without remuneration and that the appointment is so made.

But circumstances may alter and it may be proper for a Court at a later stage to make an order allowing remuneration.

Where a business rival company of the judgment-debtor proposes itself as Receiver and acts for no remuneration in the beginning and it is largely working in its own interests, 5 per cent. on the net profits is the proper rate of commission. AIR (Vol 29) 1942 Nag 64: 1942 NLJ 191: ILR (1942) Nag 671: 199 Ind Cas 874 (DB).

——O. 40, R. 2 — Appeal — Order fixing remuneration made at later stage.

Though the Court has power to make the order fixing a remuneration of Receiver at any time, nevertheless it must be regarded as part of the order of appointment. Ordinarily the remuneration would be fixed at the time of appointment and in such a case, the appeal can be directed against the remuneration fixed. If that is the position when the order fixing the remuneration is made along with the order of appointment, there is no difference in principle to allowing the party to appeal when the order fixing the remuneration is made at a later stage which the Court has power to do. In either event, the order fixing the remuneration of the Receiver is appealable. AIR (Vol 29) 1942 Nag 64: 1942 NLJ 191: ILR (1942) Nag 671: 199 Ind Cas 874 (DB).

——O. 40, R. 2 — He is entitled to ordinary commission and allowance and also to lien on estate.

Where a Receiver or manager is appointed by the Court in a suit properly constituted, such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance, and also to a lien on the estate as against all persons interested in it for the balance, whatever it may be, that shall be found to be due to him on taking his accounts. A Receiver, though discharged by the dismissal of the suit in which he was appointed, is entitled to a lien on the estate for all his just claims and allowances. AIR (Vol 25) 1938 Rang 357: 178 Ind Cas 30.

——O. 40, R. 2 — Rules framed by Rangoon High Court, Rr. 204, 205 — Head of charges.

The Official Receiver, in making his lists, should consider under what head the fees are to be charged and charged at the rate specified in the sub-section. The Court may then, in the circumstances of any particular case, review such remuneration, and whilst not exceeding the maximum laid down, may direct such remuneration at any less rate as may be thought fit. AIR (Vol 25) 1938 Rang 357: 178 Ind Cas 30.

——O. 40, R. 2 — Extra expense.

Remuneration fixed by Court — Receiver incurring extra expense — Post facto sanction to expense to be accorded by Court in special circumstances. (1936) 1936 MWN 222 (DB).

——O. 40, R. 2 — Right to indemnity — Nature of right — Suit for recovery of money spent.

As the right to indemnity which a Receiver has got is not created by the contract, Art. 83, Lim. Act, does not apply to a suit by the Receiver to recover the money spent by him. AIR (Vol 22) 1935 Mad 594: (1935) MWN 598: 69 MLJ 539: 42 MLW 680: 157 Ind Cas 746.

——O. 40, R. 2 — 'Gross sale-proceeds', whether include gross sales — "Trade discount" and freight and packing charges.

Where in a certain business, the Receivers were ordered by the Court to retain five per cent. of the 'gross sale proceeds' in their hand:

Held, that they were not entitled to that commission on the sum shown as "trade discount" inasmuch as "proceeds" mean produce, outcome of profit and an amount never received, viz., the so-called "trade discount" cannot be a part of proceeds, but they might be allowed to retain such commission on freight and packing charges. AIR (Vol 18) 1931 Mad 500: 60 MLJ 332: 131 Ind Cas 655.

——O. 40, R. 2 — Commission — Conversion of old Government bonds into new bonds by Bank.

An estate under the management of Receivers owned a number of 1930 Govt. bonds which were in deposit in the Imperial Bank as security against an over draft. When these bonds were about to mature, certain of the parties to the suit, apprehending that the Receivers would, for the purposes of

earning commission, receive money for the old bonds and re-invest in the new loan, applied to the Master to authorize the Bank directly to make the conversion instead of paying cash to the estate and the Master made an order accordingly. The Receivers claimed commission on the amount covered by the bonds:

Held, (1) that the Receivers were not entitled to the commission claimed:

(2) that even if the matter admitted of any doubt it was open to the Court to give such directions as the justice of the case required. AIR (Vol 18) 1931 Mad 36: 59 MLJ 833: 33 MLW 92: 129 Ind Cas 682.

——O. 40, R. 2 — Limits of remuneration — Not to exceed net income.

The remuneration fixed for receivers under the C. P. Code need not necessarily be the limit of the remuneration to be fixed in a case under S. 145, Cr. P. Code, but in all the circumstances the total amounts of the remuneration should certainly, on every standard of equity and justice, be not more than the net income realized by the Receiver from the estate. AIR (Vol 12) 1925 Nag 462: 91 Ind Cas 54: 8 NLJ 167: 27 Cr LJ 22.

——O. 40, R. 2 — Right to remuneration.

The managing partner of a partnership by consenting to act without remuneration as Receiver during the dissolution of the partnership does not forgo his right to such remuneration as he would be entitled to for managing and carrying on the business. AIR (Vol 13) 1926 Cal 380: 90 Ind Cas 492 (DB).

——O. 40, R. 2, and O. 43, R. 1 — Appeal — Receiver — Order increasing remuneration, if appealable.

An order increasing remuneration to be paid to a Receiver, is an order made under O. 40, R. 2 and not under clause (d) of R. 1 of the order and is not appealable under O. 43, R. 1, C. P. C. AIR Vol 2) 1915 Cal 74: 22 Ind Cas 352 (DB).

——O. 40, R. 3.

1. **Appeal.**
2. **Liability of surety.**
3. **Procedure.**
4. **Power of Court.**
5. **Receiver, duties and liabilities of.**
6. **Revision.**
7. **Security, necessity of.**

1. Appeal.

——O. 40, R. 3 (3), S. 47 — Order directing Receiver to pay certain amount according to terms of decree either to party to suit or third person — Validity — Appeal.

An order directing the Receiver to fulfil the terms of a decree which is valid and binding and to pay a certain amount according to the terms of the decree to a party to the suit or a third person is not wrong. Such an order falls under Order 40, Rule 3 (c) and not under Section 47, or O. 40, R. 1 or R. 4 and, therefore, no appeal lies therefrom. AIR (Vol 29) 1942 Sind 144: ILR (1942) Kar 343: 204 Ind Cas 158 (DB).

——.O 40, R. 3 (c) — An order passed against a party who has been appointed a Receiver to deposit in Court money collected by him in execution before he was appointed Receiver, is an order under Section 47, Civil P. C. and is appealable. AIR (Vol 22) 1935 Mad 464: (1935) MWN 481: 68 MLJ 628: 41 MLW 763: 156 Ind Cas 886 (DB).

2. Liability of surety.

——O. 40, R. 3 — Surety of receiver — Liability — Remedy.

The liability of a surety for a Receiver for the due discharge of his duties is limited to cases of a violation of those duties which may properly be said to be within the scope of his appointment as Receiver (i. e.) if the Receiver is found liable in taking accounts then the surety is liable. The surety is liable for the payment of interest on balances improperly retained by him as also costs of proceedings in Court necessarily or properly incurred in consequence of the default of the Receiver, such as costs of proceedings to take accounts for failure to account, of an application for his discharge and for the appointment of another person in his place and of any proceedings taken to enforce the cognizance. When the surety satisfies the claim of the plaintiff he will be entitled to stand in the place of the Receiver to the extent of the payment made by him and to reimburse himself from the sums ordered to be paid to the Receiver in the suit, without derogation of his right to sue the Receiver. AIR (Vol 2) 1915 Cal 331: 20 CLJ 123: 28 Ind Cas 31 (DB).

3. Procedure.

——O. 40, R. 3 — Application under O. 40, Rr. 3 and 4 against Receiver alleging fraudulent conversion by him — Matter should not be referred to Commissioner but the question of the liability should be referred to a regular suit. AIR (Vol 31) 1944 Mad 392: 57 MLW 256: 1944 MWN 257: (1944) 1 MLJ 368: ILR (1945) Mad 47 (DB).

——O. 40, R. 3 — Accounts — Separate suit.

An application against a Receiver for accounts to be taken on the basis of wilful default and neglect should be by way of a suit. AIR (Vol 14) 1927 Cal 175: 53 Cal 881: 99 Ind Cas 761 (DB).

——O. 40, R. 3 — Mismanagement — Remedy — Orders of Court.

Questions with regard to the soundness or prudence of the system of management adopted by receiver or charges of wilful default or neglect of matters that can be disposed of in the shape of exceptions to account. The proper course open to a party litigant who is dissatisfied with the mode of management is to draw up a scheme and to submit it for the orders of the Court. AIR (Vol 11) 1924 Cal 1063: 82 Ind Cas 419: 40 CLJ 28 (DB).

4. Power of the Court.

——O. 40, R. 3 (c) — Account for monies collected before appointment.

The Court has no power to order a Receiver as such to account for monies collected by him as a party before he assumed office as Receiver. AIR (Vol 22) 1935 Mad 464: (1935) MWN 481: 68 MLJ 628: 41 MLW 763: 156 Ind Cas 886 (DB).

——O. 40, R. 3 — Accounts — Court which to pass.

A Receiver was appointed by the High Court in an appeal and on his death the first court appointed a successor to the deceased Receiver. Held, that the successor was an officer of the first court and not of the High Court and therefore, his accounts were subject to examination by the first court. The High Court declined to examine them. AIR (Vol 7) 1920 Pat 220: 4 Pat LJ 636: (1920) Pat HCC 35: 54 Ind Cas 207 (DB).

5. Receiver, duties and liabilities of.

——O. 40, R. 3 — Receiver of lease-hold — Sub-rents must be appropriated first towards head-rents — Receiver, held entitled to priority in respect of loans raised under orders of Court.

A Receiver over leasehold is bound in the first place out of the sub-rents, to discharge the head-

rent and out-goings payable to a lessor for which the person whose estate is being dealt with by the Court is liable to the lessor.

The primary duty of a Receiver over a lease-hold is no doubt to discharge the head-rent out of the sub-rents but the parties concerned may by consent order obtained from the Court modify the legal responsibility thus thrown on a Receiver.

A landlord obtained a decree for Rs. 1,20,000 for arrears of rent against the holders of a Ghatwali tenure and put it into execution. In an appeal against the decree a Receiver was appointed by a consent order passed by the High Court.

The relevant paras. of the consent order were as follows:—Para. 2.—The Receiver undertakes to this Hon'ble Court to pay to the decree-holders a sum of Rs. 50,000 on or before June 30, 1933, and a further sum of Rs. 40,000 on or before June 30, 1934, and the balance of decretal amounts in execution on or before June 30, 1935, provided that the judgment-debtor shall be living at the dates mentioned and the Receiver shall not have been discharged for any reason whatsoever.

Para. 4 — For the purposes aforesaid, the Receiver is authorised to raise loans of Rs. 50,000 and Rs. 40,000 and Rs. 40,000 as and when required at interest not exceeding 12 per cent. and attorney charges at 2 per cent. besides actual out-of-pocket expenses. If the judgment-debtor can arrange loans on better terms, the Receiver will take loans so arranged.

Para. 5.—The Receiver do continue as such Receiver until the sums advanced by him or raised by him as loans as aforesaid or under any other order or orders of the Court are paid. Para. 11.—The amounts advanced by the Receiver or raised by him as loans will be a first charge on the estate and on the realisation."

Held, that, read in conjunction with para. 5, para. 11 conferred on the Receiver priority over the landlord's claim for head-rent not only with respect to the sum which he was authorised to raise under para. 4 to pay the decretal debt, but also with respect to sum advanced by him or raised by him as loans "under any other order or orders of Court." AIR (Vol 30) 1943 PC 185: (1943) 2 MLJ 463: 56 MLW 741: 10 BR 234: ILR (1944) Kar. (PC) 157 Sup.: 1944 OWN (C C) 11: 43 CWN 275: 209 Ind Cas 553.

——O. 40, R. 3, S. 80 — Transaction by Receiver without sanction — Third party with eyes open entering into transaction — Suit for royalty of lands in possession of Receiver — Non-payment of royalty by Receiver or surrender of lands based on individual contract between him and plaintiff.

On general principles, a Receiver cannot effectively deal with the properties in his possession without the sanction of the Court that appointed him. Where he deals with any property without the sanction of the Court, his transaction may be impugned by the party affected thereby and he may be held accountable if he has thereby caused any loss to such party.

The object of the Court's sanction to any transaction by a Receiver is to ensure that the interests of the parties whose properties the Receiver is entrusted to deal with, are properly protected. But a third party who has himself with his eyes open entered into a transaction with the Receiver cannot challenge it merely on the ground that it was not sanctioned by the Court.

A Receiver appointed in a suit is a Public Officer within the meaning of S. 80, Civil P. C. In a suit for royalty of lands in the possession of the Receiver, non-payment of the royalty cannot be said be an official act done by the Receiver nor can the surrenders which were the result of individual contract between the Receiver and the plaintiff be regarded as the official acts of the Receiver. Section 80, therefore, has no application. AIR (Vol 27) 1940 Pat 516: 19 Pat 433: 7 BR 283: 192 Ind Cas 17 (DB).

——O. 40, R. 3 — Debuttar — Lease — Concealment — Cancellation.

Where in a lease granted by the receiver of the debuttar property there is concealment of relations of lessee and receiver and it is possible that the Court might not have granted the sanction to the lease or at least scrutinized the terms of the lease more clearly if it were aware of the facts, unless it can be shown that the lease in any way was disadvantageous one and not to the benefit of the debuttar estate it cannot be cancelled. AIR (Vol 16) 1929 Cal 828: 50 CLJ 333 (DB).

——O. 40, R. 3 — Powers of receiver — Debuttar — Cannot lease without sanction.

A receiver appointed in respect of a debuttar property has no power to lease the debuttar property without the sanction of the Court and any misrepresentation or concealment of material facts from the Court in connection with the proposed lease would vitiate the authority of the receiver to grant the lease. AIR (Vol 16) 1929 Cal 828: 50 CLJ 333 (DB).

——O. 40, R. 3 — In cases of lease by a receiver of the debuttar property the fact that there was reason to suspect fraud at its inception is not sufficient ground for the concellation of the lease. AIR (Vol 16) 1929 Cal 828: 50 CLJ 333 (DB).

——O. 40, R. 3 — Misappropriation — Loss — Distribution.

If the property which came into the hands of a receiver appointed by the Court and which was to be sold by him for the purpose of making payments awarded to the different decree-holders ,has been misappropriated by him, the loss must be borne rateably by the decree-holders in proportion to the amount of their decrees. The loss must fall on all the judgment-creditors and not upon one of them. AIR (Vol 16) 1929 Oudh 231: 6 OWN 334: 117 Ind Cas 748 (FB).

——O. 40, R. 3 — Expenditure — Details.

The Receiver must not merely show that he paid certain sums as litigation expenses, but also furnish details of expenditure. AIR (Vol 11) 1924 Cal 1063: 82 Ind Cas 419: 40 CLJ 28 (DB).

——O. 40, Rr. 3 and 4 — Accounts — Payment in excess — If valid discharge — Bribe — Liability of minor — Charges for litigation — Servants — Right of re-imbursement — Excess deposit — Liability for interest — Borrowing at high interest — Remedy of person damnified.

The Receiver advanced to an infant more than the amount sanctioned and it was not shown that it was applied for his benefit.

Held, that a receipt by the infant for the amount was no valid discharge to the Receiver. A bribe to the Police officer to release the minor is unauthorised and the Receiver cannot claim the amount against the payee. The Receiver is bound to furnish details of litigation expenses and he is not entitled to the salary of officers appointed

without leave of Court. On the application for discharge of Receiver, the applicant was directed to pay into Court the dues to the Receiver before release of the property. The applicant attempted to raise money but owing to the obstruction of the Receiver, a high rate of interest had to be paid and the deposit was made.

Held, the inquiry as to the raising of the loan at a high rate was foreign to the accounting by the Receiver and the remedy of the applicant is by a separate suit if the Receiver claimed a larger sum that was due to him, he is liable for interest on the excess paid. AIR (Vol 2) 1915 Cal 146: 20 CLJ 113: 28 Ind Cas 25 (DB).

——O. 40, R. 3 — Liability of Receiver -Accounts.

A succeeding Receiver cannot sue a former Receiver for recovering funds which he should have realized and accounted for. AIR (Vol 1) 1914 Cal 744: 41 Cal 92: 24 Ind Cas 768.

——O. 40, R. 3 — Accounts — Mesne profits — Expenses of litigation — Rent decrees — Bona fides.

Where in recovering rents from tenants a Receiver obtains only decrees against them he cannot be compelled to execute those decrees and recover the amounts and account to the party on that basis. If the Receiver had failed to realize rents by taking proper proceedings he will not be exempt from liability.

Mistaken proceedings though taken in good faith will not absolve the Receiver from liability for rent. A decree holder need not accept pronotes from the Receiver for arrears of rent from the tenants and the Receiver must make good the amounts for which the pronotes were executed. (Proceedings by way of distraint are of an exceptional and summary character and a Receiver is not entitled to recover the costs of such proceedings initiated by him through mistake. (1912) 11 MLT 90: 22 MLJ 253: (1912) MWN 101: 14 Ind Cas 396 (DB).

——O. 40, R. 3 — Accounts — Rights and liabilities — Duties of Receiver.

O. 40, R. 3 does not mean that the alleged payment should simply be supported by vouchers. The Court must see that the payments are properly made. The Receiver must keep his accounts and vouchers ready for examination at any time. At the time of adjustment of accounts the Receiver and other interested parties have a right to be heard. A Receiver will not be permitted without Court's sanction to incur expenditure seriously diminishing the funds entrusted to him. If a Receiver proves that a transaction made by him is beneficial to the parties interested he must be allowed credit for such transaction.

A Receiver should be allowed fees for legal assistance though not previously sanctioned by the Court. The fees will not be allowed where no legal skill is required or where the estates in the hands of the receiver has no concern in the matter, but the Receiver personally is involved.

He should not employ the counsel of either of the parties to the litigation in which he was appointed as they are likely to represent their client's case ; but this rule applies where the Receiver is acting adversely to the interest of the parties. A Receiver cannot make interest for his own benefit. Receiver's account filed and vouched before an examiner can be reopened on the discovery of errors though a Judge's certificate is attached and the Receiver may be surcharged though he has been discharged. (1911) 14 CLJ 445: 12 Ind Cas 780 (DB).

——O. 40, R. 3 — Mortgage as a Receiver — Accounts.

If the mortgagee acts as receiver of the mortgaged properties, he is liable to account, and the sums received by him must be applied to satisfy the judgment-debt and then only he can obtain an order absolute for sale. (1911) 13 CLJ 459: 6 Ind Cas 323 (DB).

——O. 40, R. 3 — Liability of Receiver — Accounts — Application asking Receiver to realise interest and make good the loss to the Estate — Remedy.

On an application to the Court to direct the Receiver to realise the rent due from the lessee and make good the loss sustained by the estate, it was held, that no order can be passed against the lessee and that the receiver cannot be asked to do anything till the passing of accounts by him. (1906) 33 Cal 52: 12 CWN 1023: 1 Ind Cas 470.

——O. 40, R. 3 — Receiver, suit by — Change of Receiver pending suit — New Receiver to be brought on record.

Where a receiver files a suit and ceases to be receiver pending suit and another is appointed in his place, the new receiver should be brought on record before the further prosecution of the suit. (1904) 28 M 157 (158) (DB).

6. Revision.

——O. 40, R. 3 — Order under — Not appealable but revisable.

An order under R. 3 is not appealable but in proper cases it can be revised. However, the order under R. 3 is not conclusive in an appeal from an order under R. 4. AIR (Vol 11) 1924 Sind 35: 76 Ind Cas 203: 18 SLR 335 (DB).

7. Security, necessity of.

——O. 40, R. 3 — Receiver — Security not furnished by Receiver — Suit dismissed on that ground.

The Subordinate Judge appointed the plff. as Receiver and authorised him to bring and defend suits in his own name. Plff. instituted a suit, which was dismissed on the ground that the Receiver was not competent to maintain the action, and that as he had not furnished security, his appointment was inoperative in law.

Held, that the propriety of an order or decree made in a cause in which the Court had jurisdiction could not be challenged collaterally. The general principle applied to an order for the appointment of a Receiver by a Court of competent jurisdiction. The order of the Subordinate Judge was not conditional but absolute in its terms and took immediate effect. An order which is erroneous in law is not necessarily an order made without jurisdiction. AIR (Vol 6) 1919 Cal 533: 46 Cal 70: 22 CWN 520: 27 CLJ 395: 43 Ind Cas 804 (DB).

——O. 40, R. 4.

1. **Scope and applicability.**
2. **"Court".**
3. **Receiver's rights and liabilities.**
4. **Negligence of Receiver.**
5. **Removal or death of receiver.**
6. **Appeal.**

1. Scope and applicability.

——O. 40, R. 4 — Procedure.

Where the accounts filed by the receiver have been passed unchallenged but afterwards it is found that there was a difference in the amount received by him the proper course to pursue is to hold an enquiry to find out whether the receiver has occasioned any loss by his wilful default or gross negligence and to pass an order under O. 40, R. 4, or, if desired to proceed against

the sureties under S. 145. AIR (Vol 14) 1927 Rang 334 : 6 Bur LJ 15 : 100 Ind Cas 996.

——O. 40, R. 4 — **Scope of enquiry.**

In an appeal from order under O. 40, R. 4 it is open to the Receiver to question the correctness of the amount said to be due from him. A Court should first direct the Receiver to submit his accounts for the period during which he was in possession of the properties; and then give the plaintiff an opportunity to surcharge; and falsify them and raise his objection to them. Thereafter hearing the objections, he should decide the exact amount which the Receiver is liable to pay. After that the Receiver should be directed to pay into Court the amount due within a certain time fixed by the Court. If he fails to pay the amount without proper reason within the time fixed, the Court can then pass an order directing the attachment of his property under R. 4. AIR (Vol 10) 1923 Mad 85 : 1922 MWN 741 : 16 MLW 754 : 43 MLJ 707 : 69 Ind Cas 203 (DB).

2. "Court".

——O. 40, R. 4 — **Word "Court" — Meaning of.**

The "Court" in R. 4, O. 40, as in all other rules under this Order, means the Court which made the appointment of the Receiver. AIR (Vol 30) 1943 Cal 244 : ILR (1943) 2 Cal 204 : 47 CWN 400 : 207 Ind Cas 609 (DB).

3. Receiver's rights and liabilities.

——O. 40, R. 4 — **Receiver — Advance of loan to estate without previous sanction of Court — Right to interest.**

If a Receiver chooses to advance money of his own to the estate without previously obtaining the permission of the Court, he can only look to the estate for indemnity but he does not lose his right to get interest on the amount advanced. AIR (Vol 23) 1936 Mad 321 : (1936) MWN 131 : 70 MLJ 282: 43 MLW 460: 163 Ind Cas 968.

——O. 40, R. 4 — **Liability — Test.**

If money paid to some one else by the receiver does not reach its proper destination the receiver will be compelled to make good the loss unless he can show that he has acted with perfect regularity and has used such a degree of prudence as would be expected from a private individual in relation to his own affairs. A receiver had in his hands Rs. 815 belonging to the estate when he had a serious heart attack. Feeling that he would die any moment owing to his heart attack, he at once took steps to ensure that Rs. 815 would not be mixed up with his private property by calling a cashier who in ordinary course received the money but was not bound to do so and in whom he had apparently every reason to trust. The cashier misappropriated the money.

Held, that the receiver was not guilty of either wilful default or gross negligence so as to make his property liable to attachment and sale under O. 40, R. 4. AIR (Vol 17) 1930 Pat 232 (DB).

——O. 40, R. 4 — **Liability to account.**

A Receiver is not liable to account for any period other than that for which he is appointed or for period covered by the account under consideration by the Court. AIR (Vol 7) 1920 Pat 703 : 5 Pat LJ 97 : (1920) Pat HCC 121 : 55 Ind Cas 15.

——O. 40, R. 4 — **Claim for salary — Suit — Semble.**

A Receiver who has given up possession of the estate must institute a separate suit for recovery of sums due to him in respect of salary allowance, etc. AIR (Vol 7) 1920 Pat 220 : 4 Pat LJ 336 : (1920) Pat HCC 35 : 54 Ind Cas 207 (DB).

4. Negligence of Receiver.

——O. 40, R. 4 — **Negligence of a Receiver — Investigation.**

The question of wilful default and gross negligence is not a matter directly of accounts. It is a liability which attaches to the Receiver outside the accounts and consequently the question as to whether or not the accounts of particular years were formerly passed by the Court, is immaterial for the purpose of determining whether the charges of default or negligence could be brought home against the Receiver. The investigation into the charge of wilful default or gross negligence, therefore, cannot possibly be confined to the accounts of those years only which have not yet been passed by the Court but may extend to the accounts of the previous years already passed by the Court. AIR (Vol 30) 1943 Cal 244 : 47 CWN 400 : ILR (1943) 2 Cal 204 : 207 Ind Cas 609 (DB).

——O. 40, R. 4 — **Negligence of a Receiver — Proceedings under O. 40, R. 4 — Wilful default and gross negligence — Previous accounts.**

Order 40, R. 4, clearly contemplates a proceeding of a summary character and not a suit. It is open to the Court to investigate questions of wilful default or gross negligence on the part of the Receiver in a summary proceeding under O. 40, R. 4. The filing of a separate suit is not essential. AIR (Vol 30) 1943 Cal 244 : 47 CWN 400 : ILR (1943) 2 Cal 204 : 207 Ind Cas 609 (DB).

5. Removal or death of receiver.

——O. 40, R. 4 — **Death of Receiver during pendency of proceedings — Proceedings, if can be continued — Court, if can proceed against Receiver's property in hands of his heirs.**

The heirs and legal representatives of a Receiver cannot be made liable personally for any loss that has been occasioned to the estate which was in possession of the Receiver by reason of any misconduct or negligence on his part. But there is nothing in law which prevents a proceeding against the property of the Receiver in the hands of his heirs. Hence if the Receiver dies pending the proceedings under O. 40, R. 4, the proceedings can be continued and if the order for attachment is at all made in these proceedings it can certainly be directed against the property of the Receiver in possession of his legal representatives. AIR (Vol 30) 1943 Cal 244 : ILR (1943) 2 Cal 204 : 47 CWN 400 : 207 Ind Cas 609 (DB).

——O. 40, R. 4 — **Charge against Receiver — Summary proceedings.**

Under O. 40, R. 4, even after its amendment, the Court is ordinarily bound to deal with all matters relating to accounts such as charges made for wilful default, in the proceeding itself, although the Court has power to refer the parties to a separate proceeding. AIR (Vol 23) 1936 Mad 321 : (1936) MWN 131 : 70 MLJ 282 : 43 MLW 460 : 163 Ind Cas 968.

——O. 40, R. 4 — **Removal — Disobeying directions.**

Receiver who has not complied with the Court's order directing him to keep accounts etc., ought to be removed from his office. AIR (Vol 12) 1925 Lah 309 : 7 LLJ 6 : 86 Ind Cas 246.

——O. 40, R. 4 — **Misappropriation by deceased — Receiver — Legal representatives — Execution — C. P. C., S. 50, Cl. 2 and 145.**

The proper procedure to bring to sale under O. 40, R. 4 of the C. P. C. the properties of a deceased receiver in the hands of his legal representative is by way of execution and not by a separate suit. "Property" in this and in other clauses of the section is synonymous with estate and covers income from the property. The clause is a residuary provision intended to deal

with all cases of loss to the estate not specially provided for and therefore applies to the case of misappropriation also. AIR (Vol 3) 1916 Mad 521 : 18 MLT 127 : 39 Mad 584 : 30 Ind Cas 383 (DB).

6. Appeal.

——O. 40, R. 4 — Order refusing to reopen accounts filed by Receiver and already passed.

An order refusing to reopen the accounts filed by the Receiver during previous years and already passed by the Court does not come under O. 40, R. 4 and is not, therefore, appealable, the only remedy of the aggrieved party being by way of revision. AIR (Vol 30) 1943 Cal 244 : 47 CWN 400 : ILR (1943) 2 Cal 204 : 207 Ind Cas 609 (DB).

——O. 40, R. 4 — Court exercising discretion against taking action — Appeal therefrom stands dismissed.

Under O. 40, R. 4 a judicial discretion is given to the Court to take action under that section or not against a Receiver. An appeal is not maintainable against the exercise of the Court's discretion in not taking action. AIR (Vol 21) 1934 All 907 : 4 AWR (HC) 288 : 150 Ind Cas 750 (1) (DB).

——O. 40, R. 4; O. 43, R. 1(s) — Order directing Receiver to pay into Court loss caused by negligence — Appeal.

An order that a Receiver appointed by the Court should pay into Court a certain sum of money on account of the loss which he had caused to the estate and that if he failed to do so, the plaintiff should realise the amount from the property given by the Receiver as security for the performance of his duties is an order falling within the purview of O. 40, R. 4, and is appealable.

The fact that the said rule provides for the enforcement of such an order by attachment implies that that is the only way it is to be enforced and that arrest and imprisonment are not to be the methods of enforcement.

(The necessity of amending O. 40, R. 4, Civil P. C., in order to make clear exactly what orders it covers and what orders are, therefore, subject to appeal under R. 1(s) of O. 43 pointed out.) AIR (Vol 18) 1931 Mad 760 : 34 MLW 533 : (1931) MWN 830 : 62 MLJ 199 : 55 Mad 120 : 135 Ind Cas 1 (DB).

——O. 40, R. 4 — Order for damages — No appeal.

An order directing a Receiver to pay a sum of money by way of damages is not appealable as it does not come within the operative part of R. 4. AIR (Vol 12) 1925 Rang 266 : 4 Bur LJ 91 : 3 Rang 318 : 92 Ind Cas 631 (DB).

——O. 40, R. 4 — An appeal from an order on an application to the Court below, to call upon a discharged Receiver in a suit to render accounts and refund losses due to his neglect during the time he was in the office of a Receiver is not competent. AIR (V 9) 1922 Lah 224 : 70 Ind Cas 293 (DB).

——O. 40, R. 4 — Passing of accounts — Appealable.

Where a Court passes an order passing the accounts submitted by the Receiver, the order is appealable as such order comes with O. 40, R. 4. AIR (Vol 8) 1921 Bom 427 : 45 Bom 99 : 59 Ind Cas 421 (DB).

——O. 40, R. 4 and O. 43, R. 1 (s) — Order declaring Receiver liable for money — Appeal.

An order declaring a Receiver liable in respect of a sum of money is not appealable unless it is accompanied by order of attachment under O. 40, R. 4, C. P. C. When the taking of the accounts was completed, the Subordinate Judge found that the Receiver was liable to the estate for a certain sum of money. Held, that no appeal lay from that decision, and the expression of opinion by the former Division Bench was not binding. AIR (Vol 7) 1920 Pat 220 : 4 Pat LJ 636 : (1920) Pat HCC 35 : 54 Ind Cas 207 (DB).

——O. 40, R. 5.

——O. 40, R. 5 — A temporary injunction under the provisions of R. 1, O. 39, Civil P. C., is not a stay order issued by a Court competent to stay execution proceedings under any provisions of the Code authorising such an order. Such an order can be passed, for example, by the executing Court under O. 21, Rr. 29 and 83, or by Appellate Court under O. 40, R. 5 or perhaps by a High Court in its inherent powers. AIR (Vol 25) 1938 Lah 220 : 40 PLR 518 : 179 Ind Cas 123.

——O. 41.

See also (1) Appeal.
(2) Civil P. C., Ss. 96 to 99, 107 & 108.

——O. 41 — Applicability to appeals under U. P. Tenancy Act. See (1950) ILR (1950) All 275.

——O. 41 — Applicability — District Judge hearing appeal from order of Rent Controller — If Court of appeal — Jurisdiction of. AIR (V 37) 1950 Cal 96.

——O. 41 — Courts must observe strictly the provisions of O. 41 in remanding cases.

Provisions of O. 41 must be strictly adhered to by the Courts of Appeal not failing to give indication of the provision of the Code or the rule under which they are passing the order and giving clear direction to the trial Court as to what it has to do. (1945) 1945 AWR (Rev) 263 (DB).

——O. 41 — Order 41, which provides the procedure relating to appeals does not make any distinction between appeals arising from execution proceedings and those preferred against decrees. AIR (V 25) 1938 Nag 502 : (1938) NLJ 312 : ILR (1939) Nag 119 : 178 Ind Cas 568 (DB).

——O. 41 — It is not the function of a Court of Appeal to give effect to the right of the Government conferred by O. 33, R. 12, Civil P. C. It must, on admission of the appeal, dispose it of in the manner laid down by O. 41, Civil P. C. AIR (V 24) 1937 All 280 : (1937) ALJ 171 : 1937 AWR (HC) 113 : ILR (1937) All 484 : 168 Ind Cas 676.

——O. 41 — The provisions of O. 41, apply to the proceedings in appeal before any Revenue Court. AIR (V 22) 1935 Nag 125 (1) : 36 Cr LJ 765 : 155 Ind Cas 557.

——O. 41 — Revenue Courts are Courts of Civil Judicature in matters, arising under the Land Revenue Act and the provisions of O. 41 apply to proceedings in appeal before the Revenue Court. AIR (V 22) 1935 Nag 125 (1) : 36 Cr LJ 765 : 155 Ind Cas 557.

——O. 41 — Scope.

Duval, J. — An appeal against a complaint under S. 476, Cr. P. Code, must be treated as a miscellaneous appeal and regulated by O. 41, C. P. Code, and not by Ss. 422 - 424, Cr. P. Code. AIR (V 14) 1927 Cal 284 : 100 Ind Cas 351 : 31 CWN 281 : 54 Cal 355 (DB).

——O. 41 — Original Side appeals.

The provisions of O. 41, apply to Original Side appeals under the Letter Patent. AIR (V 13) 1926 Mad 316 : 50 MLJ 190 : 93 Ind Cas 293 : 49 Mad 291 : 24 MLW 571 (FB).

——O. 41 — Order 41 has no application to appeals from the original side of a High Court. AIR (V 12) 1925 Mad 725 : 48 MLJ 384 : 88 Ind Cas 443 : 48 Mad 631 : 21 MLW 672 : 1925 MWN 190 (DB).

——O. 41 — Appeal — Relief granted which was not asked for by the plaintiffs — Court-fee.

The plaintiffs in a suit for sale on a mortgage were granted by the first Court a relief for which they had not asked and which could not properly have been granted to them without an amendment of the plaint. On appeal by one of the defendants the appellant was made to pay an additional court-fee corresponding to the relief granted to the plaintiffs. The plaintiffs-respondents were also required to make good the deficiency in the court-fee paid in the first Court. This the plaintiffs declined to do unless the decree was confirmed in its entirety.

Held, that the plaintiffs were not entitled to retain the full benefit of the first Court's decree nor liable to pay the additional court-fee; and the appellant might on application to the proper authority obtain a refund of the excess court-fee which he had been erroneously compelled to pay. (1908) AWN 31 : 5 ALJ 18 : 3 MLT 165 : 30 A 103 (105) (DB).

——O. 41, R. 1.

1. Amendment of decree.
   See also Note 5.
2. Applicability and scope.
3. Competency of.
   See also Note 13.
4. Connected appeals.
   See also Note 6.
5. Copy of decree.
6. Copy of judgment.
7. Copy of order.
8. Court-fee.
   See also Note 10.

8-A. Cross suits and appeals.

9. Evidence, appreciation of.
   See also Civil P. C., S. 107.
10. Limitation.
11. Memo of appeal.
12. Onus.
13. Parties.
14. Powers and duties of Court.
15. Proper presentation.
   See also Notes 16 and 17.
16. Time for presentation.
   See also Note 15.
17. Vakalatnama.
   See also Note 15.

1. Amendment of decree.
See also Note 5.

——O. 41, R. 1 — Order amending decree — Decree not amended — Order amending decree without original decree, is not sufficient substitute for amended decree.

The appellant is not entitled to attach to his memorandum of appeal a mere extract of so much of the decree as he challenges. The absence of any complete amendment to the original decree is not a sufficient warrant for treating the order directing the amendment as itself a sufficient substitute for the amended decree without attaching to that order a copy of the original decree. AIR (Vol 30) 1943 Mad 185 : 55 MLW 668: (1942) 2 MLJ 563: 1942 MWN 824: ILR (1943) Mad 297: 207 Ind Cas 169 (DB).

——O. 41, R. 1 — Appeal lies against amended decrees though not from the order amending the decree. AIR (Vol 25) 1938 Lah 331: 40 PLR 100: 181 Ind Cas 28.

——O. 41, R. 1 — Amendment of decree or correction of mistake apart from review of judgment — Whether supersedes original decree.

Quaere.— Where an application for review of judgment is granted and the decree is consequently amended, no appeal is competent against the original decree as that decree must be deemed to have been superseded and, therefore, non-existent. But it is a question whether an amendment in the decree, apart from the review of the judgment, to however slight an extent, and even a correction of a mistake under S. 152 in the decree have the affect of superseding the original decree so as to necessitate the dismissal of an appeal, which was presented with a copy of the original decree. AIR (Vol 25) 1938 Lah 76: 178 Ind Cas 886 (DB).

——O. 41, R. 1 — Absence of copy — Not fatal.

Where, after the appeal is filed, a few words are added to a decree appealed from by the Court passing the decree in order to make it clear, the addition does not render the appeal incompetent, in the absence of copy of the decree after the addition. 97 Ind Cas 1003: 44 CLJ 121: AIR (Vol 13) 1926 Cal 1166 (DB).

——O. 41, R. 1 — Decree — Amendment — Pending appeal — Procedure.

If a decree is amended after an appeal had been preferred against it, and an application to the appellate Court to attach to the memorandum of appeal, a copy of the amended decree, is granted, then from that moment the pending appeal becomes an appeal against the amended decree. AIR (Vol 5) 1918 Cal 530: 43 Ind Cas 772 (DB).

——O. 41, R. 1 — Presentation of appeal — Memorandum of appeal not accompanied by copy of decree.

A memorandum of appeal not accompanied by a copy of the decree appealed from is not a valid memorandum and the appeal must be dismissed on that ground; an appeal from an amended decree must be accompanied by a copy of that decree and not the original decree. (1911) 11 Ind Cas 8 (Cal).

2. Applicability and scope.

——O. 41, R. 1 — Order 41, R. 1 is in fact a combination of the provisions of S. 26 and O. 3, R. 1. AIR (Vol 28) 1941 Oudh 169: 1940 OWN (CC) 1253: 1941 AWR (CC) 10: 191 Ind Cas 821 (DB).

3. Competency of.
See also Note 13.

——O. 41, R. 1 — Restitution sought against alleged surety also — Executing Court deciding the alleged surety not surety — No appeal — Principal judgment-debtor, if can appeal.

P obtained a decree against M. The amount of decree was paid by M. On appeal the decree in favour of P was set aside by the High Court and M applied to the executing Court praying that P should be ordered to repay the amount received by him under the decree. It was also stated that one B had stood surety for P and that the execution should issue against him also. B denied having stood surety for P. The executing Court held that he did not stand surety and dismissed the application as against him. M did not appeal to the High Court against this decision but P went in appeal on the ground that the executing Court should have held that B was a surety:

Held, that no appeal was competent on behalf of P, the judgment-debtor, as against B, the surety. By getting a decision against B so far as the question of suretyship was concerned, P could not compel M to take out execution against him. AIR (Vol 26) 1939 Lah 137.

——O. 41, R. 1 — Wrong decision on jurisdiction.

A wrong decision, even though it relates to jurisdiction, does not give a right of appeal where otherwise no appeal lies. AIR (Vol 23) 1936 Pat 119: 2 BR 307: 161 Ind Cas 26.

——O. 41, R. 1 and O. 42, R. 1 — Right to appeal — Estoppel — Adoption of and enjoyment under, an order bars appeal against the order.

An unconditional adoption of, coupled with enjoyment of the benefit under, an order directing payment of money, bars an appeal against the order, which after such adoption and enjoyment cannot be said to be valid for one purpose and invalid for another. AIR (Vol 4) 1917 Cal 546: 21 CWN 232: 37 Ind Cas 804 (DB).

4. Connected appeals.

See also Note 6.

——O. 41, R. 1 — Consolidation of appeals.

Court has no inherent jurisdiction to consolidate appeals in cases disposed of by single judgment of the lower Court so as to enable the appellant to pay court-fee on the value of the consolidated appeals and file one vakalat. 109 Ind Cas 651: AIR 1928 Mad 468, Overruled. 123 Ind Cas 203: 53 Mad 248: AIR (Vol 17) 1930 Mad 376: 58 MLJ 510 (FB).

——O. 41, R. 1 — Two decrees in one suit — One appeal enough.

The first Court passed a decree in favour of plaintiff A against defendants B, C and D. Plaintiff A filed an appeal therefrom and so the defendants B, C and D. The lower appellate Court delivered separate judgments in the two appeals and drew up two separate decrees, the net result being that the suit was dismissed. The plaintiff A came up to the High Court in second appeal desiring that both the decrees of the lower appellate Court should be set aside. The plaintiff filed only a single second appeal.

Held, that it was not necessary for the plaintiff to file two separate second appeals. (Case referred.) 12 NLJ 101: 25 NLR 183: AIR (Vol 16) 1929 Nag 229 (FB).

——O. 41, R. 1 — Cross appeal — Decree in cross appeal is not necessary.

For a proper presentation of an appeal, it is not necessary to file a copy of decree in cross-appeal in the lower appellate Court. 95 Ind Cas 256: 8 LLJ 347: 27 PLR 745: AIR (Vol 13) 1926 Lah 540.

——O. 41, R. 1 — Decree in cross-appeal unnecessary.

Where a party appeals from a decree passed against him, and files the decree made in his appeal, the appeal is not defective because of the failure to attach a copy of the decree in the cross appeal. AIR 1922 Lah 390 and 1 Lah 83, Not Foll. 94 Ind Cas 959: 7 Lah 447: 8 LLJ 521: 27 PLR 660: AIR (Vol 13) 1926 Lah 453 (DB).

——O. 41, R. 1 — Separate cases — Two cases decided by one judgment — Separate appeals.

If two separate cases are finally decided in one judgment, two separate appeals should be filed. AIR (Vol 8) 1921 Lah 346: 1 Lah 368: 56 Ind Cas 69 (DB).

——O. 41, R. 1 — Appeal — Presentation — Cross-appeals decided by lower Court by one judgment — Omission to file a copy of rival appeal, effect of.

The lower appellate Court decided by one judgment the cross-appeals of plaintiff and defendant and dismissed the plaintiff's suit, the decree embodying the result of defendant's appeal. Plaintiff preferred an appeal wherein the decree in defendant's appeal in the lower Court was not filed. It was held that this failure to file copy of other decree was bona fide mistake and did not debar plaintiff from attacking the decision of the lower Court but the order relating to costs in the decree of which the copy was not filed was binding on the plaintiff. AIR (Vol 3) 1916 Lah 166 : 85 PWR 1916: 84 PR 1916: 33 Ind Cas 742 (DB).

——O. 41, R. 1 — Separate orders — Joint appeal in respect of two distinct orders — Legality.

If there are two distinct orders in two separate execution proceedings, there cannot be a joint appeal in respect of both. AIR (Vol 2) 1915 Cal 42 : 24 Ind Cas 438 (DB).

——O. 41, R. 1 — Separate orders — Single appeal — One judgment in separate order — No order of consolidation.

One appeal from three distinct orders recorded in three distinct execution cases which were decided by one judgment, there being no order consolidating the cases, is incompetent and irregular. (1911) 15 CWN 994: 10 Ind Cas 415 (DB).

——O. 41, R. 1 — Appeal — Two decrees and one Judgment — Necessity for separate appeals.

If there are two suits and only one judgment is passed but two decrees, the party who suffers should prefer two appeals; for otherwise the decree not appealed against will be barred by res judicata. 29 Mad 333; 6 Cal 233; 33 Cal 1101; 29 All 730, Diss. From. (1908) 1908 AWN 211 (211, 219).

——O. 41, R. 1 — Appeals, filing of — Two appeals to lower Court and one decree — One appeal to High Court — Decree, form of — High Court Rules (Madras) Rule 105.

Where from a decree in a suit there have been two appeals to the lower Court, but only one decree was passed, it is enough if one appeal is preferred to the second appellate court; and even if two appeals are preferred, the proper course will be to pass only a single decree. (1906) 16 MLJ 411 (411, 412) (DB).

——O. 41, R. 1 — Appeal, consolidation of — Land acquisition — References — Contiguous land — Same proprietor — Different tenants.

Semble — Separate references under Land Acquisition Act in respect of contiguous lands owned by the same proprietor, though held by different tenants was ordered to be consolidated on appeal, the tenants having accepted the award and the appeals raising the same question between the same parties. (1902) 29 Cal 140 (148) (DB).

——O. 41, R. 1 — Consolidation of appeals — Previous order on the matter — Construction and effect of.

Where on an application to consolidate appeals or to try one of them as a test case, the rest being stayed, the court, directed one case to be tried as a test case and stayed the other appeals and the consideration of the sufficiency of stamp duty paid therein, the appellant against applied after the disposal of the test case for a consolidation of the other appeals.

Held, that the previous order did not refuse consolidation, but only directed the trial of the test case, deferring consideration of the rest, and that it did not preclude a fresh application for consolidation of the remaining appeals. (1902) 29 Cal 140 (146) (DB).

5. Copy of decree.

(a) **General.**

(b) **Land Acquisition proceedings.**

(a) General.

——O. 41, R. 1 and O. 42, R. 1 — Scope — Compliance — Appeal from decree dismissing suit — Judgment allowing — No decree prepared but memo. of costs signed by Court — Further appeal filing such memo. — Maintainability — Proper decree, what is. AIR (Vol 36) 1949 East Punj 400.

——**O. 41, R. 1 — Copy of decree is essential — Copy of judgment, when can be dispensed with.**

Order 41, R. 1, is mandatory. A copy of the decree appealed from has to be filed in every case, and so also a copy of the judgment, unless the Appellate Court chooses to dispense with it. An omission to attach a copy of the decree is fatal; even as regards the judgment, the matter is not optional with the litigant. It is for the Court to decide whether the judgment may be dispensed with or not, and consequently, if the Court does not decide to dispense with it and a copy is not filed, the appeal is incompetent. AIR (Vol 25) 1938 Nag 233: 176 Ind Cas 33.

——**O. 41, R. 1 — Order in contentious proceedings granting probate or Letters of Administration — Appeal.**

An appeal filed against an order passed in a contentious proceeding is an appeal filed under O. 41, R. 1, and not under S. 104. Accordingly an appeal against an order in a contentious proceeding granting probate or Letters of Administration with the will annexed is incompetent without the production of a copy of a formal decree prepared in terms of such order. Such a proceeding should be registered as a suit and the form in which a decree should be prepared should be that adopted by the Calcutta High Court. AIR (Vol 25) 1938 Sind 36 : 173 Ind Cas 284 (FB).

——O. 41, R. 1 — The provision of O. 41, R. 1, is imperative and states that a memorandum of appeal shall be accompanied by a copy of the decree appealed against. It is a condition precedent to there being a valid memorandum of appeal that it should be accompanied by a copy of the decree appealed from. AIR (Vol 24) 1937 Oudh 513: 1937 OWN (CC) 978: 13 Luck 597: 171 Ind Cas 286 (DB).

——**O. 41, R. 1, S. 151 — Partition suit — Decree making no provision for some members — Appeal on question of maintenance only.**

Where a decree is divisible in the sense that it contains a part with regard to allotments to different parties in a partition suit and makes no provisions for maintenance for some of the members of the family, that portion of the decree which relates to allotment need not be filed along with the memorandum of appeal if the appeal is directed to the question of maintenance only. In any case, the Court can exercise its inherent powers under S. 151, and admit the appeal as being in proper form. AIR (Vol 23) 1936 Cal 751: 40 CWN 1298: ILR (1937) 1 Cal 573: 170 Ind Cas 685 (DB).

——**O. 41, R. 1, S. 102 — Both parties going in appeal — Plaintiff's appeal dismissed — Plaintiff going in second appeal — Memorandum accompanied by decree of the other party.**

Plaintiff brought a suit for the recovery of a certain sum being the amount of damages claimed for the breach of a contract and the amount of earnest money which the plaintiff had paid to the defendant and of which the plaintiff wanted a refund. The trial Court dismissed the plaintiff's suit for damages and decreed his claim for refund of earnest. Both parties filed appeals. The lower Appellate Court dismissed the plaintiff's appeal and allowed the defendant's appeal with the result that the plaintiff's suit was dismissed in toto. Two separate decrees were drawn up. The plaintiff came up in second appeal and along with his memorandum of appeal he filed the decree of the lower Appellate Court where the defendant was an appellant and not the decree in appeal by him which was really appealed from:

Held, that there was no proper appeal inasmuch as under O. 41, R. 1, the memo of appeal should have been accompanied by a copy of decree appealed from, that is the decree, dismissing his appeal before the lower Court.

As a rule, the High Court is not in favour of entertaining revisions from the orders of the lower Appellate Courts in cases which are covered by S. 102. These orders are intended by the Legislature to be final and to allow an appeal against such orders amounts to circumventing the policy of the Legislature. AIR (Vol 23) 1936 Lah 293: 165 Ind Cas 137.

——**O. 41, R. 1, O. 44, R. 1 — Appeal in forma pauperis — Application for leave without copy of judgment and decree — Whether valid presentation.**

The proviso to O. 44, R. 1, makes it incumbent upon the applicant to show to the Court that prima facie the decree appealed from was contrary to law, and this can only be done by means of reference to the decree and judgment on which it is founded. It can hardly be intended that it is for the Court to call for copies of the judgment and decree when it has to consider an application made to it for leave to appeal as a pauper. Though in Order 44, Rule 1, there is no reference to the applications being subject to the provisions of Order 41, Rule 1, such reference is redundant in the light of the proviso. Therefore, there can be no valid application for leave to appeal before the Court without the presentation of the copies of decree and judgment. AIR (Vol 23) 1936 Mad 600: 44 MLW 152: (1936) MWN 804: 165 Ind Cas 471.

——O. 41, R. 1 — Where the trial Court, intending to draw up a decree in the prescribed form, drew up a document which did not strictly comply with the requirements of O. 21, R. 6, Civil P. C., and which could not be called a proper and a correct decree, and filed it along with the memo of appeal, and proper decree was filed only after the period of limitation:

Held, that the appellant could not be held responsible because the decree was not properly prepared and the appeal should be deemed to have been properly presented. AIR (Vol 20) 1933 Lah 938 : 147 Ind Cas 13 (DB).

——**O. 41, R. 1 — Second appeal — Filing copy of translation of original decree with memorandum of appeal.**

Where the original decree is in English and the translation of the same is not signed by the Judge but by the Translator alone, the filing of a certified copy of the translation is not a sufficient compliance with the provisions of O. 41, R. 1, Civil P. C. (1931) 132 Ind Cas 3 : 32 PLR 127.

——**O. 41, R. 1 — Powers of Court.**

The appellate Court has no power to dispense with the production of the copy of the decree. AIR (Vol 17) 1930 Rang 182.

——O. 41, R. 1 — In an appeal against an order returning a plaint the plaintiff filed along with his memorandum of appeal the plaint which was returned to him with the endorsement made thereon by the Judge under O. 7, R. 10, Civil P. C., and failed to file the certified copy of the separate order which was made prior to the endorsement. He was under the belief that the production of the endorsement made in the plaint was a sufficient compliance within the provisions of O. 43, R. 2 read with O. 41, R. 1.

Held, that there was a technical non-compliance with the provisions of O. 43, R. 2, Civil P. C., but the irregularity might well be condoned under S. 5, Limitation Act. AIR (Vol 17) 1930 Sind 252 : 25 Sind LR 63: 130 Ind Cas 554.

——O. 41, R. 1 — It is necessary that every second appeal preferred shall be accompanied by a copy of the decree of the lower appellate Court with the memorandum of second appeal. AIR (Vol 14) 1927 Lah 912: 100 Ind Cas 810.

——O. 41 R. 1 — Appeal invalid.

Where two different appeals were heard together by the first appellate Court and it decided both of them by one judgment, the principal judgment being written in No. 31, and in the Appeal No. 45 a reference was made to the judgment in the other appeal, and where the appellant could, if he had liked, have filed two appeals: one against the judgment and decree in Appeal No. 45 and the other against the judgment and decree in Appeal No. 31, but chose to file only one appeal and that too against the judgment and decree in Appeal No. 45, but instead of filing the copies of judgment and decree in that appeal he filed copies of Appeal No. 31.

Held, that in order to present a valid appeal it is necessary that an appellant must file a copy of the judgment and decree against which he appeals and that therefore in the absence of filing a copy of the judgment and decree in Appeal No. 45, the appeal is invalid. (1926) 96 Ind Cas 336: 13 OLJ 609.

——O. 41, R. 1 — An appeal unaccompanied by the copy of the decree is liable to be dismissed. AIR (Vol 12) 1925 Nag 52: 81 Ind Cas 1001.

——O. 41, R. 1 — Decree not drawn — No decree in trial Court — Appeal — Decision — Nullity.

Plaintiff's suit was dismissed by the trial Court but no decree was prepared. Plaintiff appealed to the District Judge who accepted the appeal and granted the plaintiff a decree. Held, that the proper course for the District Judge to have adopted was to grant an adjournment to enable the plaintiff to get a decree prepared and therefore the decree granted by him was a nullity. AIR (Vol 11) 1924 Lah 352: 69 Ind Cas 558.

——O. 41, R. 1 — Must be filed with memo of appeal.

O. 41, R. 1, is imperative and states that a memorandum of appeal shall be accompanied by a copy of the decree appealed against. It is a condition precedent to there being a valid memorandum of appeal that it should be accompanied by a copy of the decree appealed from. AIR (Vol 10) 1923 Mad 482: 44 MLJ 279: 72 Ind Cas 308: 17 MLW 352: 32 MLT 232: 1923 MWN 164.

——O. 41, R. 1 — Appeal without decree — Filing after time — Appeal barred.

An appeal was filed without a copy of the decree as the same was not drawn up on that date. The decree was subsequently drawn up but the appellant did not apply within 30 days thereafter and applied for it and filed it long thereafter. Held, that the appeal presented without a copy of the decree is not a proper presentation and that the fact of the decree being applied for and filed after the limitation period would not save the appeal from being barred. AIR (Vol 9) 1922 Lah 191: 4 Lah LJ 193.

——O. 41, R. 1 — Essential — Subsequent finding cannot cure limitation.

R. 1 of O. 41 makes it obligatory on the appellant to file a copy of the decree with the memorandum. If such copy is not filed, then the appeal cannot be accepted by the Court. Where the decree was filed subsequently but after the expiry of Limitation for filing the appeal.

Held, that that the Court cannot overlook this defect simply because the appeal was as a matter of fact, admitted and argued. AIR (Vol 8) 1921 UB 15: 65 Ind Cas 68: 4 UBR 75.

——O. 41, R. 1 — Appeal — Presentation of appeals — Vernacular copy of decree.

An appeal presented with a vernacular translation of the decree unaccompanied by an English copy is not validly presented. Where the defect was not cured within a reasonable time, the delay cannot be excused. (1920) 2 Lah LJ 728.

——O. 41, R. 1 — Presentation of appeal — Decree not framed by the lower Court.

Order 41, R. 1 of the C. P. C. requiring a copy of the decree along with the appeal does not apply where the original Court has omitted to frame a decree. The proper course for the appellate Court in such a case is to grant an adjournment until a copy of the decree is forthcoming. AIR (Vol 6) 1919 Lah 125 : 19 PR 1919 : 49 Ind Cas 673.

——O. 41, R. 1 — Presentation of appeal — Copy of decree not filed.

A petition of appeal filed without a copy of the decree appealed against, is not valid as an appeal. AIR (V 7) 1920 Pat 280 : 54 Ind Cas 36. See also: AIR (V 6) 1919 Lah 42 : 53 Ind Cas 137 (Lah).

——O. 41, R. 1 — Miscellaneous appeal — Copy of decree cannot be dispensed with.

Where there is a judgment and decree on a question decided under S. 47 C. P. C. a copy of decree must be filed. AIR (Vol 5) 1918 All 394: 40 All 12: 15 ALJ 801: 42 Ind Cas 838 (DB).

——O. 41, R. 1 — Presentation of appeal — Decree not containing grounds of appeal to lower appellate Court.

A second appeal filed with a copy of a decree of the lower appellate court not containing the grounds of appeal to that court, is validity presented under O. 41, R. 1 and O. 42, R. 1 of the C. P. C. AIR (Vol 5) 1918 Lah 79: 80 PR 1918: 181 PWR 1918: 48 Ind Cas 102.

——O. 41, R. 1 — Presentation of appeal — Copy of decree.

An appeal is preferred only when a copy of the decree appealed against, is filed. AIR (Vol 3) 1916 Cal 666: 42 Cal 433: 30 Ind Cas 165 (DB).

——O. 41, R. 1 — Presentation of appeal — Memo. of appeal unaccompanied by copy of decree — Invalid presentation.

A Memorandum of appeal unless accompanied by a copy of the decree appealed from, is ineffective and useless. AIR (Vol 2) 1915 Cal 693: 27 Ind Cas 447 (DB).

——O. 41, R. 1 (1) — Decree — Copy of, to be filed.

A copy of the decree appealed against is absolutely necessary for an appeal. The Court may in its discretion dispense with a copy of the judgment. (1911) 7 NLR 67: 10 Ind Cas 866.

(b) Land acquisition proceedings.

——O. 41, R. 1 — Land acquisition — Appeal — Copy of award necessary — If filed out of time, it should be excused.

In an appeal from an award of District Judge in a land acquisition case the appellant failed to file a copy of the award with the appeal. The appeal was filed in 1922. The decision of Lahore High Court in AIR 1925 Lah 438, under which the amendment to Land Acquisition Act in 1921 was interpreted, making the filing of copy of award with appeal obligatory, was decided in 1925. The appellant's counsel applied during the hearing of the appeal in 1927 for an extension of time under S. 5 Limitation Act and put in a complete copy of the award together an affidavit and statement of reasons asking for indulgence.

Held, that the application should be allowed and that the appeal should be heard. AIR (Vol 15) 1928 Lah 263: 112 Ind Cas 797 (DB).

——O. 41, R. 1 — Decree cannot be dispensed with.

It is within the powers of the appellate Court to dispense with a copy of the judgment, but not with a copy of the decree.

Where several references under the Land Acquisition Act are disposed of in an award in one reference and reference is made to that award in other references and the memorandum of appeal is not accompanied with the copy of the principal award.

Held, that the failure is fatal to the appeal. AIR (Vol 14) 1927 Lah 49 : 7 Lah 539 : 8 LLJ 352 : 27 P LR 698: 97 Ind Cas 187.

——O. 41, R. 1 — Where a number of separate references under the Land Acquisition Act are heard together and disposed of by one judgment, and where distinct appeals are filed from this judgment, it is absolutely essential that a copy of the award should accompany each memorandum of appeal, and the Appellate Court has no power to dispense with such a copy. AIR (Vol 12) 1925 Lah 438: 94 Ind Cas 145: 6 Lah 218: 26 PLR 356 (DB).

6. Copy of judgment.

(a) General.

(b) When can be dispensed with.

(a) General.

——O. 41, R. 1 — Preliminary judgment.

Where part of a judgment previously delivered is not filed along with the memorandum of appeal but the final judgment is filed, the appeal is properly presented. AIR (Vol 19) 1932 Lah 136: 33 PLR 100: 134 Ind Cas 300 (DB).

——O. 41, R. 1 — Copy of preliminary judgment.

Where there was a preliminary and a final judgment in a suit for pre-emption, held, that it was sufficient to file the final judgment along with the memorandum of appeal. AIR (Vol 18) 1931 Lah 202: 12 Lah LJ 74.

——O. 41, R. 1 — Only final judgment necessary.

The word "judgment" in O. 41, R. 1 means the statement of the final adjudication of the rights of the parties in the action, and does not include orders whereby some preliminary issue, point or plea was determined or some step taken or other question settled in the progress of the cause. Under O. 41, R. 1, therefore, a memo of appeal should be accompanied by a copy of the decree and (unless the appellate Court dispenses therewith) of the final judgment only. It is not necessary for the appellant to file with it a copy of an order disposing of a preliminary issue in the case: 97 Ind Cas 780 : AIR 1926 Lah 638; 104 Ind Cas 545 : AIR 1927 Lah 449; 109 Ind Cas 397 : AIR 1927 Lah 451; 109 Ind Cas 399 : AIR 1928 Lah 46 and 105 Ind Cas 658: AIR 1928 Lah 60 Overruled. AIR (Vol 16) 1929 Lah 481: 115 Ind Cas 753: 30 PLR 373: 10 Lah 587 (FB).

——O. 41, R. 1 — Where an objection was raised that the appeal was not properly instituted because no copy of the judgment of the Trial Court on the preliminary issue was produced along with the memorandum of appeal, held, that the copy of the trial Court's order on the preliminary issue was not essential and that the presentation of the appeal was not vitiated on that ground. (1929) 30 Pun LR 236 (DB).

——O. 41, R. 1 — When necessary and when not.

Where the judgment of the preliminary issue is not referred to at all in the final judgment, the latter cannot be held to be the complete judgment in the case, and, therefore, copies of both are necessary. In such a case, the judgment is really embodied in two documents. So also where there is a reference in the final judgment to the judgment on the preliminary issues, so that the intention of the Court may be by that reference to make the previous judgment a part of the final judgment, the judgment is embodied in two separate documents & the appeal is not properly presented unless both the documents are filed along with the copy of the decree. Where, however, the Court incorporates the judgment on the preliminary issues in the judgment finally delivered, the judgment finally delivered is the whole judgment in the case and the appeal will be properly presented even though the first judgment is not filed with it. The question whether the grounds of appeal did or did not attack the preliminary judgment, would be a good ground for dispensing with the preliminary judgment, or for extending time for the filing of that judgment or the contrary, but it has nothing to do with the question whether the appeal when filed was properly presented or not. AIR (Vol 15) 1928 Lah 46: 109 Ind Cas 399: 9 LLJ 502 (DB).

——O. 41, R. 1 — Copies of the judgments of the lower appellate Court must be filed with the memorandum of second appeal in the Punjab High Court unless they have been specifically dispensed with and the mere fact that the copies are already on the record of another appeal filed by the respondent is no ground for not complying with the rule. (1928) 111 Ind Cas 384: 29 PLR 260 (DB).

——O. 41, R. 1 — Copy of judgment of trial Court.

A memorandum of second appeal to the Lahore High Court must be accompanied by a copy of judgment of the Court of first instance, and, if the latter is not presented till after the period of limitation has expired, the appeal should ordinarily be rejected as barred by limitation. (1928) 109 Ind Cas 727: 10 LLJ 288.

——O. 41, R. 1 — No proper presentation without it — Presence in some other case not enough.

An appeal is not properly instituted which is not accompanied by copies of the judgments of the Courts as required by O. 41, R. 1, and the High Court rules. The mere fact that such copies are already on the record of some other appeal filed by the opposite party in the same Court is not a good reason for dispensing with such copies. AIR (Vol 14) 1927 Lah 721: 104 Ind Cas 290.

——O. 41, R. 1 — Not attacked in appeal — Copy need not be filed.

Where a copy of the final judgment of the trial Court has been filed and, in the grounds of appeal before the High Court, no objection is taken by the appellant to any of the points decided by the trial Court by the preliminary judgment, it is not necessary for the appellants to file a copy of the preliminary judgment. AIR (Vol 14) 1927 Lah 640: 103 Ind Cas 73 (DB).

——O. 41, R. 1 — Presence in connected case not enough.

Every memo of appeal should be accompanied by a copy of the judgment of the trial Court. A note to the effect that the copy of the trial Court's judgment is already filed in the High Court, though in another case, but between the same parties arising practically out of the same proceedings, is not sufficient compliance with the rule. AIR (Vol 14) 1927 Lah 423: 28 PLR 272: 101 Ind Cas 776.

——O. 41, R. 1 — Copies unavailable — Unattested copy enough.

It is sufficient compliance with law if second appeal is presented with unattested copy of first Court's judgment, when an attested copy was applied for, but the report was that the record could not be traced. AIR (Vol 13) 1926 Lah 404: 94 Ind Cas 2.

——O. 41, R. 1 — Same judgment — Different appellants — Copies — Necessary with each.

Where there are several appeals from one judgment by different appellants, the High Court will insists under the rules to have copies of Judgment filed with each memo. of appeal though where there are several appeals from the same judgment by the same appellant, he should be permitted to file one copy only of the judgment with the memorandum in one of his appeals. AIR (Vol 9) 1922 Pat 580: 69 Ind Cas 686: 1 Pat 670: 4 PLT 290 (DB).

——O. 41, R. 1 — Absence of — Incomplete not properly preferred.

Having regard to the amendments of O. 41, R. 1 and O. 42, R. 1 of the C. P. Code, which the Allahabad High Court has made in exercise of the powers given to it under S. 122 of the Code, a memorandum of second appeal without a copy of the first Court's judgment is an incomplete document and is not properly preferred. AIR (Vol 8) 1921 All 242: 63 Ind Cas 344: 19 ALJ 706 (DB).

——O. 41, R. 1 — According to the rules of the Lahore High Court in the case of second appeals the memorandum of appeal shall, in addition to the copies specified in O. 41, R. 1, be accompanied by a copy of the judgment of the Court of first instance. Where such copy is not produced within time, the presentation is not valid. AIR (Vol 8) 1921 Lah 73: 63 Ind Cas 33: 2 Lah 227: 90 PLR 1921.

——O. 41, R. 1 — Presentation of appeal — Copy of judgment.

A second appeal preferred to a Revenue Court under the provisions of special enactment like the Oudh Rent Act should not be dismissed on the ground that it is unaccompanied by a copy of the Lower Court's judgment which is incomplete and refers to another main judgment not filed with the memo of appeal, in as much as he is not required by law to file such a copy. (1916) 3 OLJ 209: 34 Ind Cas 706.

(b) When can be dispensed with.

——O. 41, R. 1 and Madras Amendment, O. 41A, Rr. 1 and 2 — Production of printed copies of judgment can be dispensed with.

The production of the printed copies of judgment is not mandatory. Court has power to dispense with the production of the printed copies of judgment so long as a certified copy of the judgment is there. AIR (Vol 33) 1946 Mad 163: (1945) 2 MLJ 563: 58 MLW 617: (1946) MWN 39.

——O. 41, R. 1 — 'Judgment', meaning of — Redemption suit under S. 12, U. P. Agriculturists' Relief Act — All issues except one as to amount payable decided on April 11 — Last issue decided on Commissioner's report on May 29 and judgment pronounced — Appeal filed with copy of order of May 29 — Copy of order of April 11 filed on Court's direction later on Appeal, held properly filed as order of May 29 was main judgment — Even if there was defect, it was cured by Court's direction.

The word 'judgment' in O. 41, R. 1 means the statement of the final adjudication of the rights of the parties in the action, and does not include orders whereby some preliminary issue, point or plea was determined or some step taken or other question settled in the progress of the cause.

In a suit for redemption of a mortgage under S. 12. U. P. Agri. Relief Act, issues were framed and first 8 of them were disposed of by an order dated April 11, 1940. The last issue as to the amount on payment of which the plaintiff was entitled to redeem, was, on Commissioner's report, decided by an order dated May 29, 1940, and a judgment was pronounced dated and signed on that day. The facts were started in this judgment and a reference was made to the findings upon the issues recorded on April 11. The defendant's appeal was admitted on August 27, 1940, and notice was ordered to be issued to the respondents. On April 25, 1941, the appellant was ordered by the Court to file a copy of the order of April 11, 1940, disposing of issues Nos. 1 to 8 and this was filed on May 17; on both these dates, the Counsel for the respondent was present and raised no objection. On May, 31, at the hearing of the appeal, an objection that appeal was incompetent was raised on the ground that copy of the order dated April 11, 1940, had not been filed along with memo. of appeal as required by O. 41, R. 1:

Held, that the order dated May 29, 1940, was the main judgment as the main issue on which the relief to be given to the plaintiff was decided by that order and not by the order of April 11, 1940. The appeal, as presented, satisfied the requirements of O. 41, R. 1.

Held, further that even if it was necessary to file a copy of the order of April 11, 1940, the defect was cured by filing the order subsequently under the direction of the Court as such an action of the Court was tantamount to an order dispensing with the filing for the time being of the previous order. AIR (Vol 32) 1945 Oudh 194: 1945 OWN (C C) 40: 1945 AWR (C C) 22.

——O. 41, R. 1 — Appeal cannot be dismissed for non production of copy of judgment when trial Judge has denied appellant copy.

There is nothing in the rules of practice prohibiting a second copy application. It was not open to the Judge of the first Court to say that he would not entertain a second or third or later application. It is his duty to give the printed copy leaving it to the Appellate Court to excuse the delay in producing the printed judgment. If the Appellate Court has granted time to the appellant to produce printed copies of the judgment of the trial Court, it means that the delay in producing printed copies has been excused. It is a travesty of justice for the first Court to deny the appellant a printed copy and for the Appellate Court to dismiss the appeal on the ground that printed copies were not produced. Courts are in existence to do justice to the parties and not to dismiss appeals on such grounds. Rules which are designed to promote efficient and good hearing of appeals are not to be grossly abused. Order 41, R. 1 clearly gives the Appellate Court power to dispense with the production of a copy of judgment. Only the production of decree copy is compulsory. AIR (Vol 31) 1944 Mad 90: 56 MLW 668: 1943 MWN 750: (1943) 2 MLJ 517: ILR (1944) Mad 681: 215 Ind Cas 43.

——O. 41, R. 1 — Absence of recorded order dispensing with judgment.

Order 41, R. 1, does not say that the Court must record an order dispensing with the judgment. The absence of a recorded order does not, therefore, necessarily show that no order was passed.

The appellant wanted merely to exercise his right of purchasing the share acquired by a stranger to the family. The right was not asserted or refused in the Court of first instance and the judgment of the trial Court which did not deal with this question was not required for considera-

tion by the Appellate Court. There was no written order dispensing with the judgment, nor was there a very definite finding of the lower Court on this point. The wordings of the provisions of O. 41, R. 1, Civil P. C., said this: "There is a provision then that the Appellate Court can dispense with the filing of the copy, and though no specific order was passed on the subject, it may be deemed in the circumstances to have so dispensed with the filing:"

Held, that in view of the principle omnia praesumuntur rite esse acta and in view of the fact that dispensation would most certainly be granted in a case of this description, the Court did grant dispensation at the time of admitting the appeal. AIR (Vol 26) 1939 Cal 711: 43 CWN 1139: 186 Ind Cas 58.

——O. 41, R. 1 — The counsel filing the appeal contented himself with filing a copy of the brief order recorded by the lower appellate Court dismissing the appeal "for the reasons given in the judgment of the connected civil apepal." But in his grounds he noted that the detailed judgment was filed in a connected appeal.

Held, that in view of the counsel specifically referring to the absence of the detailed judgment, the error, if any might be condoned and the copy of the detailed judgment dispensed with. AIR (Vol 17) 1930 Lah 935 (DB).

——O. 41, R. 1 — Under O. 41, R. 1, C. P. Code it is not left to the litigant's choice to file or not to file a copy of judgment, but it is the Judge alone who can dispense with it. AIR (Vol 15) 1928 Nag 131: 106 Ind Cas 57.

——O. 41, R. 1 — Where the memorandum of appeal stated that the copy of judgment would be given afterwards, and the appeals were admitted on presentation, notice being ordered to issue to the respondents.

Held, that it must be taken that the Court dispensed with the copy of judgment. A I R (Vol 13) 1926 Nag. 57 : 90 Ind Cas 135 (DB).

——O. 41, R. 1 — Copy of formal order may be dispensed with.

The appellants before the District Judge failed to file a copy of the formal order appealed against but the formal order was a precise copy, so far as its operative words were concerned, of the Judgment of the order which they did file, he'd that the failure mattered to nobody and the objection is one of those futile and childish objections which bring the law into so much contempt in the minds of reasonable business people. (Directions issued to District Judge to hear the appeal on merits.) A I R (Vol 10) 1923 All 579 : 74 Ind Cas 761 : 21 A. L. J. 452 : 4 L. R. A. Civ. 246 (DB).

——O. 41, R. 1 — Presentation of appeal — Judgment copy to be filed.

A Memorandum of appeal must be accompanied by a copy of the judgment unless dispensed with by the Court. A I R (Vol 2) 1915 Mad 493 : 25 Ind Cas 28 (DB).

7. Copy of order.

——O. 41, R. 1, O. 43, R. 2 — Appeal not maintainable without copy of order appealed against.

The combined effect of O. 41, R. 1 and O. 43, R. 2, is that the procedure laid down in R. 1, of O. 41, to the effect that the memorandum shall be accompanied by a copy of the decree appealed from, must be held to apply in the case of appeals from orders as distinguished from decrees. In an appeal from an order dismissing an application to set aside an ex parte decree it is obligatory on the appellant to file along with his memorandum of appeal a copy of the formal order appealed from without which the appeal is not maintainable. A I R (Vol 29) 1942 Oudh 349 : 1942 O W N (C C) 213 : 1942 A W R (C C) 161 : 200 Ind Cas 479 (DB).

——O. 41, R. 1 — No valid appeal against an order under S. 47, Civil P. C., can be filed which is not accompanied by a copy of the formal order or decree.

Under O. 41, R. 1, it is imperative that a copy of the decree should accompany the memorandum of appeal. If it is filed beyond the period of limitation the appeal is barred by time. A I R (Vol 27) 1940 Oudh 351: 1940 AWR (HC) 261: 15 Luck 669 : 1940 O W N (C C) 528 : 188 Ind Cas 226.

——O. 41, R. 1 — Where there is an appeal from an order under S. 47 which has the force of a decree, the appellant is not bound to file a copy of the order especially where a copy of the judgment is already on the record in an analogous appeal from the same order and which is available for use in both the appeals. A I R (Vol 27) 1940 Pat 176 : 20 P L T 801.

——O. 41, R. 1 — Where the only order on record contains not only the grounds of decision but also "the formal expression" and the decision itself, it should be taken to be of a dual character, of "judgment" and "order" and if the appellant files a copy of such an order with his memorandum of appeal, he should be considered to have substantially complied with the provisions of O. 41, R. 1, Civil P. C. and R. 2 Chap. III of the Rules of Allahabad High Court. A I R (Vol 20) 1933 All 762 : 56 All 27 : (1933) A L J 1301 : 147 Ind Cas 865.

——O. 41, R. 1 — Copy — Meaning of.

The word "copy" as used in O. 41 and also O. 42 means copies duly certified under the provisions of the Evidence Act and thus rendered capable of production before a Court of law for examination. A I R (Vol 16) 1929 Lah. 771 : 30 P L R 587 : 11 L L J 363 (DB).

——O. 41, R. 1 — Intermediate order — Not necessary.

It is not necessary for appellants to file with memorandum of appeal copy of an intermediate order of the trial Court which decided issues which were not in dispute in the lower appellate Court and which was not of importance for the decision of the second appeal. A I R (Vol 16) 1929 Lah. 379 : 119 Ind Cas 232 : 10 L L J 546 : 30 P L R 48.

——O. 41, R. 1 — Intermediate order — When not necessary.

Where long time had elapsed between the passing of the intermediate order and the final judgment and the trial Judge who delivered the judgment made no reference to it in his judgment but recorded a fresh finding on the question of limitation which was the subject-matter of the intermediate order, evidently in ignorance of the intermediate order which was passed by his predecessor.

Held, that there was sufficient cause for the failure of the appellants to file a copy of it with the memorandum of appeal. A I R (Vol 16) 1929 Lah. 295 : 118 Ind Cas 449 : 30 P L R 328 : 10 Lah. 613 (DB).

——O. 41, R. 1 — Refusing — Order for stay — Not necessary — If not part of judgment appealed.

The Courts of justice exist for the purpose of adjudicating upon the merits of the disputes between the parties and the rules of procedure are not made for the purpose of hindering justice.

A suit for compensation for non-delivery of goods agreed to be sold was filed. The defendant vendees applied under S. 10, C. P. Code, but the stay of suit was refused and the claim was decreed. The defendants filed an appeal but did not file the order re-

fusing the stay along with the memorandum of appeal.

Held, that there was a proper presentation, as the Interlocutory order was dealing with an issue of transitory character which was no longer a matter in controversy between the parties and could not be considered as a part of the judgment on which the decree was founded. A I R (Vol 16) 1929 Lah. 42 : 115 Ind Cas 67 (DB).

——O. 41, R. 1 — Order on preliminary issues unnecessary.

Where the correctness or otherwise of the decree passed by the lower Court did not in any way depend upon the correctness or otherwise of the order passed on the preliminary issues, and that order did not materially affect the decree,

Held, that it was not necessary to file a copy of the order on priliminary points. A I R 1927 Lah. 103 and 451 and A I R 1928 Lah. 46, Doubted and Dist. A I R (Vol 15) 1928 Lah. 601 : 112 Ind Cas 602 (DB).

——O. 41, R. 1 — It is not necessary for the appellant to file with memorandum of appeal a copy of an interim order which he does not want to attack. A I R(Vol 14) 1927 Lah. 629 : 103 Ind Cas 224 (DB).

——O. 41, R. 1 — Copy of part of judgment not filed until expiry of limitation — Case must be decided on its merits.

Where a copy of the part of the judgment (copy of an order on a preliminary issue) is not filed till after the expiry of limitation and when the appellant thought he had fully complied with the provisions of the law, a dispensation should be granted to him as regards that part of the judgment. Each case of this kind must be decided on its own merits. Had that part of the judgment been attacked in appeal, effect would have been different. A I R (Vol 14) 1927 Lah. 449 : 104 Ind Cas 545 : 9 L. L. J. 237 : 28 P L R 407 (DB).

——O. 41, R. 1 — A second appeal is not time-barred because of the copy of the First Court's interlocutory order, which is mentioned in that Court's judgment as being a part of the judgment, is filed after the expiry of the period of limitation, when the points decided by the interlocutory order do not arise in the appeal. A I R (Vol 9) 1922 Lah. 93: 4 L L J 20.

8. Court fee.

See also Note 10.

——O. 41, R. 1 — Appeal from order rejecting plaint as insufficiently stamped — Order determining court-fee payable — If to be filed.

An appellant in an appeal filed against an order rejecting a plaint on the ground that it was insufficiently stamped cannot be required to file along with the memorandum of appeal a copy of the order of the Court determining the court-fee payable. It is sufficient if a copy of the final order rejecting the plaint is filed. (1948) I L R (1948) 2 Cal 149 : 52 C W N 684 : 83 C L J 247.

——O. 41, R. 1 — The provisions in O. 7, R. 11, Cl. (c) do not apply to appeals. An appeal in which the full court-fee has not been paid, can be dismissed by the Appellate Court without calling upon the appellant to pay the deficiency. So far as memoranda of appeal are concerned, express provision is made in O. 41, R. 3 for their rejection. A I R (Vol 25) 1938 Mad 316 : (1938) M W N 71 : 47 M L W 211 : (1938) 1 MLJ 514: 177 Ind Cas 453.

——O. 41, R. 1 — Copies of judgment and decree accompanying memo. not properly stamped till after the expiry of the period of limitation — Appeal is time barred. (1937) 39 PLR 502.

——O. 41, R. 1 — Some preliminary issues were decided on a previous date and the suit was decided later. The memorandum of appeal was presented with the final judgment but without the order which was passed deciding preliminary issue. This decision was objected to in the grounds of appeal.

Held, that there was no proper presentation of the appeal. A I R (Vol 15) 1928 Lah. 45 : 105 Ind Cas 593 : 28 P L R 537 (DB).

——O. 41, R. 1 — Necessary if attacked in appeal.

Two preliminary issues were struck as to the frame of the suit & the valuation, and were decided by the trial Court. In the final judgment no reference was made to these preliminary issues and a decree was given to the plaintiff. The defendant in the memorandum of appeal took four grounds against the findings on the preliminary issues. No copy of the order passed on the preliminary issues was attached to the memorandum.

Held, that it was absolutely essential that a copy should accompany the memorandum and in absence of such copy, the presentation of appeal was defective. A I R (Vol 14) 1927 Lah 451 (DB).

——O. 41, R. 1 — Court-fees — Suit for partition — Remand — Appeal.

A District judge in appeal in a suit for a partition of a house remanded the suit, after deciding to what fractional shares the parties were entitled, in order that the partition might be carried out by the court of first instance. The District Judge, however, erroneously described his order as an order of remand under S. 562 of the Code of Civil Procedure. Held on appeal from such order attacking the case on the merits that the memorandum of appeal must be stamped as an appeal from a decree. (1908) 1908 A W N 40 (40) : 5 A L J 545 (DB).

——O. 41, R. 1 — Memo. of appeal to lower court insufficiently stamped — Deficiency not made good in the High Court — Decree in favour of respondent reversed.

See (1904) 1 A L J 392 (393) (DB).

8A. Cross suits and appeals.

——O. 41, R. 1 — Cross-suits — Same issue involved — Appeal against decisions in one only.

In cross-suits involving the same issue the party feeling aggrieved by the decision cannot be allowed to appeal against the decree in one of them alone without appealing against the decree in the other. AIR (Vol 23) 1936 Rang 401 : 164 Ind Cas 743 (DB).

——O. 41, R. 1 — Separate decrees — Separate appeals — Single suit.

Two or more decrees cannot be challenged in the appeal even when such decrees are based upon one judgment to one suit. AIR (Vol 5) 1918 Pat 219 : 3 Pat LJ 96 : 44 Ind Cas 418.

9. Evidence, appreciation of.

See also Civil P. C., S. 107.

——O. 41, R. 1 — Appellate Court ought to pay respect to opinion of trial Court as to credibility of witness.

An Appellate Court ought to pay respect to the opinion which a Judge who has watched and listened to the witnesses has formed as to their credibility. There can, however, be cases in which a Judge can be shown to have misapprehended part of the evidence, or to have drawn inferences from the fact found which cannot reasonably be justified, or in some other way to have left his decision fairly open to attack. AIR (Vol 33) 1946 PC 156 : 1946 MWN 520 : (1946) 2 MLJ 156 : 59 MLW 489.

——O. 41, R. 1 — Trial Court's opinion as to credibility of witness — Interference in appeal.

The Appellate Court should not ordinarily interfere with the trial Court's opinion as to the credibility of a witness, because the trial Judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility, and whether after careful thought, or with reckless glibness. He alone can form a reliable opinion as to whether the witness had emerged with credit from a cross-examination. AIR (Vol 30) 1943 PC 159 : (1943) 2 MLJ 405 : 48 CWN 1 : 10 BR 139 : 56 MLW 766 : (1943) ALJ 580 : 1943 AWRPC 71 : 46 Bom LR 316 : ILR (1944) Kar (PC) 109 Sup : 209 Ind Cas 132.

——O. 41, R. 1 — Evidence should be considered as whole.

When dealing with a version spread over several consecutive stages, it is inevitable that careful regard should be had to them all and their truth or falsehood tested on a review of the entire case. The incidents have to be judged in the light of what preceded and followed; and it would be an error to segregate the incidents and test their veracity in isolation. AIR (Vol 27) 1940 PC 93: 6 BR 636: 21 PLT 519: 52 MLW 57: (1940) MWN 922: 72 CLJ 263: 1940 AWR (PC) 101: ILR (1940) Kar (PC) 235 Sup: 188 Ind Cas 1.

——O. 41, R. 1 — Finding based upon agreement not pleaded and unsupported.

The finding of the lower Court based upon an agreement, not pleaded and unsupported by evidence, cannot be accepted. (1936) 159 Ind Cas 96: 18 NLR 104.

——O. 41, R. 1 — Discretion of Appellate Court in the consideration of evidence cannot be restricted. (1936) 165 Ind Cas 49: 1936 OWN (CC) 906 (DB).

——O. 41, R. 1 — Finding based not on mere presumption.

Where the Court has after a consideration of the entire evidence recorded a clear finding one way or the other, then the finding is based not on a mere presumption, but on the evidence, and has to be accepted. AIR (Vol 22) 1935 All 509: 1935 AWR (HC) 503: (1935) ALJ 834: 57 All 895: 158 Ind Cas 197 (DB).

——O. 41, R. 1 — Ordinarily where the judgment of the Court below is on a pure question of fact depending on the credibility of witnesses, it is not desirable that an Appellate Court should differ. But where that Court has not discussed the evidence and has mentioned witnesses only by numbers and not by names, the Appellate Court may differ. AIR (Vol 22) 1935 All 329: (1935) ALJ 150: 1935 AWR (HC) 218: 57 All 85: 153 Ind Cas 1078 (DB).

——O. 41, R. 1 — An Appellate Court will not be justified in interfering with the findings of fact arrived at by a trial Court upon the evidence except for very strong reasons. AIR (Vol 22) 1935 Rang 30: 154 Ind Cas 535.

——O. 41, R. 1 — Courts of Appeal should be most reluctant to reverse such findings of fact more especially when the lower Court has had an opportunity of seeing the witnesses and the case requires the expression of opinion as to the credibility of the witnesses called. AIR (Vol 21) 1934 Pat 30: 148 Ind Cas 498 (1) (DB).

——O. 41, R. 1 — Trial Judge's decisions based on testimony of witness.

According to well-established rules, great regard is to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him. On appeal the whole case including the facts is no doubt within the jurisdiction of the Appellate Court. But generally speaking, it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credibility which attaches to one or other of conflicting witnesses. AIR (Vol 20) 1933 Oudh 170 (2): 10 OWN (CC) 147: 8 Luck 538: 160 Ind Cas 346 (DB).

——O. 41, R. 1 — Decision on the credibility of witness.

It is undesirable in interfering with the findings of fact of the trial Judge, who sees and hears the witnesses, and has an opportunity of noting their demeanour, especially in cases where the issue is simple, and depends on the credit which attaches to one or the other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. AIR (Vol 20) 1933 Oudh 142: 10 OWN (CC) 201: 150 Ind Cas 330.

——O. 41, R. 1 — Appellate Court, functions of — Question of fact — Inferences from fact.

A Court of appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong. Where the case depends upon proper inferences to be drawn from facts indisputably established by the evidence an appellate court may be in as good a position to judge as the original tribunal. But where the case hinges on the question which of two conflicting stories is to be believed, to which witnesses credence is to be given the original tribunal is far better placed than the appellate Court to correctly gauge the truth. (1904) 6 Bom LR 1130 (1131) (DB).

——O. 41, R. 1 — Appellate Court — Objection to admissibility of evidence not objected to in first court.

See (1904) 31 C 155 (158). Also (1901) 23 A 331 (336): 1901 AWN 91.

——O. 41, R. 1 — Mortgage document — T. P. Act, S. 88 — One attesting witness not called — No objection taken in first — Raising of objection in appeal — Waiver.

Where a mortgage document is tendered in evidence but an attesting witness was not called to prove execution as provided in S. 68, T. P. Act, and no objection is taken on that score in the first Court, it must be taken to have been waived and the objection cannot be taken in appeal. (1903) 13 MLJ 143 (143) (DB).

10. Limitation.

——O. 41, R. 1 — Appeal filed in time becoming untraceable — New appeal filed — Appeal not time-barred.

If an appeal which is filed in time is not traceable in the office and a new one is filed after the expiry of limitation, the appeal must be held to have been filed in time as the new appeal amounts only to a reconstruction of the old one. AIR (Vol 32) 1945 Lah 15: 46 PLR 350: 219 Ind Cas 425 (DB).

——O. 41, R. 1 — Court-fee paid after limitation but within time allowed.

Where an application for leave to appeal 'in forma pauperis' is dismissed but no time is given to the applicants to pay court-fee at the time but only when the applicants apply for it after the expiration of limitation for filing the appeal, and the court-fee is paid within the time so allowed,

the case is covered by S. 149 and the appeal is within time. Even if it is not, the delay would be condoned by S. 5, Lim. Act. AIR (Vol 32) 1945 Oudh 172: 1945 AWR (CC) 5: 1945 OWN (CC) 20 (DB).

——O. 41, R. 1 — Limitation for appeal expiring on Sunday — Following day was a public holiday — Appeal presented before limitation but was not accompanied by copies of judgment and decree — Court making order dispensing with a copy of judgment but refusing to dispense with a copy of decree — Copy of decree was asked for on the next day of the public holiday and filed on the day it was obtained:

Held, that the time taken for obtaining the copy of decree could be deducted and that the appeal was in time. AIR (Vol 25) 1938 Bom 288: 40 Bom LR 389: 175 Ind Cas 508.

——O. 41, R. 1 — (Peshawar) — Appeal filed within time but without copy of judgment of trial Court — Appeal returned and again filed with copy, but beyond limitation.

Where an appeal was filed within limitation without a copy of the judgment of the trial Court having been enclosed as required by the amended R. 1 of O. 41, (amended by Judicial Commissioner's Court) and the appeal was returned with the direction that the copy of the judgment should be produced, and it was presented again with the copy of the judgment of the trial Court, when the period for filing the appeal had expired:

Held, that the appeal was barred by time. AIR (Vol 24) 1937 Pesh 50: 168 Ind Cas 878 (DB).

——O. 41, R. 1 — Minor — Appointment of guardian, whether necessary.

Where the person against whom an appeal is to be presented is the minor respondent and not his guardian, the appointment of a proper guardian is not a necessary preliminary to the filing of an appeal, although it is necessary before the appeal can be properly heard and disposed of. The appeal, therefore, must be deemed to have been presented in time by calculation of the date when it was actually presented. AIR (Vol 23) 1936 Pat 153: 2 BR 344: 161 Ind Cas 579 (DB).

——O. 41, R. 1 — Appeal filed with proper stamp beyond time — Lahore High Court Rules and Orders, Vol. I, Chap. 14-B, Para. 2.

Where an appeal is filed without the order appealed against being stamped and the same returned and filed again with proper stamp but out of limitation, the appeal is barred by time. AIR (Vol 22) 1935 Lah 124 (2): 37 PLR 124: 153 Ind Cas 64.

——O. 41, R. 1 — An appeal filed without a court-fee stamp should not be held to be a nullity and could be a case for the application of S. 5, Lim. Act. AIR (Vol 22) 1935 Oudh 231: 1935 OWN (CC) 162: 1935 RD 78: 10 Luck 569: 154 Ind Cas 135 (DB).

——O. 41, R. 1 — Stamp not affixed till long after expiry of period of limitation.

Where no court-fee stamp was affixed to the copy of the order appealed against which was filed with the memo. of appeal, and the stamp was not affixed till long after the expiry of limitation and the appellant had nothing to urge in justification of the mistake and the delay in affixing the stamp:

Held, that the appeal was not properly presented within time and ought to be dismissed. AIR (Vol 21) 1934 Lah 272: 35 PLR 142 (1): 147 Ind Cas 343.

——O. 41, R. 1 — Time for copies, though not necessary, to be excluded.

In reckoning the time for presenting an appeal, the time required for obtaining a copy of the decree and judgment must be excluded, even though by the rules of the Court it is not necessary to obtain such copies. AIR 1927 Rang. 20: 4 Rang 265: 98 Ind Cas 417, Reversed. 109 Ind Cas 1: 5 OWN 479: 30 Bom LR 842: 47 CLJ 510: 6 Rang 302: 26 ALJ 657: 32 CWN 845: 55 IA 161: 28 MLW 207: AIR (Vol 15) 1928 PC 103: 54 MLJ 696.

——O. 41, R. 1 — Connected appeals.

There were two connected appeals before the lower appellate Court. A full judgment was recorded in one while a brief order referring to the full judgment was recorded in the other. A copy of this brief order alone was filed with the appeal and a reference was made to the copy of the full judgment which was filed in a connected appeal. The latter appeal was rejected while the former was admitted. At that time copy of the full judgment being ordered to be filed was accordingly filed though after the period of limitation has expired,

Held, that the appeal was in time. (1928) 109 Ind Cas 564 (Lah).

——O. 41, R. 1 — Excusing delay.

Where a copy of the order of the Court below on a preliminary issue was not filed along with the copy of the final order, and when it was filed, the period of limitation had expired, but it was found that preliminary order was not contested.

Held that it would be but fair to condone the delay under S. 5, Limitation Act. 9 LLJ 566: 106 Ind Cas 826: AIR (Vol 14) 1927 Lah 905.

——O. 41, R. 1 — Delay — Gross negligence cannot be condoned.

Where the appellant's counsel acted with gross negligence in valuing the appeal, and thus it was presented with insufficient Court-fees and the deficit was made good beyond limitation.

Held, that the delay in making good the deficiency that occurred in consequence of clear negligence cannot be condoned. 102 Ind Cas 615: 28 PLR 338: 9 LLJ 290: AIR (Vol 14) 1927 Lah 884.

——O. 41, R. 1 — Appeal without decree — Filing after time — Appeal barred.

The appeal presented without a copy of the decree is not a proper presentation and the fact of the decree being applied for and filed after the limitation period, would not save the appeal from being barred. 4 Lah LJ 193: AIR (Vol 9) 1922 Lah 191.

——O. 41, R. 1 — Necessity of — Absence — Effect.

Under Ch. 3, R. 2, of the Rules made by the Allahabad High Court and O. 42, R. 1, as amended by the Allahabad High Court, a memorandum of second appeal must be accompanied by a copy of the judgment of the Court of first instance. Otherwise the Court must refuse to accept the memorandum under S. 122 of the C. P. Code. Both Ch. 3, R. 22 of the Rules of the Allahabad High Court and the amendment made by that Court in O. 42, R. 1, are 'intra vires'. The terms of the amended O. 42, R. 1, do not allow the construction that the Court can dispense with the copy of judgment of the Trial Court. But when a properly constituted appeal is presented out of time nothing prevents the application of Limitation Act, S. 5 in a proper case. 63 Ind Cas 338: 43 All 660: 19 ALJ 598: AIR (Vol 8) 1921 All 23 (DB).

——O. 41, R. 1 — Appeal.

Where the defect in presentation was not cured within a reasonable time, the delay cannot be excused. (1920) 2 Lah LJ 728.

——O. 41, R. 1 — Presentation of appeal — Copy of Judgment filed after limitation — Limitation.

When the copy of the judgment is filed after the period of limitation, the appeal must be dismissed in the absence of just cause shown for ex-

tending the time. AIR (Vol 4) 1917 Lah 436: 67 PR 1917: 133 PWR 1917: 41 Ind Cas 918.

——O. 41, R. 1 — Presentation of appeal — Copy of decree or judgment — Not filed with memorandum of appeal — Decree not drawn up.

Where an appeal is preferred against a decree or an order, the memorandum ought to be accompanied by a copy of the judgment and a copy of the decree or order as the case may be. Where an order has not been drawn up, the appellant may simply attach to his memorandum a copy of the judgment alone and time should run from the date of the judgment. Where, however, a separate order is drawn up embodying the formal expression of the decision, copies of both the documents should be attached and the appellant will be entitled to a deduction of the time required for obtaining copies thereof. (1912) 15 CLJ 498: 14 Ind Cas 1006 (DB).

——O. 41, R. 1 — Appeal from wrong order — Conversion of appeal as one from another order — Limitation Act, S. 5 — Return to the lower appellate Court.

When the High Court found that the order appealed against to the lower appellate court did not lie, in law but that properly the appeal should have been filed against another order of a different date, their Lordships converted the appeal to the lower appellate court into an appeal from the right order and returned the records to the lower appellate court for the exercise of its discretion under S. 5 of the Limitation Act, on a consideration of the facts that led up to the delay. (1905) 7 Bom LR 664: 30 B 56 (60) (DB).

11. Memo of appeal.

——O. 41, R. 1 — Pleading — Contentions inconsistent with those raised in written statement cannot be allowed to be raised for first time in appeal.

It is not open to a person who is brought on the record in appeal as a legal representative of the defendant to raise for the first time in appeal contentions which are not only new but also inconsistent with those raised in the written statement put in by the defendant. AIR (Vol 33) 1946 Lah 450 (DB).

——O. 41, R. 1 — Ground for.

In an appeal arising out of execution proceedings, it is not open to the appellant, the legal representative of the judgment-debtor, to re-open the question that the transaction is not binding on him, when that question has become final by reason of a decision in a previous suit against which there was no appeal. AIR (Vol 28) 1941 Mad 480 : 53 MLW 283: 1941 MWN 216: (1941) 1 MLJ 469: 199 Ind Cas 23 (DB).

——O. 41, R. 1 — No distinction in this respect between Letters Patent appeal or any other appeal.

No memorandum of appeal, whether in a Letters Patent appeal or any other appeal can be considered to be complete unless it mentions the names of the parties against whom relief is sought. There is no real reason, for making any distinction between a Letters Patent appeal and any other appeal. AIR (Vol 25) 1938 Lah 325: 40 PLR 1060: ILR (1938) Lah 398: 180 Ind Cas 698 (DB).

——O. 41, R. 1 — It is not proper to state in the grounds of appeal the same ground over and over again or the legal arguments in support of the grounds. AIR (Vol 22) 1935 Mad 282: 68 MLJ 218: (1935) MWN 172: 41 MLW 257 : 58 Mad 771: 157 Ind Cas 589 (DB).

——O. 41, R. 1 — Legal representative.

The legal representative of a deceased appellant can assail the decree of the lower Court on such grounds only as would have been available to the deceased appellant. AIR (Vol 21) 1934 Pat 443: 1 BR 205: 153 Ind Cas 557 (DB).

——O. 41, R. 1, S. 96 — Application for review of part of decree — Appeal against decree passed on review — Appellant, whether can claim for increase of amount awarded by original decree.

Although if an application for review is rejected, the party applying would be debarred from asking for relief, he can after a decree has been passed on review, claim in appeal against that decree that the amount awarded by the original decree should be increased. AIR (Vol 19) 1932 Nag 143: 28 NLR 245: 140 Ind Cas 21.

——O. 41, R. 1 — Admission of appeal — Bars later objection.

The admission of a defective memorandum of appeal may operate as a decision and bar a later objection where the defect is quite obvious. AIR (Vol 14) 1927 Lah 451 (DB).

——O. 41, R. 1 — Memo of appeal — Can be written by anybody.

It is immaterial whether a memorandum of appeal is written by the appellant himself or by somebody else as long as it is signed by the appellant (or his agent duly authorised in his behalf), and presented to the proper authority. Hence there is no valid objection to the entertainment of the appeal where the memorandum is written by a petition-writer. 83 Ind Cas 543: AIR (Vol 10) 1923 Lah 484 (DB).

——O. 41, R. 1 — Form.

Plea 3 of the memorandum of appeal ran as follows: — "That the Court below should have decided issues 6, 7, 8, 9, 10, 12 and 13 in favour of the defendants-appellants". Held each should raise a specific issue. Appeals drawn up in this way are liable to be returned for amendment. 77 Ind Cas 839: 9 OLJ 637: AIR (Vol 10) 1923 Oudh 113.

——O. 41, Rr. 1 and 3 — Urdu stamped paper with a title and English paper containing grounds.

A document in Urdu with stamp and the title of the case accompanied by a document in English, containing the grounds, form together a valid memorandum of appeal. Even if the vernacular memorandum is regarded as an appeal the defect could be cured under R. 3. AIR (Vol 7) 1920 Lah 314: 2 Lah LJ 507: 2 UPLR (Lah) 49: 55 Ind Cas 24.

12. Onus.

——O. 41, R. 1 — It is for an appellant to show that the Court below is wrong, and a respondent is entitled to rely on the statement of facts contained in the judgment of the Court below until they are shown by the appellant to be incorrect. AIR (Vol 27) 1940 All 467 : 1940 AWR (HC) 623: 191 Ind Cas 620 (DB).

———O. 41, R. 1 — In an appeal the burden of proving that the judgment appealed from is wrong rests upon the appellant, and he does not discharge that onus by merely showing that there is an equal possibility of the judgment in favour of one party or the other being correct. AIR (Vol 21) 1934 PC 208: 11 OWN (PC) 1081: (1934) ALJ 909 : 67 MLJ 361 : 40 MLW 415 : 60 CLJ 128 : 38 CWN 1157 : 36 Bom LR 981 : 4 AWR (PC) 353 : (1934) MWN 976 : 151 Ind Cas 45.

——O. 41, R. 1 — In appeal it need not necessarily be shown that the judgment is perverse. It is enough to show that it is inconsistent with the evidence or based upon unsound deduction. AIR (V 20) 1933 Bom 361 : 35 Bom LR 763 : 149 Ind Cas 271 (DB).

——O. 41, R. 1 — Onus of proving judgment appealed against to be wrong.

In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to equal possibility of the judgment on either the one side or the other being right, he has not succeeded. AIR (Vol 20) 1933 Oudh 142: 10 OWN (CC) 201: 150 Ind Cas 330 (DB).

——O. 41, R. 1 — In appeals the burden of showing that the judgment appealed against is wrong lies on the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded. AIR (Vol 18) 1931 Oudh 346: 8 OWN (CC) 883: 15 RD 427: 134 Ind Cas 407.

——O. 41, R. 1 — Appeal — Onus of showing lower Court's judgment is wrong -- Duty of respondent to show that it is right.

When an appeal is preferred against a judgment, it is for the appellant to show it is wrong, and not for the respondent to show it is right. (1902) 4 Bom LR 167: 12 MLJ 83: 6 CWN 386: 29 Cal 187 (199): 29 IA 24 (PC).

13. Parties.

——O. 41, R. 1 — Appeal by third person.

Quaere.— It is doubtful whether an appeal is tenable at the instance of a person who has not been joined as a party to the case. AIR (Vol 31) 1944 Nag 137 : 1944 NLJ 68: ILR (1944) Nag 522: 216 Ind Cas 65.

——O. 41, R. 1 — Pro forma defendant's interest prejudiced.

The law allows any party to a suit who is adversely affected by a decree to appeal from it and if a pro froma defendant considers that his interests with reference to the subject-matter of the suit have been prejudiced, an appeal filed by him would be competent. AIR (Vol 29) 1942 Cal 1: ILR (1941) 2 Cal 434 : 73 CLJ 475: 200 Ind Cas 822 (DB).

——O. 41, R. 1 — Appeal from Tea Licensing Committee to a judicial tribunal — That body or committee should be made respondent. (1939) ILR 1939-2 Cal 277: 43 CWN 820.

——O. 41, R. 1 — Appeal by decree-holder from order in execution setting aside sale — Auction purchaser.

Where a decree-holder prefers an appeal from the order in execution setting aside a sale and the auction-purchaser to whom a notice has been given does not show any interest one way or the other and the purpose of the appeal is to confirm the sale, it is unnecessary to join him as a party and the appeal does not fail if he is not so joined. AIR (Vol 25) 1938 Nag 525: 1938 NLJ 303: ILR (1940) Nag 302: 179 Ind Cas 256 (DB).

——O. 41, R. 1 — Beneficiary of charitable funds.

The Court should not encourage appeals by beneficiaries of charitable funds, where the Advocate-General is before the Court and can appeal if he thinks proper. AIR (Vol 24) 1937 Bom 63: 38 Bom LR 1283: ILR (1937) Bom 425: 166 Ind Cas 940 (DB).

——O. 41, R. 1 — Person not party to suit.

Only persons whose names appear as parties to the decree or order of the Court below, are entitled to appeal if they are aggrieved. Where a person's name does not appear in the array of parties, it is open to him to ask the Court to implead him. If he has not chosen to do so, he cannot maintain an appeal. AIR (Vol 24) 1937 Lah 347 : 173 Ind Cas 505.

——O. 41, R. 1 — Competency.

Where the suit would have been quite all right even if it had been instituted by the plaintiffs against the contesting defendants without impleading the deceased defendant-respondent as a defendant and there is no apprehension of there being any inconsistent decree if the appeal were to be allowed, the appeal does not become incompetent by not bringing on record the legal representatives of the deceased on his death pending the appeal. AIR (Vol 22) 1935 Cal 202: 60 CLJ 225 : 155 Ind Cas 733.

——O. 41, R. 1 — An appeal cannot proceed in the absence of a necessary party. AIR (Vol 22) 1935 Pesh 106 : 157 Ind Cas 502.

——O. 41, R. 1 — No decree against one of the defendants who died when an appeal by others was filed — Heirs of deceased parties to appeal.

It is open to some of the defendants in a suit for partition, to file an appeal without making the heirs of the deceased defendant parties in whose favour no decree is passed in the partition suit and there is no defect of parties. AIR (Vol 21) 1934 Cal 488 : 38 CWN 268 : 61 Cal 302 : 151 Ind Cas 749 (2) (DB).

——O. 41, R. 1 — Persons not party to first appeal.

When one of the parties to a suit is no party to the first appeal, it is not competent for him to file a second appeal. To permit such an appeal would really amount in effect to permitting an appeal against the decree of the trial Judge. AIR (Vol 18) 1931 All 766 (2) : (1931) ALJ 271 : 132 Ind Cas 205 (DB).

——O. 41, R. 1 — Non-contesting parties — Omission — Not fatal.

Where certain non-contesting defendants were not impleaded as parties in the lower appellate court in the appeal preferred by the contesting defendants and the plaintiff having preferred a second appeal similarly omitted to implead them, Held, that the appeal was not rendered incompetent on that account. AIR (Vol 17) 1930 Cal 748: 34 CWN 642:

——O. 41, R. 1 — Right to appeal — Legal representative.

An appeal by a legal representative without being recorded as a legal representative on an application duly made by him is not maintainable. AIR (Vol 5) 1918 All 309: 16 ALJ 394: 45 Ind Cas 451 (DB).

——O. 41, R. 1 — Right to appeal — Party.

The right of appeal is allowed only to a person who is a party to the suit from which the appeal lies & who is aggrieved by the decree. AIR (Vol 5) 1918 Lah 263: 84 PWR 1918: 82 PLR 1918: 45 Ind Cas 181.

——O. 41, Rr. 1 and 4 — Right to appeal — Party.

A defendant not appearing in an appeal preferred by his co-defendant cannot be said to be constructively a party to the appeal. He cannot prefer appeal from an order of the lower court after remand. (1912) 16 Ind Cas 693 (Mad) (DB).

——O. 41, R. 1 — Right to appeal — Stranger.

A party cannot appeal from a decree in his favour merely because of an adverse finding on an unnecessary issue. 120 PLR 1911: 101 PWR 1911: 9 Ind Cas 1030.

14. Powers and duties of Court.

——O. 41, R. 1 — Where the decision of the point in appeal affects the jurisdiction of the lower Court, the Appellate Court cannot refuse to adjudicate upon it merely because of an unwise and ill-advised concession made by the appellant in

the lower Court. AIR (Vol 28) 1941 Mad 287: 1940 MWN 1152 : (1940) 2 MLJ 858: 52 MLW 962.

——O. 41, R. 1 — Reference to Official Referee — He arriving at definite finding of fact — His report confirmed by Court.

Where a case is referred to the Official Referee who comes to a definite finding of facts which are stated in clear and unequivocal terms and the finding is based upon the impression which he formed as to the credibility of the witnesses at the time when the oral evidence was given and the Judge before whom his report comes for confirmation confirms the finding, the principle of law applicable to a matter of this kind is, that a Court of appeal ought not to interfere unless it is satisfied that the judgment, which it is reviewing is clearly wrong. AIR (Vol 25) 1938 Cal 218 (219, 220) : ILR (1937) 2 Cal 459: 175 Ind Cas 167 (DB).

15. Proper presentation

See also Notes 16 and 17.

——O. 41, R. 1 — Pleader being busy, memo presented by another Pleader on verbal instructions of authorised Pleader — Original Pleader (Authorised) however appearing subsequently on several dates fixed in the appeal.

The appellant engaged G, a Vakil, on January 4, 1941 and signed a power-of-attorney in his favour. The memorandum of appeal was prepared and signed by G as also the power-of-attorney in token of his acceptance on January 15, 1941. But being busy in one of the Courts on that date, he asked S, Advocate, to file the appeal in the District Court on his behalf. This was done. G appeared subsequently on several dates fixed in the appeal. When it came up for final hearing before the District Judge, a preliminary objection was raised on behalf of the respondent that the appeal had not been properly presented and was consequently liable to be dismissed:

Held, that the appeal could have been presented by S at the instance of G although the former had no power-of-attorney in his favour, or, in other words the power to present the appeal could have been verbally delegated by G:

Held, further that it would be merely an irregularity and as the Pleader engaged in the case had been appearing on several dates after that date, it must be deemed to have been cured or condoned and the Court would not have been acting without jurisdiction if it had refused to give effect to the plea that the appeal had not been properly presented on behalf of the appellant. AIR (Vol 31) 1944 Lah 131: 46 PLR 96: ILR (1945) Lah 274: 216 Ind Cas 5 (DB).

——O. 41, R. 1 — Presentation of plaint by an unauthorised person is an irregularity which can be cured by the trial Court. But where no attempt has been made by the defendant to get it cured, he cannot be allowed to get it cured. AIR (Vol 28) 1941 Oudh 169 : 1941 OWN (CC) 1253 : 1941 OLR (CC) 32 : 191 Ind Cas 821.

——O. 41, R. 1 — Pleader presenting memo without signature.

S, a senior Counsel was engaged by a Party but the memorandum of appeal was only signed by a newly enrolled Pleader who had not been engaged as Counsel but was merely working as an apprentice with S and the memorandum was presented by the apprentice without the signature and permission of S:

Held, that there was no proper presentation of the memorandum. AIR (Vol 26) 1939 Lah 41: 41 PLR 327: 179 Ind Cas 895.

——O. 41, R. 1 — Practice of Court to put memos in petition box — Person having power-of-attorney putting memo in box — Subsequent appearance of junior Counsel, not having power-of-attorney does not invalidate the presentation.

Strictly speaking under O. 41, R. 1, the memo. of appeal should be presented to the Court or some officer appointed by it in this behalf. But if the Court has adopted the practice of presenting appeals by putting them in petition box, the person who puts the memo. in the box would be the person presenting the appeal. The appearance of a junior Counsel for taking a date, though having no power-of-attorney would not invalidate the presentation of appeal when the person who had put in the appeal was duly authorised. The defect, if there be any is technical and should be condoned. (1938) 173 Ind Cas 796: 39 PLR 456.

——O. 41, R. 1 — Scope of — Appeal, if can be presented by any person.

The language of O. 41, R. 1, is not susceptible of the interpretation that an appeal can be presented to the Court by any person, and that it is not necessary that he should be duly authorized to present the appeal. AIR (Vol 23) 1936 Lah 195: 167 Ind Cas 467.

——O. 41, R. 1 — Copies of Urdu translation of judgment and decree filed with memorandum of appeal — No proper appeal — Insufficient compliance with law. (1936) 38 PLR 288.

——O. 41, R. 1 — Under O. 41, R. 1 read with O. 3, R. 1, a memo. of appeal has to be filed by the appellant in person or by specially empowered agent or Pleader. Under O. 3, R. 4 (2) the appointment of Pleader only remains in force during the lifetime of a client. Not only would an appeal preferred by a Pleader on behalf of such a client who has died be incompetent but the memo. of appeal itself would be non-existent. Though the Court may under S. 153 allow an amendment of the appeal against the person who has died before the presentation of appeal, it has no such power where it is sought to substitute a person for the potential appellant who died before the memo. was filed. AIR (Vol 21) 1934 Nag 274: 31 NLR 57: 153 Ind Cas 251 (DB).

——O. 41, R. 1 — Presentation in Judge's house after Court hours.

Where an appeal is filed on the last day of limitation, if the Judge finds that there was sufficient reason for not presenting the appeal within Court hours on that day he can receive the appeal at his residence after Court hours. AIR (Vol 18) 1931 Lah 671 : 32 PLR 417 : 133 Ind Cas 442 (1).

——O. 41, R. 1 — Printing of records — Duty of appellant to print documents relied on by trial Court.

Where the trial Court has relied upon certain documents and based its judgment upon them, it is the duty of the appellant to print those documents. AIR (Vol 18) 1931 Lah 347 : 130 Ind Cas 772 (DB).

——O. 41, R. 1 — Presentation by unauthorized person is no appeal at all.

Where a memorandum of appeal is presented in Court by an unauthorized person it is no appeal at all and the Court may reject it for that obvious defect but the Court is not justified in treating it as an appeal in due form and rejecting the same as statute barred. 121 Ind Cas 546: 1930 ALJ 394: AIR (Vol 17) 1930 All 112 (DB).

——O. 41, R. 1 — Presentation of appeal — Presenting by unauthorised person.

Where an appeal was filed by one of its officers on behalf of a company, the defect can be cured by putting in a power of attorney authorising the signatory. (1910) 34 Bom 1: 11 Bom LR 1 : 1 Ind Cas 14 (DB).

16. Time for presentation.

See also Note 15.

——O. 41, R. 1 — Vacation or even on Sunday to proper officer.

There is nothing to prevent the presentation of a plaint or a memorandum of appeal during a vacation or even on a Sunday provided it is presented to a proper officer and that officer receives it. 71 Ind Cas 426: 3 PLT 820: 1922 PHCC 365: 1 PLR 12: 2 Pat 264: AIR (Vol 10) 1923 Pat 150.

17. Vakalatnama.

See also Note 15.

——O. 41, R. 1 — Presentation of appeal by Pleader having no vakalatanama.

The presenting or the filing of the appeal amounts to acting on behalf of the appellant, and on the day that the appeal is presented, the person presenting the appeal must be duly authorised to act on behalf of the appellant.

Where an appeal was not presented by A's clerk but by C who duly signed the memo. of appeal it cannot be said that C was merely an agent of A, as by signing the memorandum of appeal he acted independently of A and presentation of the appeal by him cannot be held to be presentation by an agent or clerk of A. When the appeal is filed by C without a vakalatnama, no appeal is validly presented. AIR (Vol 23) 1936 Lah 195 : 167 Ind Cas 467.

——O. 41, R. 1 — An appeal filed with a defective vakalatnama cannot be considered as properly presented. 91 Ind Cas 865: AIR (Vol 13) 1926 All 252.

——O. 41, R. 1 — Non-filing of Vakil-patra with appeal — Procedure.

The non-filing of the Vakil-patra in Court with the appeal would not prevent the appeal from being an appeal properly preferred. The proper practice is that the appellant, if a Vakil-patra is not filed with the appeal, should apply to the Court as soon as it is filed for leave to take the appeal on the file. 28 Bom LR 538: 95 Ind Cas 266: AIR (Vol 13) 1926 Bom 336 (DB).

——O. 41, R. 1 — Presentation of appeal — Pleader — Vakalat not signed by party.

Where a memorandum of appeal is presented by pleader whose vakalat is not signed by the party but the defect is subsequently rectified, there is a valid presentation of the appeal. (1913) 11 ALJ 779: 21 Ind Cas 444.

——O. 41, R. 1 — Presentation of appeal — Vakalatnama filed after limitation period — Effect of delay.

An appeal is barred though it is filed in time, if the vakalatnama is filed after the limitation period. (1911) 13 CLJ 544 : 11 Ind Cas 387 (DB).

——O. 41, R. 2.

1. **Appellate Court whether can set up new case.**
2. **Grounds not set up in memorandum of appeal.**

See also, Note 4.

3. **Point of jurisdiction.**
4. **New case or point.**

See also Civil P. C., S. 100.

5. **Mixed point of law or fact.**
6. **Point of law.**
7. **Leave of Court.**
8. **Point of limitation.**
9. **Presentation of appeal.**
10. **Res judicata, Plea of.**
11. **Scope.**
12. **Change of ground.**
13. **Waiver.**

1. Appellate Court, whether can set up new case.

——O. 41, R. 2 — Appeal — Decision on grounds not raised at the trial.

The decision in appeal should not proceed on grounds not raised at the trial. (1913) 6 Bur LT 53: 19 Ind Cas 48.

——O. 41, R. 2 — Where the lower Appellate Court has set up a new case not put forward in the trial Court by the plaintiff, its judgment is clearly vitiated by the error of law. AIR (Vol 29) 1942 Oudh 180: 1941 OWN (CC) 1340: 1941 AWR (Rev) (HC) 1148: 1941 RD 1160: 17 Luck 472: 198 Ind Cas 184.

——O. 41, R. 2 — Point that interest allowed by trial Court was justified under Interest Act — Documents not properly brought on record.

The point that the interest awarded by the trial Court was justified under the Interest Act can be raised for the first time in appeal in support of the trial Court's decree. But merely because reliance on the Interest Act was placed at a late stage, the Appeliate Court cannot refer to documents that are not properly brought upon the record, or accept a new case which was based upon facts which are not clear to it and which are matters of doubtful inference or surmise. AIR (Vol 29) 1942 Sind 165: ILR (1942) Kar 346: 204 Ind Cas 136 (DB).

——O. 41, R. 2 — Court raising a new point itself.

While it is open to the Court to decide a case on any rule of law which it considers applies, it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an opportunity of meeting it. AIR (Vol 25) 1938 Mad 357 : (1938) MWN 269 : 48 MLW 78 : ILR (1938) Mad 829 : 174 Ind Cas 493.

——O. 41, R. 2 — An Appellate Court is not justified in decreeing a claim on a footing wholly unwarranted by the pleadings of the parties. AIR (Vol 18) 1931 All 600 : 131 Ind Cas 513 (DB).

——O. 41, R. 2 — Amendment — To suit final and preliminary decrees.

Court has power to amend the memorandum of appeal from preliminary decree, so that it will be an appeal both as against the final decree as well as against the preliminary decree in a mortgage suit. AIR (Vol 15) 1928 Cal 167: 106 Ind Cas 128 (DB).

——O. 41, R. 2 — New ground by Court.

Where the order of remand was appealable under O. 43, R. 1, C. P. Code but the appellant did not appeal against it and he was precluded from disputing the correctness of the order of remand in final appeal.

Held, that this preclusion of a party does not take away the power, which vests in a Court of appeal under O. 41, R. 2, to base its decision upon a point not urged in the memorandum of appeal and, therefore, it can grant relief to the appellant in a fit case. Where the lower appellate Court remanded an appeal for admission of oral evidence when such evidence was not admissible.

Held, that it was a fit case for the exercise of the power conferred on appellate court. AIR (Vol 13) 1926 Nag 147: 89 Ind Cas 1019.

——O. 41, R. 2 — Issue raising two questions — Impugning one — Whole issue open.

Where two questions namely the legal necessity for and the antecedency of certain debts incurred by the father of a Hindu family, were dealt with

under one issue in the Court of first hearing, and the appellant in his memorandum of appeal impugned one question only, held, that the Court had power to treat memo of appeal as meaning that the appellant wished to impugn the decision on the issue generally. AIR (Vol 10) 1923 Oudh 147 : 74 Ind Cas 353 : 25 OC 388 : 9 OLJ 601.

——O. 41, R. 2 — Appellate Court — Powers of to make out a new case in appeal.

It is not open to an appellate Court to make out a new case for the first time in appeal contrary to the pleadings in the first Court. (1908) 10 Bom LR 514 (516) (DB).

2. Grounds not set in memorandum of appeal.

See also Note 4.

——O. 41, R. 2 — New point — Point not taken in memorandum of appeal although appellant having sufficient time to do so, cannot be allowed to be discussed in appeal.

Where a point appears to have been taken in arguments in the lower Court but there is nothing about it in the memorandum of appeal, the Appellate Court cannot allow the point to be discussed before it especially when, if it was desired to argue the point the appellant had more than five years within which to make an application to include that ground in the memorandum of appeal. AIR (Vol 33) 1946 Nag 135 : 1946 NLJ 74 (DB).

——O. 41, R. 2 — Ground that finding of lower Court is not based on evidence, if not taken in memorandum cannot be urged at hearing.

It is not open to the appellant to contend at the hearing of the appeal that the finding of the lower Court was not based on legal evidence, specially when no such ground was taken in the memorandum of appeal. AIR (Vol 33) 1946 Pat 338 (DB).

——O. 41 R. 2 — Objection as to absence of notice to certain persons before cancellation of security bond.

An objection as to absence of notice to certain persons before cancelling security bonds which was not raised in the trial Court nor taken in the grounds of appeal, held could not be raised for the first time in appeal. AIR (Vol 30) 1943 Mad 288 : (1943) 1 MLJ 114 : ILR (1943) Mad 509 : 56 MLW 25 : 210 Ind Cas 268 (DB).

——O. 41 R. 2 — Plea not raised in grounds cannot be raised.

It is not open to an appellant to urge a plea in appeal which was not specifically raised in the grounds of appeal. (1943) 207 Ind Cas 523 : 1943 OWN (CC) 180 : 19 Luck 204 (DB).

——O. 41, R. 2 — A plea not raised in the lower Courts nor in the memorandum of appeal before the Appellate Court for the determination of which the Appellate Court would have to consider various facts, is not entertainable in appeal. AIR (Vol 29) 1942 All 361 : 1942 AWR (HC) 213 : ILR (1942) All 498 : 201 Ind Cas 415 (DB).

——O. 41, R. 2 — Appeal — Point as to non-fulfilment of statutory requirement can be taken for first time in appeal.

A point in respect of non-fulfilment of a statutory requirement for instituting a suit can be taken in appeal even if it is not mentioned in the memorandum of appeal. AIR (Vol 23) 1936 Bom 412 : 38 Bom LR 808 : 165 Ind Cas 1001 (DB).

——O. 41, R. 2 — Agreement about finding — Cannot be challenged.

Where the parties to the insolvency petition agreed to be bound by findings and as there was no suggestion in the appeal memorandum that there was no such agreement, the appellant cannot be heard to challenge the agreement. AIR (Vol 16) 1929 Mad 573 : 1929 MWN 262 : 118 Ind Cas 494 (DB).

——O. 41 R. 2 — Where the appellant definitely claimed in the memo of appeal the whole amount of interest entered in the plaint on the ground that the condition for enhancement was not a penalty but conceded at the hearing that the finding of the lower Court regarding condition being penal was correct.

Held, the Court cannot listen to an entirely different plea which was not entered in the memorandum of appeal that the condition was penal but that reasonable compensation should be granted. AIR (Vol 13) 1926 Lah 11: 26 PLR 240: 89 Ind Cas 879 (DB).

——O. 41, R. 2 and O. 47, R. 1 — Grounds taken in an application for review but not urged in the memorandum of appeal as originally filed, cannot be urged in support of the appeal after its readmission upon the application for review. AIR (Vol 7) 1920 Cal 106 : 54 Ind Cas 631. (DB).

——O. 41, R. 2 — New ground — Not raised in memorandum of appeal — When entertained.

An appellate Court is not bound to consider a contention not put forward in the memorandum of appeal unless there can be no reasonable doubt on the record that the evidence on the new point raised had been completely given on both sides or the decision on the new point is a pure question of law and it is expedient in the interests of justice to consider and decide it though it was not mentioned in the memorandum of appeal to the Lower Appellate Court. AIR (Vol 7) 1920 Mad 88 : 11 LW 611 : 57 Ind Cas 800.

——O. 41, R. 2 — New grounds — Not raised in pleadings nor in the memorandum of appeal.

An appellate court should not decide a case on a plea not raised in the pleadings or in the grounds of appeal. (1909) 6 ALJ 636 : 3 Ind Cas 510.

——O. 41, R. 2 (S. 542, old Code) — Appellant confined to grounds set out — Technical point not raised in memorandum of appeal — Discretion of the Court.

Case in which an appellate Court refused to allow a technical plea not taken in appeal to be urged. (1902) 6 CWN 395 : 29 C 355 (357) (DB).

3. Point of jurisdiction.

——O. 41, R. 2 — Powers of appellate Court — Ground not contained in memo of appeal.

O. 41, R. 2, C. P. Code, gives ample powers to an appellate Court and enables it to decide an appeal even on a ground not contained in the memorandum of appeal. AIR (Vol 39) 1952 Nag 60 : ILR (1950) Nag 679 : 1949 NLJ 550.

——O. 41, R. 2 — Facts found giving rise to legal plea.

Obiter.— It is the duty of the Court, if the facts which it finds, give rise to a particular situation in which the Legislature has enacted that certain consequences must follow to consider how the law should be applied, whatever may be the failings of the parties in raising pleas or arguing before it.

There is no law which prevents a Court from seeking the trust somewhere midway between the statements of parties to a suit. AIR (Vol 30) 1943 Mad 511 : 56 MLW 237 : (1943) 1 MLJ 380 : 1943 MWN 468 : 210 Ind Cas 50.

——O. 41, R. 2 — Objection not set forth in grounds of appeal — Appellate Court under O. 41, R. 2 has discretion to allow objection and ordinarily would not object to its being raised and argued if respondent is not likely to suffer thereby — Objection to territorial jurisdiction neither raised in trial Court nor mentioned in grounds of appeal:

Held, that the objection could not be allowed to be raised. But in view of large stakes involved and possibility of case proceeding further it was proper that objection be dealt with on merits. AIR (Vol 28) 1941 Mad 129 : (1940) 2 MLJ 520 : 52 MLW 556 : (1940) MWN 1083 (DB).

——O. 41 R. 2 — Appellate Court giving decree on ground not set up in pleadings or issue.

An Appellate Court cannot decide a case upon a matter which has not been raised as part of the case in the pleadings nor been the subject of an issue in the trial Court. AIR (Vol 24) 1937 Mad 122 : (1936) MWN 1210 : 44 MLW 840 : 168 Ind Cas 98.

——O. 41 R. 2 — Quantum of damages — Findings as to, by trial Court — Interference.

Per Stone, C. J. and Pollock, J.— An Appellate Court should be slow to interfere with the finding as to the quantum of damages made by the trial Court, unless the trial Court has gone wrong in fixing the basis upon which the figure is founded. AIR (Vol 24) 1937 Nag 354 : ILR (1938) Nag 54 : 174 Ind Cas 401 (DB).

——O. 41, R. 2 — The Appellate Court should not dismiss the plaintiff's suit on a plea which was never taken by the defendant at a proper stage of the suit. AIR (Vol 23) 1936 Cal 176 : 61 CLJ 189 : 162 Ind Cas 138.

——O. 41 R. 2 — Courts of Appeal should always be chary of entertaining points which are not sifted in the Court below. A question of jurisdiction though a question of law, cannot be allowed to be raised for the first time in an appeal. (1936) 163 Ind Cas 188 : 39 CWN 876 : 61 CLJ 342 : 62 Cal 1088 (DB).

——O. 41 R. 2 — Question of jurisdiction allowed to be raised by lower Appellate Court — Materials to adjudicate on point — It may direct original Court to take further evidence.

Where the lower Appellate Court permits the question of jurisdiction to be raised before it, it is incumbent upon it in the circumstances to secure the materials upon which a decision could be safely arrived at either by taking the necessary evidence or by directing the Court of fact to take it. AIR (Vol 23) 1936 Pat 260 : 16 PLT 915 : 15 Pat 272 : 2 BR 540 : 162 Ind Cas 1004 (DB).

——O. 41 R. 2 — Lower Court in exercise of its discretion accepting the explanation of the conduct of the insolvent.

Where in exercise of his discretion, the District Judge has accepted the explanation of the conduct of the insolvent as a trader or in relation to his estate, and the question mainly rests in the discretion of the District Judge, a Court of Appeal should be slow to interfere with that discretion. AIR (Vol 21) 1934 PC 1 : 39 MLW 82 : 148 Ind Cas 858.

——O. 41 R. 2 — Where there is no substantial reason for doing so, the decision of the trial Court on a question of fact should not be disturbed. AIR (Vol 21) 1934 Pat 144 : 148 Ind Cas 501 (DB).

——O. 41 R. 2 — A question of jurisdiction may be raised at any stage of an appeal. AIR (Vol 20) 1933 All 392 : 17 RD 309 : 149 Ind Cas 1066 (2).

——O. 41, R. 2 — Jurisdiction — Question not raised in first court — First raised in appellate court — How far allowable.

Courts should not assist parties to set aside decrees upon point not raised before the Court which tried the matters in issue, as the pleas might have been met by other facts. (1902) 25 A 135 (136) : 1902 All WN 219 (DB).

4. New case or point.

See also Civil P. C., S. 100.

(a) General.
(a-1) Adverse possession.
(b) Custom.
(c) Ejectment.
(d) Estoppel.
(e) Plea involving question of fact.
(f) Plea necessitating remand.
(g) Inconsistent plea.
(h) Mesne profits.
(i) Negligence.
(j) Patent on record.
(k) Subsequent alterations.
(l) Nature of transaction.
(m) Written statement.

(a) General.

——O. 41, R. 2 — Question whether person is holding public office within S. 45, Specific Relief Act, cannot be disputed at stage of argument in appeal.

The question whether a person is holding a public office within the meaning of S. 45, Specific Relief Act, is a mixed question of law and fact and cannot be disputed in appeal at the stage of arguments when it was conceded in the trial Court. AIR (V 33) 1946 Bom 407 (DB).

——O. 41 R. 2 — Question of law not depending on disputed facts.

Where the determination of a question of law which is raised for the first time in appeal does not depend upon a decision as to facts which are in dispute, the Court is not only competent but should in the interests of justice entertain the plea. AIR (V 31) 1944 Bom 50 : 45 Bom LR 980 : 212 Ind Cas 291 (DB).

——O. 41, R. 2 — Plea that defendant was agriculturist within Dekkhan Agriculturists' Relief Act.

A plea that the defendant was an agriculturist within the meaning of the Dekkhan Agri. Relief Act depends on evidence and hence cannot be raised in appeal as a new point. AIR (V 31) 1944 Bom 37 : 45 Bom LR 1014 : 215 Ind Cas 12 (DB).

——O. 41, R. 2 — Point not taken in pleadings cannot be raised.

A point which was not taken in the pleadings cannot be allowed to be raised in appeal. AIR (V 30) 1943 Cal 319 : 76 CLJ 83 : 47 CWN 186 : ILR (1943) 1 Cal 274 : 208 Ind Cas 309 (DB).

——O. 41, R. 2 — Plea outside pleadings.

The trial Court was prepared to allow the additional plea under S. 53 (2) (b) (i), Insurance Act, that the company should be wound up on the ground of its failure to deposit in time the amount required under S. 7, Insurance Act, to be taken, if the pleadings were amended. But as the pleadings were not amended the plea was disallowed:

Held, that the plea could not be allowed to be taken in appeal, it being outside the pleadings and, all the necessary facts not having been investigated. AIR (V 30) 1943 Lah 109 : 45 PLR 49 : ILR (1944) Lah 47 : 208 Ind Cas 170 (DB).

——O. 41, R. 2 — Suit by usufructuary mortgagee based upon covenant to repay entitling him to money-decree — Plea that mortgagee is entitled to decree for sale on ground of his being deprived of security or possession.

Where the case of the usufructuary mortgagee is based upon the covenant of repayment which would entitle him to a decree for the money under the provisions of cl. (a) of S. 68 (1), T. P. Act, he cannot be allowed to set up the plea, that he is entitled to a decree for sale upon the ground that he had been deprived of his security or possession of the property for the first time in appeal as it changes the nature of his claim and is not a matter of pure technicality. AIR (V 29) 1942 All 326 : (1942) ALJ 441 : ILR (1942) All 368 : 1942 AWR (HC) 158 : 203 Ind Cas 135 (DB).

——O. 41, R. 2 — The plaintiff cannot be allowed to make a new and inconsistent case in appeal or he cannot be allowed to adopt the case of the defendants, partly or wholly, in appeal and ask for relief on that basis. (1937) 39 Bom LR 1318 (DB).

——O. 41, R. 2 — The appellant is not entitled to raise a point for the first time in appeal, where the decision of this point would necessitate the production of further evidence by the defendants. AIR (V 24) 1937 Lah 135: 39 PLR 253: 164 Ind Cas 63 (DB).

——O. 41, R. 2 — It is very necessary that every discouragement should be given to an invention of new points at a late stage, points which might have been met if taken properly by adducing further evidence. AIR (V 23) 1936 Pat 260 : 16 PLT 915 : 15 Pat 272 : 2 BR 540 : 162 Ind Cas 1004 (DB).

——O. 41, R. 2 — No issue in the primary Court.

A new point depending on consideration of evidence cannot be taken for the first time in appeal, though it was indicated in the written statement but no issue was joined on it and was submitted to the judgment of the primary Court. (1936) 163 Ind Cas 663 : 61 CLJ 551 (DB).

——O. 41, R. 2 — Fresh evidence necessary.

Where plea was not taken in the lower Court, nor was it raised in the grounds of appeal, but it had been submitted as an additional ground of appeal:

Held, that the appellants could not raise this new point on appeal for deciding which it was necessary to take evidence. AIR (V 22) 1935 Pesh 44 : 155 Ind Cas 1006 (DB).

——O. 41, R. 2 — It is not open to a party to raise before the Appellate Court a case founded on totally different and contradictory facts which the opposite party had no chance of meeting. AIR (V 20) 1933 Mad 675 : (1933) MWN 352 : 38 MLW 301 : 65 MLJ 271 : 145 Ind Cas 933.

——O. 41, R. 2 — No attempt should be made to secure at appellate stage a consideration of matters which have not been adjudicated upon or even considered in the Court of first instance which are outside the questions at issue between the original parties. AIR (V 19) 1932 Cal 448 : 59 Cal 329 : 138 Ind Cas 104 (DB).

——O. 41, R. 2 — It will be unfair to allow the appellants in a case to spring a surprise on the opponent by allowing them to raise a contention not raised either in the lower Court or in the grounds of appeal. AIR (V 19) 1932 Lah 264 : 33 PLR 151 : 136 Ind Cas 733.

——O. 41, R. 2 — New case based on the late production of document.

Courts should be careful in allowing parties to make out at a late stage a new case different from that which was set up in their pleadings before the trial, and should not be too ready to receive in evidence documents produced very late with the allegation of their having been mislaid. AIR (V 19) 1932 Pat 332 : 13 PLT 545 : 140 Ind Cas 104 (DB).

——O. 41, R. 2 — Principles.

A point not taken in the Court below, whether the omission was by the appellant in that Court or whether the respondent failed to support his decree by taking the point, will not be permitted to be raised, except: I. Where the point may be described as involving a question of public policy, e.g., (1) involving jurisdiction, (2) involving the principle of res judicata, (3) where the decision of the point would prevent future litigation. In the above instances the point will be allowed to be argued only, if it can be decided upon the materials before the Court and does not involve the taking of further evidence or the sending of the case, or any issue, back to the lower Court, or a decision of a question of fact.

II. Where the plaint discloses no cause of action or the written statement no ground of defence, it is not a ground for permitting a new point to be argued merely;

(1) that it was omitted by oversight in the Court below, or

(2) that the materials are all on the record and that the answer to the point is plain. AIR (V 18) 1931 All 35 : (1930) ALJ 1601 : 53 All 65 : 133 Ind Cas 428 (FB).

——O. 41, R. 2 — A party cannot be permitted to give the go-bye to the case on which he went to trial and to set up a new case in appeal. Where a party went to trial alleging that there was a sale in consideration of the balance of a dower debt which was originally fixed at Rs. 40,000 but it was found that the dower debt was only Rs. 500:

Held, that he could not be allowed to set up a new case that the dower debt had been increased by the sale-deed to Rs. 40,000.

No amount of evidence can be looked into upon a plea which was never put forward. It is incumbent on a party who wishes to put forward a new case to ask for amendment of the pleadings and to raise new issues so as to afford an opportunity to the opposite party to meet the new case.

Per Wild, C. J. — It is not open to a party who pleads that a deed is a sale-deed to make out a new case and argue that it is a deed of gift. AIR (V 18) 1931 Sind 17 : 25 SLR 72 : 129 Ind Cas 900 (DB).

——O. 41, R. 2 — A new case that does not arise out of the pleadings and cannot be decided on the evidence on the record cannot be entertained in appeal. (1931) 135 Ind Cas 703 : 8 OWN (CC) 1028 (DB).

——O. 41, R. 2 — Where the interest actually stipulated for in the bond was not pleaded at any stage in the trial Court to be penal, the appellate Court has no jurisdiction to set up an entirely new case for the defendant and to hold that the interest was penal. AIR (V 16) 1929 Lah 548 : 120 Ind Cas 192 : 11 LLJ 144.

——O. 41, R. 2 — A plea which is not raised in the trial should not be considered by the District Court. (1922) 68 Ind Cas 227 : 3 LLJ 392 (DB).

——O. 41, R. 2 — New point — Not raised in the memorandum.

An appellant will not be allowed to argue a new point in appeal, especially if it was raised by way of additional grounds, long after the period of limitation for filing the appeal had expired. AIR (V 3) 1916 Lah 452 : 7 PR 1916 : 46 PLR 1916 : 129 PWR 1915 : 30 Ind Cas 22 (DB).

——O. 41, R. 2 — Additional grounds.

Additional grounds of appeal should not be allowed to be filed at a late stage. AIR (V 1) 1914 Lah 402 : 49 PR 1914 : 252 PLR 1914 : 160 PWR 1914 : 25 Ind Cas 443 (DB).

——O. 41, R. 2 — An appellant cannot put forward a new case in appeal. 167 PWR 1912 : 190 PLR 1912 : 17 Ind Cas 243.

——O. 41, R. 2 — New plea — Grounds that can be raised in appeal.

Where the first Court has neither put in issue, a plea of the defendant nor has given a finding thereon and the appellant has not mentioned it in the ground of appeal, such plea cannot be raised in appeal. A point not raised in the original Court cannot be allowed to be advanced for the first

time in appeal. 183 PWR 1912 : 197 PLR 1912 : 17 Ind Cas 232 (DB).

——O. 41, R. 2 — Pleadings — Appellate Court — Plea of stifling prosecution raised for the first time in appeal — Plea of coercion and public policy to avoid sale deed — Neither raised by pleadings nor in the grounds of appeal — Whether entertainable.

An appellate Court ought not to decide a case on a plea that a deed was void as it was obtained to hush up crime and was therefore, against public policy where such a plea was not raised by the pleadings or in the grounds of appeal to that Court. (1909) 6 ALJ 636 (640) : 3 Ind Cas 510.

——O. 41, R. 2 — Pleadings — Allegations — Decision on — New case in appeal not allowed.

A litigating party can only succeed secundum allegato et prohibita and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up. It is, therefore, not open to a Court of appeal to expose a party after he has obtained his decree to the brunt of a new attack of which he had never had any notice during the hearing of the suit. (1908) 10 Bom LR 768 : 33 B 35 (38) : 1 Ind Cas 456 (DB).

——O. 41, R. 2 — Party not entitled to raise points not pressed by the Vakil in the lower Court.

A party cannot be allowed to raise a contention not pressed by the Vakil in the lower Court. (1908) 18 MLJ 188 (188) (DB).

——O. 41, R. 2 — Relief — Onus of proof — Points not raised in first Court.

The plaintiff claimed the lands in dispute as reformations in situ of her permanently settled estate. The parties went to trial on the narrow issue whether the reformations were on specified tarafs. It was proved that the lands were on the original site of the estate.

Held, reversing the judgment of the High Court, that the plaintiff should be treated as having a prima facie title as co-sharer in every part of the estate which was not shown to have been alienated, and no weight should be attached to a suggestion not made in the Court of first instance, where it might have been explained and met by evidence. (1906) 3 CLJ 560 (569): 1 MLT 175 (PC).

——O. 41, R. 2 — Appellate Court — New case in appeal.

A contention opposed to the plaint and not advanced in the lower Court cannot be raised in the appellate Court. (1902) 25 M 220 (231) (FB).

——O. 41, R. 2 — Plea of 'contrary to public policy' — 'Point not raised until the hearing in appeal.'

Their Lordships refused to allow a plea of an agreement being 'contrary to public policy' for the first time at the hearing of the appeal. (1901) 25 B 10 (19) : 2 Bom LR 907 (FB).

(a-1) Adverse possession.

——O. 41, R. 2 — Adverse possession, question of, cannot be raised for first time in appeal. AIR (V 26) 1939 Pat 636: 18 Pat 590: 6 BR 117: 185 Ind Cas 179 (DB).

(b) Custom.

——O. 41, R. 2 — Plea as to existence of custom.

The plea as to whether a custom exists involves a pure question of fact and cannot be allowed to be raised for the first time in appeal. AIR (V 31) 1944 Bom 40 : 45 Bom LR 992 : ILR (1943) Bom 706 : 212 Ind Cas 232 (DB).

(c) Ejectment.

——O. 41, R. 2 — Decree for ejectment passed — Plea of partial ejectment not taken in trial Court.

Where a decree for ejectment is passed against the tenant and he prefers an appeal from the decree, it is not permissible for him to make out a new case in appeal by contending that the suit was bad for partial ejectment when the tenant deliberately omits to raise such a plea in the trial Court. AIR (V 26) 1939 Cal 486.

(d) Estoppel.

——O. 41, R. 2 — Plea of estoppel raised in written statement, issue framed but not pressed in trial Court.

Where the defendant raised the plea of estoppel under S. 115, Evidence Act, in his written statement and an issue was framed on that point by the trial Court, but at the time of the hearing of the suit this issue was not pressed by the defendant:

Held, that the defendant was not entitled to raise the question of estoppel in appeal. AIR (V 29) 1942 Cal 586 : 46 CWN (CC) 1022 : ILR (1943) 1 Cal 128 : 203 Ind Cas 630 (DB).

(e) Plea involving question of fact.

——O. 41, R. 2 — Point involving question of fact.

No objection to the maintainability of the suit on the ground that the plaintiff was divested of her interest on account of the adoption was specifically taken and no such issue was framed. The point, however, was sought to be raised at the time of the argument:

Held, that the defendant could not be allowed to raise a new point, involving a question of fact, at that late stage. AIR (V 31) 1944 Cal 106 : ILR (1943) 1 Cal 578 : 212 Ind Cas 483 (DB).

——O. 41, R. 2 — Point depending on question of fact not put in issue in trial Court.

The point that Regulation 76 of Table A of Sch. I, Companies Act was applicable to the company depends upon the question of fact namely, whether there was a special resolution of the company by which the aforesaid Table A was adopted, and when the question of fact was not put in issue in the lower Court, the point cannot be raised in appeal. AIR (V 30) 1943 Cal 455 : 46 CWN 1015 : 76 CLJ 267 : ILR (1943) 1 Cal 59 : 208 Ind Cas 483 (DB).

——O. 41, R. 2 — Plea involving issues of fact.

New grounds should not be allowed to be raised for the first time in appeal specially when they involve issues of fact, such as that the gift was altogether bogus or that it was invalid as the donee had not accepted it, when they were not expressly raised in the plaint or in the statement before issues. AIR (V 29) 1942 Lah 243 : 44 PLR 382 : 203 Ind Cas 404 (DB).

——O. 41, R. 2 — Where in appeal the findings of facts of the trial Court are not challenged and the appeal is only confined to the question of law, the appellant must be deemed to have accepted the findings of facts of the trial Court. AIR (V 26) 1939 Mad 860 : 50 MLW 291 : (1939) MWN 892 : (1939) 2 MLJ 489 : ILR (1939) Mad 980 : 188 Ind Cas 727 (DB).

——O. 41, R. 2 — A plea involving a question of fact, not raised in the pleadings or at any stage before the trial Court will not be entertained for the first time in appeal. AIR (V 25) 1938 All 145 : (1938) ALJ 16 : 1938 AWR (HC) 1 : 174 Ind Cas 465 (DB).

——O. 41, R. 2 — Second appeal — Further finding of fact necessitated.

It is not open for an appellant in second appeal to take a new point which requires for its determination further findings of fact before such point can be determined. AIR (V 24) 1937 All 661 : (1937) ALJ 769 : 1937 RD 387 : 1937 AWR (HC) 650 : 171 Ind Cas 686.

——O. 41, R. 2 — Question of fact.

A plea which involves a question of fact cannot be taken for the first time in appeal when it cannot be decided upon the record before the Court. AIR (V 19) 1932 Oudh 123 : 9 OWN (CC) 60 : 7 Luck 454 : 137 Ind Cas 102 (DB).

(f) Plea necessitating remand.

——O. 41, R. 2 — Involving framing of fresh issue and remand.

A new plea necessitating a remand, the framing of a fresh issue and the trial of a totally new point cannot be allowed at the appellate stage. AIR (V 21) 1934 Lah 34 (2) : 148 Ind Cas 171 (DB).

(g) Inconsistent plea.

——O. 41, R. 2 — Inconsistent.

A party cannot be allowed to set up, for the first time in appeal a case diametrically opposed to his own pleas in the Court below, and utterly inconsistent with the position taken up by him in the previous litigation. AIR (V 28) 1941 Lah 347 : 43 PLR 489 : 197 Ind Cas 481 (DB).

——O. 41, R. 2 — Pleadings — Plaintiffs not allowed to set up in appeal a case inconsistent with that upon which they came into Court.

Where in a partition suit the plaintiffs appellants came into Court alleging joint possession along with certain other plaintiffs, of a certain share and the lower Court decreed the appellant's claim only as far as their claim in the plaint was concerned while finding that other plaintiffs who are not appellants were entitled to partition by reason that they were not in possession of the property within 12 years prior to suit and the appellant plaintiffs, consequent on that finding claimed in appeal a share in the property disallowed to the others.

Held, that the granting of the plaintiffs appellants' prayer would involve the granting of a decree on a ground inconsistent with the case set up by them in their plaint and therefore refused. (1904) 1904 AWN 33 (34) (DB).

(h) Mesne profits.

——O. 41, R. 2 — No prayer for mesne profits made in plaint — Defendant confessing judgment at hearing.

There was no prayer in the plaint for the mesne profits of the property sought to be recovered. At the hearing the defendant confessed judgment and a decree for possession was passed in favour of the plaintiff:

Held, that had there been a claim for mesne profits in the plaint, the contest in respect of that jote would not have been withdrawn. In these circumstances it would not be fair to the defendant if the amendment allowing the plaintiffs to introduce the prayer for mesne profits is granted at the appellate stage. AIR (V 29) 1942 Cal 371 : 46 CWN 347 : ILR (1942) 2 Cal 35 : 201 Ind Cas 279 (DB).

——O. 41, R. 2 — The judgement-debtor cannot lie by in the executing Court with an allegation which would require an investigation into facts and then bring it up in appeal and found upon it a proposition of law to the effect that the sale is bad. AIR (V 29) 1942 Mad 97 : 54 MLW 365 : 1941 MWN 985 : (1941) 2 MLJ 550 : 201 Ind Cas 156.

(i) Negligence.

——O. 41, R. 2 — Plea of contributory negligence in defence.

Where the plea of contributory negligence was not specifically raised in defence and no issue was struck, the plea cannot be entertained in argument in appeal. AIR (V 30) 1943 Oudh 140 : 1942 OWN (CC) 773 : 1942 AWR (CC) 359 : 19 Luck 95 : 204 Ind Cas 100 (DB).

——O. 41, R. 2 — Negligence.

In a suit based on negligence, the plaintiff is not entitled to throw over the case of negligence which he has alleged and spoken to in evidence and ask the Court of Appeal to find negligence established on quite different facts. AIR (V 19) 1932 PC 95 : 63 MLJ 275: 36 MLW 434: 136 Ind Cas 451 (PC).

(j) Patent on record.

——O. 41, R. 2 — Question of law affecting validity of decree not expressly pleaded in pleading.

It has always been regarded as a healthy rule of practice that a party can succeed only upon a definite plea set up in defence or in the plaint. But every variance between pleading and proof is not always fatal. The test is whether the other party would be taken by surprise if relief were granted on the basis of the new point raised.

The application of the rule has to be considered in connection with the other circumstances of the case. Courts have in some cases allowed questions of law affecting the validity of the decree to be raised for the first time in appeal on the supposition that the question could be raised upon the substance of the pleadings. Making allowance for the fact that the pleadings in the muffasil are inartistically drawn up, that fact does not warrant the departure from the rule that a plaintiff must be held to the state of facts and equities alleged and pleaded by him or involved in or consistent therewith. That rule applies with equal force to the defendant.

Where a question of law affecting the validity of a decree is not expressly pleaded in the pleadings, it can be allowed to be raised for the first time in appeal, if the question can be raised upon the substance of the pleadings and is not inconsistent with it. AIR (V 24) 1937 Bom 449 : 39 Bom LR 807 : 172 Ind Cas 451 (DB).

——O. 41, R. 2 — New point patent on the record.

Where a point though not taken in the grounds of appeal is patent on the record, it may be allowed to be argued in appeal. AIR (V 20) 1933 Lah 738 : 34 PLR 642 : 150 Ind Cas 155.

(k) Subsequent alterations.

——O. 41, R. 2 — Claim for damages based on re-sale — Alternative plea for damages on basis of market value.

Where a party, in a suit for damages for breach of contract, claims damages on the basis of a re-sale which he fails to prove, he cannot subsequently in appeal set up an alternative claim for damages on the basis of the market price:

Held, that the use of the word 'deposit' in a contract implied an agreement that the sum deposited may be forfeited in case of breach by the depositor. AIR (Vol 24) 1937 Lah 842 : 40 PLR 55 : 175 Ind Cas 90.

(l) Nature of transaction.

——O. 41, R. 2 — Point that party had relinquished his claim to inheritance.

The question whether a party had relinquished his claim to the inheritance depends upon investigation of facts and where that question has not been pleaded in the written statement and the facts have not been put in issue, the question cannot be allowed to be raised for the first time in appeal. AIR (Vol 29) 1942 Cal 180: 74 CLJ 261: 46 CWN 561: 200 Ind Cas 392 (DB).

——O. 41, R. 2 — Plea that party was purchaser at rent sale.

A party in appeal cannot be given a fresh opportunity for proving his case that he was a purchaser at a rent sale with no notice of an unusual covenant governing the holding sold when no founda-

tion was made for such a case either in the pleadings or in the trial Court. AIR (Vol 29) 1942 Cal 133: 74 CLJ 139: 200 Ind Cas 235.

——O. 41, R. 2 — Plea as to bogus nature of transaction.

The plea as to the bogus nature of the transaction cannot be entertained in appeal on the ground that it was not clearly raised in either of the two plaints relating to the transaction. AIR (Vol 29) 1942 Lah 243 : 44 PLR 382: 203 Ind Cas 404 (DB).

——O. 41, R. 2 — Second appeal — Plea that certain statements are inadmissible.

The High Court will not give effect to the contention sought to be raised before them for the first time, relating to the inadmissibility of statements in evidence for the reason that they were not statements as contemplated by S. 164, Criminal P. C. AIR (Vol 23) 1936 Cal 101 : 37 Cr LJ 445: 63 CLJ 191: 161 Ind Cas 289 (DB).

(m) Written statement.

——O. 41, R. 2 — Plea not raised in written statement.

In a suit for ejectment of the tenant on the ground that the landlords wanted the land for building purposes, it was contended for the first time in the lower Appellate Court that as the landlords did not prove that they required the whole of the land, a decree for the whole of the land could not be given:

Held, that such contention should have been raised in the written statement, in which case it would have become an issue in the suit and that there were no materials on which the Court could decide the question. AIR (Vol 31) 1944 Mad 262: (1944) 1 MLJ 117: 1944 MWN 84: 57 MLW 239.

——O. 41, R. 2 — Where the defendant does not deny her liability in the written statement to pay rent which accrued due during the lifetime of the predecessor, she cannot be allowed to take such plea for the first time in appeal. AIR (Vol 22) 1935 Pat 306: 14 Pat 70: 1 BR 777: 157 Ind Cas 433 (DB).

——O. 41, R. 2 — Plea not taken in written statement.

It is not open to a party to raise in appeal a plea not raised in the trial Court on which, if raised evidence would have been taken. AIR (Vol 20) 1933 Rang 385 : 150 Ind Cas 697.

——O. 41, R. 2 — New ground.

Where an objection is not taken in the written statement and the matter is not discussed in trial Court and is not mentioned in grounds of appeal, the appellate Court should not go into the question at all. 33 CWN 559: 49 CLJ 555: 120 Ind Cas 455 : 57 Cal 10: AIR (Vol 16) 1929 Cal 651 (DB).

5. Mixed point of law and fact.

——O. 41, R. 2 — Plea of adoption being invalid.

A plea that the adoption is invalid on the ground of the extinguishment of the co-parcenary prior to adoption, involves questions not only of law but of fact and therefore cannot be allowed to be raised for the first time in appeal when it was not raised in the trial Court nor in the grounds of appeal. AIR (Vol 28) 1941 Bom 193 : ILR (1941) Bom 306 : 43 Bom LR 214: 197 Ind Cas 142 (DB).

——O. 41, R. 2 — Legality of partnership as regards constitution.

The question as to the legality of the constitution of a partnership is clearly a mixed question of law and fact and the Appellate Court cannot for the first time raise such a question and decide it. AIR (Vol 28) 1941 Sind 73 : ILR (1944) Kar 21: 194 Ind Cas 380 (DB).

——O. 41, R. 2 — Mixed question of law and fact.

A point that a certain transfer was invalid because it was made during the time that the property was under the control of the Collector, who could perform the powers conferred on him by Paras 1 to 10 of Sch. III, Civil P. C., is a mixed quse-tion of law and fact and cannot be allowed to be taken for the first time in appeal. AIR (Vol 27) 1940 All 500: 1940 AWR (HC) 470: (1940) ALJ 744: ILR (1940) All 681 : 191 Ind Cas 745 (DB).

——O. 41, R. 2 — Mixed question of law and fact.

When the question taken for the first time in appeal is a mixed question of fact and law, it should not be allowed to be raised. AIR (Vol 24) 1937 All 161 : 1936 AWR (HC) 1290 : 167 Ind Cas 657 (DB).

——O. 41, R. 2 — Mixed question of fact and law.

A new plea in respect of which no issue was framed in the trial Court and which raises a mixed question of law and fact and involves admission of additional evidence cannot be raised for the first time in appeal. AIR (Vol 21) 1934 Oudh 145 : 11 OWN (C C) 430 : 18 RD 213: 9 Luck 670: 149 Ind Cas 550 (DB).

——O. 41, R. 2 — Admission by Counsel of a mixed question on law and fact does not debar the party from arguing the question in appeal if no surprise is sprung on the opposite party. AIR (Vol 19) 1932 Oudh 172: 9 OWN (CC) 304: 7 Luck 564 : 137 Ind Cas 349 (DB).

——O. 41, R. 2 — Jurisdiction.

The ground that the lower Appellate Court erred in allowing an objection to jurisdiction as to the place of suing as there had been no proof of failure of justice as required by S. 21, is a point of law which may be taken in second appeal, even though it was not set forth in the memo of appeal. AIR (Vol 18) 1931 All 556: 131 Ind Cas 603 (DB).

6. Point of law.

——O. 41, R. 2 — New point of law.

A new question of law which goes to the root of the case may be raised for first time in appeal. (1944) 46 PLR 382 (DB).

——O. 41, R. 2 — A point of law can be raised for the first time in appeal if no new facts have to be investigated for deciding the same. AIR (Vol 30) 1943 Pat 320 : 22 Pat 280 : 10 BR 354 : 211 Ind Cas 212 (DB).

——O. 41, R. 2 — Plea not raised in written statement, no issue upon it framed and plea not raised even in memo of appeal — Question of law — No objection by respondent's Pleader.

A plea which was not raised in the written statement and on which no issue was framed and which was not clearly raised even in the memorandum of appeal was allowed to be argued for the first time in appeal as it involved a pure question of law and as no objection was raised by respondent's Counsel. AIR (Vol 29) 1942 All 365 : (1942) ALJ 487 : ILR (1942) All 708: 1943 AWR (HC) 241 : 203 Ind Cas 97 (DB).

——O. 41, R. 2 — When there is a pure question of law arising between the parties or a mere question of interpretation of some document the Court may even in appeal allow the point to be raised for the first time. But the question must be an absolutely clear and unambiguous one and it should not require the production of any additional evidence. AIR (Vol 24) 1937 All 535: (1937) ALJ 442 : 1937 AWR (C C) 355 : 1937 ALR (C C) 782: 170 Ind Cas 983 (DB).

——O. 41, R. 2 — Point of law — Act declared as void — Objection to enforcement of it.

No Court can enforce as valid that which competent enactments have declared shall not be valid; nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties or by a failure to plead or to argue the point at the outset. Such a point can be raised at any stage. AIR (Vol 24) 1937 Lah 387 : 39 PLR 714: 173 Ind Cas 379.

——O. 41, R. 2 — Any new point of law may be taken in appeal if the same may be fairly urged on the facts admitted by the parties or found by the Court. AIR (Vol 21) 1934 All 868 : (1934) ALJ 809: 3 AWR (H C) 811 : 57 All 166 : 149 Ind Cas 797 (DB).

——O. 41, R. 2 — A point of law can be taken for the first time in appeal even though it was not taken in the written statement. AIR (Vol 20) 1933 Bom 413: 35 Bom LR 850 : 57 Bom 678: 147 Ind Cas 1096 (DB).

——O. 41, R. 2 — Question of law.

A question relating to the validity of the lease which was not raised in the lower Court or set forth in the memorandum of appeal was allowed by the Court to be raised on appeal as it was a pure question of law. AIR (Vol 18) 1931 Bom 466 : 33 Bom LR 590 : 133 Ind Cas 839 (DB).

——O. 41, R. 2— Co-appellant— Reliance on other's grounds.

When one of the appellants dies, his co-appellant is competent to rely on all such grounds upon which the deceased appellant could have resisted and did resist the claim. AIR (Vol 16) 1929 Cal 263: 33 CWN 150 : 56 Cal 487: 117 Ind Cas 855 (DB).

7. Leave of Court.

——O. 41, R. 2 — Plea that matter in dispute could not be referred to arbitration, pending review, without Court's intervention, and leave of Court was necessary under O. 32, R. 7 though question of law depends on facts — Facts neither disclosed in plaint nor in paper-book.

The plea that, since the review application was pending, it was not open to the parties to refer the matters in dispute to arbitration without the intervention of the Court and, therefore, the leave of the Court should have been obtained under O. 32, R. 7, Civil P. C., though a question of law, it depends on facts and where these facts are not disclosed in the plaint or anywhere in the paper-book, it cannot be entertained in appeal. AIR (Vol 29) 1942 All 36: (1941) ALJ 770 : 1941 AWR (HC) 371: 198 Ind Cas 385 (DB).

——O. 41, R. 2 — Leave to argue new point cannot be granted under O. 41, R. 2, in the absence of particular reason. AIR (Vol 28) 1941 Oudh 72 : 1940 OWN (CC) 1052 : 1941 AWR (CC) 467 : 1940 RD 531 : 192 Ind Cas 379.

——O. 41, R. 2 — Point of law can be raised for first time in appeal, if same can be determined from existing material on record.

Where the point of law which a party desires to raise for the first time in appeal can be determined on the material already existing on the record, the Court should not refuse permission to the party to urge that plea. AIR (Vol 27) 1940 Lah 252: 190 Ind Cas 692.

——O. 41, R. 2 of Civil P. C. provides that appellant shall not except by leave of Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. Object of this rule is to give notice of the ground of objection to the opposite party. AIR (Vol 24) 1937 Oudh 416 : 1937 OWN (CC) 634 : 5 ITR 417: 169 Ind Cas 404 (DB).

——O. 41, R. 2 — Implied leave.

An additional ground of appeal filed after the time for filing the appeal is barred, of which the respondent has had sufficient notice can be argued with the leave of the Court, express or implied. When the Court is under the mistaken impression that leave had already been obtained for filing of the additional ground and allows the argument on the ground without objection being taken, it can be assumed that permission to argue is impliedly given, though the Court was under a mistaken impression. AIR (Vol 18) 1931 Rang 314 : 135 Ind Cas 328.

——O. 41, R. 2 — New ground not taken in memo— Leave of Court.

A party can go outside his ground of appeal with the leave of the Appellate Court. AIR (Vol 2) 1915 Lah 449 : 57 PLR 1916 : 121 PWR 1915 : 30 Ind Cas 817.

8. Point of limitation.

——O. 41, R. 2 — Plea of limitation.

The guardian of two minors A and B, who was appointed by the Court transferred their property to C without the Court's sanction. A after attaining majority transferred his own and also B's interest in the same property to D. D brought a suit for the possession of the property against C. C's plea of limitation on the ground that B attained majority more than three years before the suit, was refuted by D and B was found to be minor. C appealed:

Held, that as B was found to be minor, it was competent for C to take up the plea in appeal that D was not entitled to B's share in the property transferred to him, though the plea was not specifically raised in the written statement. AIR (Vol 28) 1941 Mad 481: 1941 MWN 456 : 53 MLW 650: (1941) 1 MLJ 800: ILR (1941) Mad 775: 196 Ind Cas 87 (FB).

——O. 41, R. 2 — A question of limitation even though not raised in the lower Court can be raised in appeal. AIR (Vol 26) 1939 Bom 425 : 41 Bom LR 939 : ILR (1939) Bom 564: 186 Ind Cas 164.

——O. 41, R. 2 — Plea of limitation — No material on record to decide point.

The plea as regards the limitation, is not a pure question of law, but it is a mixed question of fact and law. In order that such a plea may be supported, finding of fact is necessary. Where such a plea is raised for the first time in appeal and there is no material on record for the Court to come to any finding on such a point, the plea cannot be allowed to be raised in the appeal. AIR (Vol 26) 1939 Rang 42: 180 Ind Cas 300 (DB).

——O. 41, R. 2 — Plea of limitation depending on evidence.

Where the determination of a plea of limitation depends upon evidence, it will not be entertained for the first time in appeal. AIR (Vol 24) 1937 Lah 312: 174 Ind Cas 837.

——O. 41, R. 2 — It is true that a new point which was not raised in the trial Court should not be allowed to be raised in appeal except in exceptional circumstances. But the question of limitation stands on a different footing. Where a party wants to take benefit of S. 20, Lim. Act, and fails to bring his case under it, in appeal he can be allowed to set up his case under S. 19. Justice should not be allowed to be defeated simply because a party has not been able to prove the case which he attempted to prove but has proved certain other facts which nevertheless entitle him to a decree, provided the aggrieved party is not taken by surprise. AIR (Vol 24) 1937 Oudh 391 : 1937 OWN (CC) 719: 13 Luck 334: 168 Ind Cas 799 (DB).

——O. 41, R. 2 — Appeal — Limitation — Plea abandoned in lower Court and raised in appeal.

A plea of limitation abandoned in the lower court cannot be raised in the appellate court when it cannot be decided by the latter on the facts found by the lower court, or admitted by the defendant. (1901) 25 M. 55 (60) : 11 MLJ 318 (DB).

9. Presentation of appeal.

——O. 41, R. 2 — Proper presentation.

There is no proper presentation of an appeal without a copy of a decree even when there is no decree in existence. AIR (Vol 9) 1922 Lah 170 : 69 Ind Cas 895 (DB).

——O. 41, R. 2 — At a private residence of Judge.

A Judge has jurisdiction to receive an appeal presented at his private residence beyond Court hours. 7 NWPHCR 5, overruled. (1912) 34 All 482: 9 ALJ 743: 14 Ind Cas 744 (FB).

10. Res judicata, plea of.

——O. 41, R. 2 — Second appeal.

Although a second Appellate Court will be chary of allowing an appellant to take a point in second appeal which has not been raised, and which ought to have been raised at an earlier stage of the hearing, where a particular point involves a question of res judicata, a Court is bound to entertain it notwithstanding that the parties themselves may even have abandoned it. AIR (Vol 24) 1937 Mad 228 : (1936) MWN 789: 169 Ind Cas 318.

(Reversed in AIR (Vol 25) 1938 Mad 501: 178 Ind Cas 717 on another point.)

——O. 41, R. 2 — Plea of, if can be taken for first time at hearing of second appeal.

A plea of 'res judicata' can be taken for the first time at the hearing of a second appeal though not taken in the memo of appeal. AIR (Vol 1) 1914 All 2: 22 Ind Cas 12.

11. Scope.

——O. 41, R. 2 — An appellant should not be allowed to raise and succeed on defences not raised in the written statement or in the memorandum of appeal. It is true that the Appellate Court under O. 41, R. 2 in deciding the appeal is not confined to the grounds of objection in the memorandum but it is not permitted to rest its decision on any other ground unless the party affected thereby has had a sufficient opportunity of contesting the case on that ground. When an appellant seeks to raise a point not taken in the Courts below or in the memorandum of appeal, the propriety of allowing him to do so and of basing the appellate decision on such a ground is a matter which the Appellate Court ought to decide. AIR (Vol 27) 1940 Pat 33.

——O. 41, R. 2 — It is not a desirable practice that one or more points should be taken in the Court of first instance, and another point of considerable importance and material gravity should be kept in the background until the parties are before the Court of Appeal. (1936) 164 Ind Cas 732: 39 CWN 174 (DB).

——O. 41, R. 2 (S. 542 old Code) — Applicability to second appeals.

S. 542, C. P. C., applies to appeals from appellate decrees. (1907) 6 CLJ 237 : 34 C 941 (947, 948) : 11 CWN 959 (FB).

12. Change of ground.

——O. 41, R. 2 — Kumaun custom — Custom not pleaded in plaint but referred to in judgment by trial Court.

In a suit between the parties who were the residents of Kumaun where the suit was tried, the Kumaun custom was not specifically pleaded in the plaint but a reference was made in the trial Court's judgment to Panna Lal's book on Kumaun Customs and Para. 84 of the same was mentioned:

Held, that the plea of custom should be allowed to be raised in appeal in view of the whole matter. AIR (Vol 29) 1942 All 104: (1942) ALJ 37: 1941 AWR (H C) 389 : 199 Ind Cas 212 (DB).

——O. 41, R. 2 — Where variance between proof and pleading was not material and it could not be said that the defendants were in any way taken by surprise by the raising of the new plea:

Held, that the Appellate Court was not right in refusing to go into the question simply because it was not the specific case raised by the plaintiff in his plaint. AIR (Vol 29) 1942 Cal 357: 46 CWN 298: 202 Ind Cas 398 (DB).

——O. 41, R. 2 — Plaintiff, if can change his ground.

It is not open to the plaintiff to change his ground in the Court of first appeal and his case must be adjudged on proof of the title which he originally pleaded as the ground of his claim for the recovery of the possession of the land in suit. AIR (Vol 21) 1934 Oudh 47: 10 OWN (CC) 1263: 17 RD 1132: 147 Ind Cas 1011 (DB).

——O. 41, R. 2 — Suit on promissory note — Defendant admitting execution of pro-note and the receipt of consideration — Defendant subsequently finding that it was not executed in favour of plaintiff but in favour of some other person:

Held, that the defendant could plead in appeal that the plaintiff could not sue on such a pro-note. AIR (Vol 21) 1934 Rang 280 : 152 Ind Cas 410.

13. Waiver.

(a) General.

(b) Objections in appeal.

(a) General.

——O. 41, R. 2 — A point which was never put in issue and the other party not called on to plead to or to adduce evidence on it, cannot be raised in appeal even though it might appear to have been established from facts appearing on record. It would be unfair to allow the party to proceed on a claim which was outside its pleadings. AIR (Vol 34) 1947 Pat 356: 224 Ind Cas 177: 12 BR 489 (DB).

——O. 41, R. 2 — Objection as to evidence being irrelevant can be taken for first time in appeal.

Even if a party has not taken any objection in the lower Court to the admissibility of the evidence, it is open to him to contend in appeal that evidence which is really irrelevant cannot be made use of for the purpose of the decision. AIR (Vol 30) 1943 Mad 749 : 56 MLW 533 : (1943) 2 MLJ 545 : ILR (1944) Mad 276 : 211 Ind Cas 453 (DB).

——O. 41, R. 2 — Where in a mortgage executed by a Hindu father it is recited that the property mortgaged is exclusive and absolute property of the mortgagor but the mortgagee suing to enforce it avers in the plaint that the property is mortgaged as a manager, the plea, that the mortgage cannot be enforced against the joint family property in view of the recital in the mortgage must be raised in the first Court and cannot be allowed to be raised in appeal for the first time. (1941) 1941 NLJ 630 (DB).

——O. 41, R. 2 — Issue not framed and point not pressed in trial Court.

Where the point that the plaintiff had no cause of action was not taken before or even at the settlement of the issue and no issue was framed upon it, nor was it pressed in the trial Court, the point must be presumed to have been waived, and cannot be raised in appeal. AIR (Vol 28) 1941 Pesh 69: 196 Ind Cas 301 (DB).

——O. 41, R. 2 — Abandonment of point — Arguments offered but not convincing.

Where an order of the Court shows that arguments were offered on a certain point but they were unconvincing, it is not tantamount to the abandonment of the plaint. AIR (Vol 25) 1938 Lah 809: 40 PLR 798: 179 Ind Cas 752.

——O. 41, R. 2 — Question for determination of shares not raised in issues.

Where in a suit for declaration that the plaintiffs were owners of a certain share in the shamilat of the village, no prayer is made for determination of their shares in the village, the question that the shares of the plaintiffs in the shamilat land should be determined, cannot be raised for the first time in appeal as the matter was not raised in issue in the trial Court. AIR (Vol 24) 1937 Lah 428: 175 Ind Cas 138: 39 PLR 656.

——O. 41, R. 2 — Plea expressly withdrawn.

Although it is within the discretion of a Court of Appeal to entertain a plea raising a pure question of law even though it has not been raised in the lower Court, yet where the plea has been expressly withdrawn in the trial Court, the plea will not be entertained in the Appellate Court. AIR (Vol 24) 1937 Oudh 243: 1937 OWN (CC) 229: 13 Luck 167: 167 Ind Cas 72 (DB).

——O. 41, R. 2 — Plea of qualified privilege not taken in lower Court.

Where in an action for libel, the defendants plead qualified privilege which they had at the appellate stage, it would be unfair to allow the defendants to succeed as this question was not raised and the plaintiff never had the opportunity of proving that though the occasion was one of qualified privilege, the defendants have not used that occasion in a proper way. AIR (Vol 23) 1936 Pat 309: 2 BR 503: 17 PLT 816: 162 Ind Cas 809.

——O. 41, R. 2 — Absence of plea or issue —Whether can be agitated for first time in appeal.

Waiver depends on evidence of fact and if it was neither pleaded nor was an issue raised thereon, the question cannot be agitated for the first time on appeal. AIR (Vol 21) 1934 Mad 508: 40 MLW 35: 67 MLJ 470: 150 Ind Cas 952 (DB).

——O. 41, R. 2 — Point as to maintainability of suit.

Having elected to go to trial upon the footing that the plaintiff was entitled to bring the suit and having been content that the suit should be heard on the merits, the defendant is not entitled in the Appellate Court to claim for the first time that the suit as framed is not maintainable by reason of section 53, T. P. Act. AIR (Vol 21) 1934 Rang 308: 153 Ind Cas 191.

——O. 41, R. 2 — Abandonment of plea — Ground of attack in plaint but not mentioned in appeal.

A ground of attack mentioned in the plaint in respect of which no issue is drawn and which is not repeated either in the written grounds of first or second appeal cannot be allowed in second appeal. 174 PWR 1912: 217 PLR 1912: 17 Ind Cas 247 (DB).

(b) Objection in appeal.

——O. 41, R. 2 — Objection that suit for declaration could not be referred to arbitration cannot be raised for first time in appeal. AIR (Vol 31) 1944 Lah 280: 46 PLR 108.

——O. 41, R. 2 — Suit by landlord for possession and rent — Objection as to sufficiency of notice to quit.

In a suit for possession and rent against the tenant the latter cannot for the first time in appeal be allowed to raise objection to sufficiency of notice to quit after having failed in the first Court on his plea of title. AIR (Vol 31) 1944 Pat 77: 22 Pat 513: 11 BR 97: 216 Ind Cas 111 (DB).

——O. 41, R. 2 — Suit to file award and for decree in terms thereof — Objection to mode of allotment of properties — Second appeal.

The parties made a reference to arbitration to partition their joint properties. In the suit by one of the parties to have the award filed and decree passed in its terms, the defendant did not object to the mode of allotment of the properties by the arbitrators. Nor was there any reference to the mode of allotment of the properties in the grounds of appeal filed by the defendants:

Held, that the High Court should be very loath to allow the appellant to raise the objection to the mode of allotment in appeal for the first time. AIR (Vol 30) 1943 Pat 285: 22 Pat 108: 10 BR 344: 211 Ind Cas 137 (DB).

——O. 41, R. 2 — Secondary evidence admitted in trial Court without objection — Admissibility of, if can be challenged in appeal.

Once the secondary evidence of a will is found to have been admitted by the trial Court without any objection, the contention in appeal as to its inadmissibility must be overruled. AIR (Vol 28) 1941 Mad 612 : 53 MLW 483 : (1941) 1 MLJ 557 : 1941 MWN 529 : 200 Ind Cas 102.

——O. 41, R. 2 — Objection on ground of limitation raised in trial Court but given up before issues.

Where an objection on the ground of limitation is raised in the pleas in the trial Court but is given up before issues, this disentitles the party from reagitating the objection in appeal and the party cannot be allowed to lead any further evidence where the record is incomplete on the point. AIR (Vol 27) 1940 Lah 475: ILR (1941) Lah 843: 191 Ind Cas 676 (DB).

——O. 41, R. 2 — Objection that the suit is barred under Section 47 can be allowed to be raised for first time in appeal. AIR (Vol 26) 1939 Mad 867: ILR (1940) Mad 123: (1939) MWN 918: 50 MLW 472: 187 Ind Cas 816.

——O. 41, R. 2 — Objection going to root of case.

An Appellate Court is bound to take notice of an objection which goes to the root of the case although not pressed by the appellant. AIR (Vol 23) 1936 Pesh 97 (100): 162 Ind Cas 416.

——O. 41, R. 2 — Document admitted without objection in trial Court.

Where a document has been admitted without objection in the trial Court, objections as to lack of formal proof of loss of the original etc. cannot be taken tor the first time in appeal. AIR (Vol 21) 1934 Lah 271: 35 PLR 74: 150 Ind Cas 240.

——O. 41, R. 2 — Objection by judgment-debtor that execution is incompetent for want of leave of Court.

Where a decree is assigned by a company which since goes into liquidation and the decree is sought to be executed, it is not open to the judgment-debtor to object that the execution proceedings are incompetent on the ground of want of leave from Court when the judgment-debtor has raised no such objection in the first Court and the assignor company does not press the objection. AIR (Vol 20) 1933 Cal 809: 37 CWN 909: 146 Ind Cas 502 (DB).

——O. 41, R. 2 — Objection in appeal.

Failure to take objection to jurisdiction does not preclude the appellate court from setting aside an order which is bad for want of jurisdiction. (1902) 7 CWN 390: 30 C 593 (598) (DB).

——O. 41, R. 2 — Appeal — Succession certificate want of — Objection first raised on appeal.

An appellate court should not for the first time on appeal entertain an objection for want of succession certificate without giving the plaintiff an opportunity to meet it by producing the certificate. (1901) 5 CWN 607: 28 C 246 (249) (DB).

——O. 41, R. 3.

1. **Amendment.**
2. **"Within time to be fixed."**
3. **Substitution of representatives after period of Limitation.**
4. **"May be rejected".**
5. **Order of rejection, whether appealable.**

1. Amendment.

——O. 41, R. 3 — Appealing on his own behalf and on behalf of idol as manager — A naming himself in grounds of appeal but idols not mentioned nor A mentioned as appealing on behalf of idols — Case held one of misdescription and memo of appeal could be amended.

Defendant A claimed to be a manager of the endowed property which was the subject-matter of the suit and put up defence on behalf of the idols who were also made defendants in the trial Court. In the grounds of appeal, A questioned the findings of the trial Court in so far as they went against idols. In the grounds of appeal, A named himself as the appellant but did not mention the names of the idols either as appellants or as respondents and omitted to describe himself as appealing not only on his own behalf but also on behalf of the idols:

Held, that the omission of the idols in the grounds of appeal amounted merely to a misdescription and therefore, the memorandum of appeal could be amended so as to show distinctly the names of the idols on whose behalf A was appealing as manager. The omission had not caused any disadvantage and, therefore, could not have the effect of rendering the judgment of the trial Court final in regard to the questions affecting the idols. AIR (Vol 31) 1944 Oudh 162: 1944 AWR (CC) 27: 1944 OWN (CC) 83 (DB).

——O. 41, R. 3 — Amendment of memorandum.

Where only one of the defendants appeals from the decree and there is nothing in the memorandum of appeal itself which indicates that the appellant is objecting only to part of the decree except the figure given for valuation and the amount of court-fee paid, then, if the appellant offers to amend the valuation and pay the increased court-fee, the offer should be accepted, whether other defendants are made respondents or not. AIR (Vol 26) 1939 Pat 162: 5 BR 682: 4 CLT 67: 181 Ind Cas 840 (DB).

——O. 41, R. 3 — Formal mistake in description of respondents.

The fact that there was a mistake in the description of the respondent does not entail the dismissal of the appeal where the defect is a formal one. When brought to its notice, the Appellate Court should allow it to be corrected, especially when the appellant applied at the hearing of the appeal to amend the mistake and the respondents are willing to go on with the appeal on merits. AIR (Vol 24) 1937 Lah 60: 39 PLR 188: 169 Ind Cas 647.

——O. 41, R. 3 — Decree not stamped — Memorandum incomplete — Power to reject.

Where a memorandum of appeal was presented with an unstamped copy of the decree appealed from, and without affidavits to show how the persons named as legal representatives held that position and it was contended that the Court had no power to reject the memorandum:

Held, that as long as there were such defects, the memorandum of appeal cannot be entertained and all that the Court can do is to return it and give the petitioners the chance of putting it in again in a complete form.

In such a case any time that it allows for representation is only by way of concession, and a continuance or extension of the concession cannot be demanded of it as a matter of right, at any rate, after the expiry of the normal period of limitation within which an appeal can be presented.

Obiter.— Such a memorandum could not, however, be rejected under O. 41, R. 3.

An appeal cannot be held to have come properly before a Court until it has been registered. AIR (Vol 20) 1933 Mad 358: 144 Ind Cas 608.

——O. 41, R. 3 — Insufficient stamp — Power to refuse acceptance.

High Court has full power to refuse to accept a memorandum of appeal when it has the endorsement of the Stamp Reporter, that the amount of the Court-fees paid is insufficient, otherwise the provisions of Section 4, Court-fees Act, would be evaded indirectly; 38 Bom 41, Diss. from. AIR (Vol 16) 1929 All 75: 118 Ind Cas 228: 50 All 980: 26 ALJ 1199.

——O. 41, R. 3 — An appellate Court has no right to reject an appeal on the ground that it is insufficiently stamped. AIR (Vol 10) 1923 All 349: 74 Ind Cas 757: 21 ALJ 333: 4 LRA Civ 188 (DB).

——O. 41, R. 3 — Effect of wrong name of the respondent.

Where in an appeal the respondent was wrongly named owing to a clerical error in the decree, the mistake is not fatal, but can be rectified. AIR (Vol 5) 1918 Cal 582: 21 CWN 774: 27 CLJ 129: 41 Ind Cas 37 (DB).

——O. 41, Rr. 3 and 20 — Appellate court — Addition of parties — No duty.

There is no duty on the Courts to add the proper persons as parties to the appeal if the appellant neglects to do so. 59 PR 1913: 59 PLR 1913: 88 PWR 1913: 18 Ind Cas 37 (DB).

——O. 41, R. 3 — Court-fee, deficiency in — Objection in appeal by defendant appellant that plaint not properly stamped.

Where a plaint is not properly stamped and a decree is given in plaintiff's favour and objection is taken in appeal, the appellant should be made to pay the proper court-fee before the respondent is called upon to pay the deficient stamp duty payable in the court of the first instance. (1904) 14 MLJ 144 (145) (DB).

2. "Within time to be fixed".

——O. 41, R. 3 — Amendment — Time for.

Where an appeal was presented four years ago, the time for removing the defect in the presentation of the appeal cannot be extended. AIR (Vol 13) 1926 Lah 626: 8 LLJ 397: 27 PLR 652: 97 Ind Cas 773 (DB).

3. Substitution of representatives after the period of Limitation.

——O. 41, R. 3 — Appeal against deceased person — Application to substitute names of legal representative after limitation.

Where a possible respondent dies before the appeal is filed, the names of his representatives cannot be substituted in the appeal, after the expiry of the period of limitation. 21 Ind Cas 306: (1913) 1 Upp Bur Rul 175.

4. "May be rejected."

——O. 41, R. 3 — The provision in O. 7, R. 11 Cl. (c) does not apply to appeals. An appeal in which the full court-fee has not been paid, can be dismissed by the Appellate Court without calling upon the appellant to pay the deficiency. So far as the memoranda of appeal are concerned, express provision is made in O. 41, R. 3, for their rejection. AIR (Vol 25) 1938 Mad 316: (1938) M WN 71: 47 MLW 211: (1938) 1 MLJ 514: 177 Ind Cas 453 (DB).

5. **Order of rejection, whether appealable.**

——**O. 41, R. 3 — Rejection of memo. of appeal.**

An order of Appellate Court dismissing the memorandum of appeal for non-payment of deficit court-fee is a decree and is appealable as such. AIR (Vol 29) 1942 Lah 64: 43 PLR 710: 199 Ind Cas 298.

——**O. 41, R. 3 — Rejection of memo. of appeal.**

An order rejecting a memorandum of appeal on the ground that it was insufficiently stamped without giving the appellant any time at all to make up the deficit amounts to a decree and as such is appealable. AIR (Vol 26) 1939 Pat 83: 5 BR 59: 19 PLT 885: 17 Pat 687: 178 Ind Cas 150 (DB).

——O. 41, R. 3 — Obiter.—An order dismissing an appeal as being time-barred before it has been admitted or registered is a decree.

The Civil P. C., does not in terms entitle an Appellate Court to reject a memorandum of appeal before registering it on the ground that it is out of time. In so rejecting the memorandum, the Appellate Court assumes a jurisdiction which it does not possess, and its order can be interfered with under S. 115. AIR (Vol 24) 1937 Cal 732: 42 CWN 72: 176 Ind Cas 361.

——**O. 41, R. 3 — Appeal.**

Memo. of appeal rejected on the ground of deficient court-fee. Order does not amount to a decree and no further appeal lies therefrom. AIR (Vol 23) 1936 Pesh 140: 163 Ind Cas 462 (DB).

——**O. 41, R. 3 — Order rejecting memorandum of appeal for insufficient court-fee — Fresh memorandum of appeal with requisite court-fee after limitation.**

An order rejecting a memorandum of appeal for non-payment of deficit court-fee within the period allowed by the Court, is not a decree within the meaning of S. 2. The rejection of a memorandum of appeal by the Appellate Court shall not, of its own force, preclude the appellant from presenting a fresh memorandum on proper court-fee. When such an appeal memorandum is presented after it is time-barred, the Judge should not register the appeal without deciding the question as to whether the appellant was entitled to extension of time under S. 5, Lim. Act. If, however, the Judge omits to do so and registers the appeal, the order cannot be said to be passed without jurisdiction, but there is a tacit term that the question under S. 5, Limitation Act, will be considered on objection being taken by the respondent. AIR (Vol 19) 1932 Cal 482: 59 Cal 388: 138 Ind Cas 643 (DB).

——**O. 41, R. 4.**

See also Civil P. C., O. 22 Rr. 3, 4 and O. 41. R. 33.

1. Abatement.
2. Appeal.
3. Applicability and scope.
4. Common ground.
5. Death of party.
6. Interpretation.
7. "May reverse the decree . . . all the plaintiffs or defendants".

See also N. 5.

8. Partial abatement.
9. Transposition of parties.

1. **Abatement.**

——**O. 41, R. 4 — Scope — If controls or abrogates O. 22, Rr. 3 and 11 — Death of one of several appellants — Rignt not surviving to survivors — Effect — Whole appeal — If abates.**

O. 41, R. 4, C. P. Code, does not control O. 22, Rr. 3 and 11; that rule has nothing to do with the joinder of parties; all it does is to lay down for appeals a rule which appertains to suits before decree, but it does not abrogate the other rules regarding joinder of parties and abatement. If the right to sue does not survive to the survivor or survivors, then unless the interests are severable the survivors cannot get a decree for the whole, and as no decree can be passed either in favour of a dead person or in favour of persons who are not parties on record, the survivors who omit to safeguard their own interests by joining the legal representatives of the deceased appellant cannot obtain a decree in their favour. The true test is whether the appeal can be heard in the absence of the appellant who is dead. If it cannot be heard, the appeal abates as a whole and not merely as against the deceased appellant. ILR (1938) All 350 : AIR (Vol 34) 1947 Cal 453, not foll. AIR (Vol 38) 1951 Nag 133: ILR (1949) Nag 964 (DB).

——**O. 41, R. 4 — Applicability — Death of one defendant and consequent order of abatement — Effect.**

The provisions of O. 41, R. 4, C. P. Code, cannot be attracted or invoked when there is already an order of abatement recorded consequent on the death of a defendant. AIR (Vol 37) 1950 Cal 59.

——**O. 41, Rr. 4 and 33 — Powers of appellate Court — Death of one of defendants pending their appeal against joint decree passed against them — Deceased defendant expunged before expiry of limitation for substitution — Decree as a whole — If may be set aside.**

During the pendency of an appeal filed by the defendants against a joint money decree passed against them, one of the defendants died. Before the period of limitation for an application for substitution expired, the name of the deceased defendant was expunged from the category of appellants on an application filed by the remaining appellants. It was contended for the respondent that the appeal had abated as against the deceased respondent and consequently the whole appeal had abated as the decree was joint. The appellate Court overruled this contention, and dismissed the suit holding that the claim was entirely false.

Held, that no abatement of the appeal took place as the name of the deceased defendant was expunged from the category of appellants before the expiry of the period of limitation for substitution, that there was nothing in law to prevent the appellate Court from hearing the appeal of the remaining defendants and giving relief either under O. 41, R. 4 or under O. 41, R. 33, C. P. Code or both, and that the decree being a joint decree, the only relief which could be given was to set it aside as a whole. AIR (Vol 35) 1948 Pat 460: 27 Pat 242 (DB).

——**O. 41, R. 4 — Death of one of appellants — Abatement — Court's power to pass decree in respect of all.**

Even after an appeal has abated under O. 22, R. 3, it is open to the Court acting under O. 41, R. 4, to pass a decree in respect of all the appellants including the appellant whose appeal has abated.

If the case is of such a nature that it cannot be disposed of in the absence of the legal representatives of the deceased, the whole appeal will abate. But if the lower Court's decree proceeds on a ground common to the deceased as well as to the survivors then the latter can under O. 41, R. 4, appeal from the whole decree and the absence of the legal representatives of the deceased is no bar to the disposal of appeal. Hence in such a case if the legal representatives are not substituted within the period of limitation the appeal abates only so far the deceased is concerned and not as a whole, and if the appeal succeeds, the appellate decree or order enures to the benefit of all the appellants including the deceased. AIR (Vol 32) 1945 Bom 126: 46 Bom LR 737.

——O. 41, R. 4 — Ground common to all plaintiffs — Death of one of them.

Where the suit has proceeded on a common ground as contemplated by O. 41, R. 4, Civil P. C., and the decree appealed from also proceeds on the same common ground any one of the plaintiffs may appeal from the whole decree and the Appellate Court may reverse of vary the decree in favour of all the plaintiffs. The death therefore of any of the plaintiffs has no effect unless it can be shown that his interest is separable from the interest of the surviving plaintiffs-appellants. AIR (Vol 26) 1939 All 626: (1939) ALJ 708: 1939 RD 493: 1939 AWR (HC) 671: 186 Ind Cas 564 (DB).

——O. 41, R. 4 — Decree obtained in name of individual members of joint family — Appeal from decree given up against one of them.

Where a decree is obtained in the names of the individual members of a joint family, then the question of representation does not arise. Any appeal against such a decree must be brought against all the persons in whose name the decree stands. The result of giving up the appeal against one of them is that the appeal cannot be continued against the remainder. AIR (Vol 26) 1939 Pat 198: 5 BR 816: 182 Ind Cas 740 (DB).

——O. 41, R. 4 — Suit on ground common to all plaintiffs — Some alone appealing — Non-appealing plaintiffs, and pro forma defendants impleaded as respondents, some of whom dying during pendency of appeal — Representatives of deceased not brought on record — Appeal, if abates — Other respondents dying, found to be necessary parties to suit — Their representatives not brought on record — Appeal against them, if abates.

Where the suit has proceeded on a common ground, as contemplated by O. 41, R. 4, and some only of the plaintiffs have appealed and have impleaded as respondents the non-appealing plaintiffs and the pro forma defendants having the same interest as the plaintiffs and some of the respondents die pending the appeal, R. 4 and not R. 3 of O. 41, governs the case.

It is obvious that if on the death of these respondents, the right to appeal survives against the surviving respondents alone i.e., against those respondents against whom any relief is claimed and no relief of any kind is claimed against the deceased respondents, the appeal does not abate and become incompetent because the heirs of the deceased-respondents are not brought on record. Similarly the appeal cannot be rendered incompetent where the other respondents who have died were necessary parties to the suit and their heirs are not brought on record. AIR (Vol 25) 1938 All 235: (1938) ALJ 159: 1938 RD 312: ILR (1938) All 350: 1938 AWR (HC) 138: 176 Ind Cas 91 (DB).

——O. 41, R. 4 — Partition case — Appeal not capable of being proceeded with in absence of legal representatives of deceased respondent — Appeal, if abates in toto.

Where it is impossible to proceed with an appeal in the absence of the legal representatives of a deceased respondent the appeal abates in toto. This principle applies in a partition case in which one of the defendants-respondents has died and the appeal has abated against him and it will not be possible to proceed with the appeal which must be deemed to have abated entirely. AIR (Vol 22) 1935 Oudh 329: 1935 OWN (C C) 401: 11 Luck 5: 154 Ind Cas 897 (DB).

——O. 41, R. 4 — O. 41, R. 4 O. 22, R. 3 (2) — Death of one of the appellants pending hearing — Application to bring on record legal representatives.

Order 41, R. 4, confers a privilege on a single appellant who takes on himself the whole burden and risk of an appeal. It does not enunciate a general principle that controls other rules in the Code. The mandatory words of O. 22, R. 3 (2) have not been qualified in this rule. Order 41, R. 4, does not discuss abatement, but is itself subject to the general rule on that subject. Courts are not justified in applying its provisions so as to negative to a very extent the provisions of the very specific rule which deals expressly with abatement.

A suit was instituted by the plaintiffs to compel the defendants to render an account of certain transactions of purchase and sale which had taken place between the parties and for a decree for such sum as might be found due on the taking of the account. Defendants appealed and pending the hearing of the appeal, one of the defendants-appellants died on October 21, 1932. On February 27, 1933, an application was made to bring on record his legal representatives. It was urged that the application was unnecessary and that the appeals have not abated and, in the second place, that if the application is necessary, it should be treated as if it asked for an extension of time :

Held, that the provisions of O. 22, R. 3 applied and that this rule should not be read in the light of O. 41, R. 4 and that the appeal abated. AIR (Vol 21) 1934 Lah 206: 35 PLR 92: 15 Lah 667: 151 Ind Cas 784 (DB).

——O. 41, R. 4 — Death of one — No abatement.

Where an appeal proceeds on grounds common to all, the defendants and one of them might have appealed and secured a modification of the decree in favour of all it is unreasonable to hold that the absence of one or after his death the absence of his representatives must disqualify the others from carrying on the appeal. AIR (Vol 13) 1926 Cal 462: 88 Ind Cas 970.

——O. 41, R. 4 — Where the 2nd plaintiff was the transferee from the 1st plaintiff,

Held, that the question of the latter's title to the property in suit affected the 2nd plaintiff's also and that a decision that 1st plaintiff's suit was not barred by limitation enured for the benefit of the 2nd plaintiff also though he had not joined in the appeal. AIR (Vol 11) 1924 Oudh 385: 81 Ind Cas 484: 11 OLJ 297 (DB).

——O. 41, R. 4 — Where in the course of a redemption suit by Burmese husband and wife the husband died.

Held, that the wife could prosecute the appeal. AIR (Vol 11) 1924 Rang 376: 84 Ind Cas 170: 2 Rang 486: 2 Bur LJ 171 (DB).

——**O. 41, R. 4 — Abatement — Death of one of joint plffs. — Abatement of appeal.**

Where all plffs. are interested in appeal, O. 41, R. 4 of the C. P. C., does not authorise one of them to proceed with the appeal without making the other plff's. parties thereto. AIR (Vol 6) 1919 Cal 410: 53 Ind Cas 548 (DB).

——**O. 41, R. 4 (S. 544 Old Code) — Death of one of several appellants — Legal representative not brought on record — Partial reversal of decree.**

Where one of several plaintiffs, appealing against a decree which proceeded on grounds common to them all, died during the pendency of the appeal and substitution was not made within time.

Held, that the appellants were not entitled to the benefit of S. 544, C. P. C. (1905) 9 CWN 1061 (1064) (DB).

——**O. 41, R. 4 — Appeal — Abatement — Joint decree for money — Appeal by defendant — Death of one of the plaintiffs between judgment and appeal — Representative not brought on record — Effect of.**

Where in an appeal by defendant against a decree for arrears of rent passed jointly in favour of all the plaintiffs the heirs of one of the plaintiffs who died subsequent to the date of the delivery of the judgment against which the appeal is preferred, were not made parties:

Held, that the appeal could not proceed and must fail by reason of defect of parties. (1902) 6 CWN 196 (197) (DB).

2. Appeal.

(a) General.
(b) Locus standi.
(c) Parties.
(d) Second appeal.

(a) General.

——**O. 41, R. 4 — Decree passed against several persons having same interest — Right of one of them to appeal.**

Where a decree is passed against several persons having exactly the same interest, any one of them can appeal against the decree under O. 41 R. 4, C. P. Code. AIR (Vol 37) 1950 PC 28: 1950 ALJ 113 : 63 LW 184 : 1950 AWR 211 : 54 CWN 508: 52 Bom LR 477 : 31 PLT 1 : (1950) 1 MLJ 294.

——**O. 41, R. 4 — Applicability — Defendants 2 and 3 deriving title from defendant 1 — All defendants contesting plaintiff's claim on ground that he had no title — Defendant 1 alone, if competent to appeal from decree.**

Where defendants 2 and 3 derived their interest in the property in suit from defendant 1 and all the three defendants contested the claim of the plaintiff on one common ground, namely, that the plaintiff had no title, the provisions of O. 41, R. 4, C. P. Code, clearly apply and defendant 1 alone is competent to appeal from the decree passed against all the defendants. AIR (Vol 37) 1950 All 1.

——O. 41, Rr. 4 and 33 and O. 34, R. 1 — Appeal by judgment-debtor against re-opened personal decree in mortgage suit — Death of one of respondents representing mortgagor's interest — His heirs not substituted — Appeal, if competent — Power of appellate Court to reverse whole decree. (1950) 54 CWN (2 DR) 280.

——**O. 41, R. 4 — Appeal filed by one of the plaintiffs — Non-prosecution — Co-plaintiff if entitled to continue appeal.**

All the co-plaintiffs or co-defendants do not become appellants ipso facto merely by one man out of them filing the appeal. A party does not become an appellant unless he signs the memorandum of appeal or authorises the person actually signing it to file it on his behalf. Hence where one of the plaintiffs files an appeal but does not prosecute it, it is not open to his co-plaintiff to apply to continue the appeal. (1950) 1950 RD 60.

——**O. 41, R. 4 — Scope — Joint proprietors — Decree against on point of adverse possession — Right of one to appeal against entire decree.**

In the case of a decree passed against several joint proprietor of an estate, it is open to any one of such proprietors to appeal from the whole decree when the decision proceeds on a ground common to all of them, e.g., the acquisition of title by adverse possession as against them by a trespasser. AIR (Vol 35) 1948 Pat 274 : 26 Pat 278 (DB).

——**O. 41, R. 4 — Death of some of appellants — Right of surviving appellants to prosecute appeal.**

On the death of some of the appellants pending an appeal, the surviving appellants are entitled to prosecute the appeal without bringing on the record the heirs of the deceased appellants. Order 41, R. 4, C. P. Code is applicable to such a case. AIR (Vol 34) 1947 Cal 453 (DB).

——**O. 41, R. 4, S. 96, O. 22, R. 10 — Failure or refusal of Official Receiver to prefer appeal — Creditor not party to litigation — Creditor, if can file appeal — S. 75, Provincial Insolvency Act.**

The Official Receiver is not a representative of the creditors nor is he a trustee on their behalf and it is not, therefore, open to the creditors to ignore him or act independently of him and file an appeal on the Official Receiver's failure or refusal to file an appeal, in a litigation to which they were not parties. The creditor does not fulfil the requirements of O. 22, R. 10. In the absence of a provision similar to what is contained in S. 75, Prov. Insol. Act, it is not possible to confer a right of appeal by analogy.

In the case of a refusal by the Official Receiver to prefer an appeal, the proper course for the creditor is to go the Insolvency Court, under S. 68 of the Prov. Insol. Act and to apply for a reversal of the refusal by the Official Receiver and either for a direction to him to appeal against the decree or in the alternative for a permission to appeal himself in the name of the Official Receiver.

The Official Receiver appears in a litigation in his individual capacity although he may be entitled to be reimbursed by the insolvent's estate. AIR (Vol 28) 1941 Mad 577 : (1941) 1 MLJ 531 : 53 MLW 479 : (1941) MWN 366 : 200 Ind Cas 366.

——O. 41, R. 4 — The right to prefer an appeal by parties to a suit can be safely deduced from O. 41, R. 4, Civil P. C., although the object of its enactment was different. AIR (Vol 28) 1941 Mad 577 : (1941) 1 MLJ 531 : 53 MLW 479 : (1941) MWN 366 : 200 Ind Cas 366.

——**O. 41, R. 4 — Pre-emption suit — Pleas by vendees-defendants common to all — One of them appealing — Appeal allowed under O. 41, R. 4 — Appellant, if can appeal in his own name — Success, enures for benefit of all.**

Where in a suit for pre-emption the pleas in defence raised by the vendee defendants were common to all of them and, the memorandum of appeal clearly mentioned O. 41, R. 4, according to which the appeal was filed in the name of only one of the vendees and the other vendee defendants were advisedly impleaded as respondents:

Held, that it was perfectly competent to one of the vendee-defendants in the Court below to appeal, in his own name and the success of the appeal naturally enured for the benefit of the appellant as well as his co-vendees-respondents. AIR (Vol 23) 1936 Lah 612 : 165 Ind Cas 66.

——O. 41, R. 4 — Every surety has his own individual liability and there is nothing to debar the other sureties from filing an appeal on their own

behalf, if one of the sureties has refrained from doing so. AIR (Vol 23) 1936 Pesh 20 : 160 Ind Cas 1005 (DB).

——O. 41, R. 4 — An appeal from a suit under S. 92 does not abate on the death of some of the plaintiffs. But there is no authority for the proposition that some of the persons who have obtained leave can present an appeal when the remaining persons are alive and have not concurred in. AIR (Vol 22) 1935 Lah 251 : 16 Lah 782 : 158 Ind Cas 465.

——O. 41, R. 4 — Where a decision of a Court proceeds upon a ground common to all defendants, appearing as well as non-appearing it is entirely within the competency of one of the defendants to challenge that decision in an appeal filed by him even though the other defendants are not parties thereto. (1934) 59 CLJ 318.

——O. 41, R. 4 — Rule 4 authorizes one of the plaintiffs to an action, in which other co-plaintiffs are also interested, to appeal for the benefit of the latter, only if they are made parties to the appeal. AIR (Vol 15) 1928 Lah 43 : 106 Ind Cas 313 (DB).

——O. 41, R. 4 — Where there are plaintiffs more than one, one of them can appeal for the benefit of all only if the rest are made parties. (1928) 110 Ind Cas 250 (Lah).

——O. 41, R. 4 — Consenting defendant can get the benefit.

A judgment-debtor, who did not appear but who held an application in the lower Court consenting to the decree being executed as against him on which no order was passed can be given the benefit of the appeal preferred by other judgment-debtors. AIR (Vol 12) 1925 Cal 23 : 39 CLJ 590 : 28 CWN 963 : 84 Ind Cas 68 (DB).

——O. 41, R. 4 — Decree in favour of other will enure for the benefit of the other's representatives.

Where one of two appellants who were undivided Hindu brothers had been dead when the decree was passed in the appeal and where subsequently the deceased's legal representatives applied to be brought on the record.

Held, that as the decree passed legally in favour of the surviving appellant must enure for the benefit of all the members of the appellant's family, and as they wished to be formally brought on record as legal representatives of the deceased appellant who was not a party when the appeal was heard, their application to be brought on the record should be allowed. AIR (Vol 12) 1925 Mad 910 : 48 MLJ 601 : 22 MLW 142 : 87 Ind Cas 748 (DB).

——O. 41, R. 4 — Appeal against one — Is maintainable.

Where a combined judgment was given in two appeals in the lower appellate Court and in the High Court only one appeal was filed against the judgment but it was filed by the principal parties and also the parties to the other appeal were impleaded and where it was objected that the omission to file a distinct appeal against the other appeal should cause the dismissal of the appeal in the High Court.

Held, that the objection was bad. AIR (Vol 11) 1924 All 834 : 78 Ind Cas 1026.

——O. 41, R. 4 — Ignorance of — Decree nullity — — Absence of legal representatives will not affect merits of appeal.

Where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, R. 4, O. 41 of the C. P. Code, does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. The effect of allowing an appeal to be heard and decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity. But the omission to bring the legal representatives of a pro forma respondent on record would not affect the merits of the appeal. AIR (Vol 10) 1923 All 211 : 21 ALJ 91 : 45 All 286 : 4 LRA (Civ) 92 : 71 Ind Cas 321 (DB).

——O. 41, R. 4 — Where the contention was that the appeal should be regarded as having being dismissed so far as half the share of the other plaintiffs, who did not appeal, is concerned.

Held, the provisions of O. 41, R. 4, lays down that, if the decree appealed against proceeds on a ground common to all plaintiffs any one of the plaintiffs may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs. AIR (Vol 9) 1922 Lah 57 : 4 Lah LJ 178 : 31 PWR 1922 : 77 Ind Cas 274.

——O. 41, Rr. 4 and 33 — Scope of — Powers of Court.

Rules 4 and 33 do not apply to parties not exercising the right of appeal and made pro forma respondents by the appellants; the non-appealing parties cannot claim the right to be heard in support of the appeal. AIR (Vol 3) 1916 Lah 113 : 109 PWR 1916 : 154 PLR 1916 : 70; 71 PR 1917 : 34 Ind Cas 714 (FB).

(b) Locus standi.

——O. 41, Rr. 4 and 33 — Appeal by one of two defendants against whom suit had been decreed allowed — Second appeal by plaintiff — Locus standi of the non-appealing defendant to appear and support — Judgment of first appellate Court.

Where only one of the two defendants against whom the suit has been decreed appeals and it is allowed and the plaintiff files a second appeal even if the defendant who preferred the first appeal admits the claim in second appeal, it is open to the other defendant to appear and contend that the first appellate judgment should be maintained even though he had not preferred the first appeal himself. 1949 RD 75.

——O. 41, R. 4 (S. 544 old Code) — Dismissal for default — No steps by absent plaintiffs — Appeal.

If one absent plaintiff out of several plaintiffs does not take any steps in the original Court to get the dismissed suit restored, he has no locus standi to appeal and hence the order passed on appeal reversing the lower Courts decision is illegal. 21 PLR 1910 : 132 PWR 1910 : 6 Ind Cas 496.

——O. 41, R. 4 (S. 544 old Code) — Appeal — Dismissal of suit for a default — Application for suit to be restored by some of the plaintiffs — Appeal by co-plaintiff who had not joined in the application.

Four brothers filed a suit. The eldest of them who was employed in the Army was not able to attend Court on the day of hearing. The pleader of the four plaintiffs and the three younger brothers were present in the Court but the pleader declined to proceed without the 1st plaintiff, who was absent.

The Munsif dismissed the suit ostensibly under S. 102, C. P. C. The pleader on behalf of the plaintiffs who were present applied for the case to be restored but his application was refused. On appeal on behalf of the plaintiff who was absent in the original Court the order was set aside and the suit was ordered to be restored. The defendant applied for revision and contended that the order passed on appeal was illegal:

Held, that the contention was right, for the absent plaintiff in the army not having taken

any steps in the original Court to get the suit restored had no locus standi to appeal and S. 545 of C. P. C. was not applicable to the case. (1910) 1910 PLR No 21 Page 51 (53) : 1910 PWR 132 : 6 Ind Cas 496.

(c) Parties.

——O. 41, R. 4 — Appeal by joint owners.

The death of one of two joint owners during the pendency of an appeal does not prevent the appeal being prosecuted by the other. In fact there is no rule that all joint owners must be parties to appeal. AIR (Vol 30) 1943 Bom 301 : 45 Bom LR 109 : ILR (1943) Bom 143 : 210 Ind Cas 474 (DB).

——O. 41, R. 4 — The provisions of O. 41, R. 4 simply lay down that one or more plaintiffs may prefer an appeal where a decree proceeds on a ground common to all but it does not lay down that the other plaintiffs are not necessary parties. (1938) 40 PLR 6.

——O. 41, R. 4 — One joint decree-holder, if can appeal without joining others as appellants or respondents.

Order 41, R. 4, allows the Appellate Court to grant a relief even to the respondent who has not joined the appeal, but it does not go further and allow one of the joint decree-holders to file an appeal of his own without either joining the other decree-holders with him as appellants or impleading them as respondents. AIR (Vol 22) 1935 Pesh 106 : 157 Ind Cas 502 (DB).

——O. 41, R. 4 — Decree against firm — Decree valid against one partner but proceeding on a ground common to all — Setting aside of decree.

Where a decree has been passed against a firm, even if it is found to be a valid one as far as one of the partners is concerned, and the decree proceeds on a ground common to all, it must be set aside in its entirety under O. 41, R. 4. AIR (Vol 21) 1934 Lah 483 : 35 PLR 417 : 148 Ind Cas 1080.

——O. 41, R. 4 — Sanction to three — Appeal by one is not enough.

Where in a suit under C. P. Code, S. 92, sanction is granted to three persons to institute the suit, the three persons form one plaintiff in the eye of the law, and therefore an appeal filed by one or two only of them is incompetent. AIR (Vol 14) 1927 Lah 382 : 100 Ind Cas 328 (DB).

——O. 41, R. 4 — Appeal by some defendants — Rights of others.

An appeal against a decree for partition of the village abadi, by defendants representing a very small share in the village, on the ground that the Lower Courts have not rightly determined the area which should be divided again, cannot be treated as an appeal under O. 41, R. 4 as one on behalf of the whole body of the defendants. 228 PWR 1911 : 2 PLR 1912 : 12 Ind Cas 605.

——O. 41, R. 4 — Where an appeal can be brought by one of the defeated plaintiffs or defendants in accordance with the provisions of S. 544, old Code, other parties who might have appealed but have not joined in the appeal are not necessary parties to the appeal even though the suit is one for partition. 22 A 222 overruled. (1903) 25 A 27 (30) : 1902 All WN 171 (DB).

(d) Second appeal.

——O. 41, R. 4 — Right of second appeal — Parties not before the lower appellate Court.

Where only one of many plaintiffs appealed in the lower Court on behalf of all and other plaintiffs were not impleaded as respondents and where there was a second appeal to the High Court:

Held, the other plaintiffs had no locus standi to appeal to the High Court as they could not be deemed to be parties to the decree in the lower appellate Court. AIR (Vol 11) 1924 All 873 : 5 LRA Civ 279 : 78 Ind Cas 637.

3. Applicability and scope.

——O. 41, R. 4 — Applicability — Appeal not properly constituted.

O. 41, R. 4, C. P. Code, applies only to a properly constituted appeal. Where one of the necessary parties to the appeal is not before the Court, its provisions cannot be invoked. O. 22, R. 3 is not qualified by O. 41, R. 4. AIR (Vol 37) 1950 Assam 54.

——O. 41, R. 4 — Applicability — Conditions of — Mere existence of common defence — Sufficiency.

O. 41, R. 4, C. P. Code, does not empower an appellate Court to exercise its power under the rule when it only finds that the ground upon which it proposes to base its decision is common to all the defendants but only when it also finds that the decision of the lower Court has proceeded on such common ground.

It is only when the decree appealed against has proceeded upon a common ground to all the defendants, that is, the Court below has made a decree against several defendants upon a finding which applies to all of them equally, that under the relevant provision anyone of the defendants may appeal against the whole decree and the appellate Court may reverse or modify that decree in favour of all the defendants, even though some of these defendants may not be before the Court. AIR (Vol 37) 1950 Cal 59.

——O. 41, R. 4 — Scope and applicability.

It is only a special concession, which depends on the discretion of the Appellate Court, that under R. 4 of O. 41, C. P. Code, one out of several persons entitled to appeal is allowed to prosecute an appeal on behalf of all persons. But in order to enable a person to take advantage of this rule it is necessary that the decree appealed from should have proceeded on some ground common to himself and to the other persons entitled to appeal. It is only in such cases that an appeal will not abate in its entirety. 1949 RD 348 (2).

——O. 41, R. 4 — Applicability to appeals under U. P. Land Revenue Act — Death of a co-appellant — Others if can prosecute appeal.

O. 41, R. 4, C. P. Code, applies to appeals under the U. P. Land Revenue Act according to para. 176 of the U. P. Revenue Court Manual. Hence the death of a co-appellant during the pendency of the appeal cannot affect the right of the remaining appellants to prosecute the appeal where the interests of the two are identical. 1949 RD 185.

——O. 41, R. 4 — Applicability — Non-appealing plaintiff or defendant not before appellate Court.

O. 41, R. 4, C. P. Code, cannot be applied where the non-appealing plaintiff or defendant has not been impleaded in the appeal at all and is not before the appellate Court. AIR (Vol 33) 1946 Lah 399: 227 Ind Cas 340: 48 PLR 141 (FB).

——O. 41, R. 4 — Order 22, R. 3 is not qualified by the provision of O. 41, R. 4. Order 41, R. 4 does not apply to a case where all the plaintiffs and defendants are not alive. Hence a case of abatement of an appeal on the ground of death of one of the appellants is governed by O. 22, Rr. 3 and 11 and not O. 41, R. 4. AIR (Vol 29) 1942 Sind 157: ILR (1942) Kar 435: 205 Ind Cas 495 (DB).

——O. 41, Rr. 4, 33 — Appeal by one party on ground common to all.

Order 41, R. 4, allows a Court of Appeal to decide the whole case, although it may have been preferred only by some of the parties concerned, provided the decree proceeds on a ground common to all the appellants. The provisions of O. 41, R. 33, give further powers to the Appellate Court to pass

such orders as the case may require in spite of the fact that the parties affected may not file any appeal or objection. AIR (Vol 23) 1936 Pesh 20: 160 Ind Cas 1005 (DB).

——O. 41, R. 4 — O. 41, R. 4, if applies when one of the necessary respondents is not before Court.

Order 41, R. 4, only lays down that where there are more plaintiffs or more defendants than one, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiff, or of the defendants may appeal from the whole decree, and the rule does not clearly apply to a case where one of the necessary respondents is not before the Court. AIR (Vol 22) 1935 Oudh 329: 1935 OWN (CC) 401: 11 Luck 5 : 154 Ind Cas 897 (DB).

——O. 41, R. 4 — Order 41, R. 4, can be invoked only in the case of appellants with a common defence in the lower Court and not in the case of respondents. Further O. 41, R. 4 provides only for some of the appellants getting a decision in favour of all persons having a common interest and has no application to or bearing on a case where the question is whether a decree can be passed against a dead man, though there is another person on record with the same defence as that of the dead man. AIR (Vol 21) 1934 Mad 730 (2) : (1934) MWN 901: 40 MLW 604: 67 MLJ 681: 58 Mad 407: 153 Ind Cas 325.

——O. 41, R. 4 — Suit for possession of deceased's property by his sister and her daughter — Suit dismissed — Appeal by sister's daughter — Decree in favour of sister, legality of.

Musammat B and Mst. J sister and sister's daughter respectively of one G S claiming to be heirs of G S filed a suit against a transferee from the widow of G S for possession on the ground that as against them the transfer was invalid and ineffectual. The trial Court dismissed the suit on the ground that plaintiffs were not heirs of G S. From that decree Mst. J appealed but not Mst. B. District Judge held that under Hindu Law Mst. J was not an heir but that Mst. B was and as Mst. B was impleaded as a respondent in the appeal by Mst. J he passed a decree in favour of Mst. B:

Held, that as no appeal had been filed by Mst. B, no decree could be passed in her favour for the provisions of O. 41, R. 4, were not attracted, the right of Mst. J and Mst. B not being identical and the decree of the trial Court not having proceeded on a ground common to both. AIR (Vol 19) 1932 Lah 37 : 12 Lah 534 : 32 PLR 798 : 135 Ind Cas 593 (DB).

——O. 41, R. 4 — Order 41, R. 4 is limited to the case of appellants. AIR (Vol 13) 1926 Cal 335: 30 CWN 45: 90 Ind Cas 986 (DB).

——O. 41, R. 4 — Rule 4 can only apply when the fact of the omission of the parties is brought to the notice of the Court and it consciously decides to apply the rule. AIR (Vol 13) 1926 Mad 991: 51 MLJ 282: 97 Ind Cas 551: 1926 MWN 763.

——O. 41, R. 4 — Powers of Court not fettered by R. 33.

The appellate Court in the appeal preferred by some of the defendants in respect of only a part of the decree cannot by virtue of the provisions of R. 33, dismiss the suit against those defendants who have in fact submitted to it. There being a distinct provision as to the power of an appellate Court to interfere with the decision of the Court of first instance upon an appeal preferred by some of the defendants in certain cases, in O. 41, R. 4 the provisions of R. 33 cannot apply to cases for which clear provision is made in the Order or to cases which would not come within the purview of the specific rule. AIR (Vol 8) 1921 All 56 : 60 Ind Cas 817 : 43 All 320 : 19 ALJ 83 (DB).

——O. 41, R. 4 — Revision from — Same powers.

The power of the Court in revision under Section 25 of the Provincial Small Cause Courts Act is not less wide than under Civil Procedure Code, O. 41, R. 4. AIR (Vol 8) 1921 Nag 105: 61 Ind Cas 563 : 17 NLR 20.

——O. 41, Rr. 4 and 33 —Powers of appellate Court.

O. 41, Rr. 4 and 33 give the court ample power to make the appropriate order needed in the interests of justice. AIR (Vol 7) 1920 Cal 423: 30 CLJ 417 : 24 CWN 110: 54 Ind Cas 636 (DB).

——O. 41, R. 4 — Scope of — Grounds not common.

The provisions of O. 41, R. 4 of C. P. C. do not apply to a case where the grounds of appeal are not common to all the appellants. AIR (Vol 4) 1917 Lah 68 : 35 PWR 1917 : 40 Ind Cas 184 (DB).

——O. 41, Rr. 4 and 33 — Powers of appellate Court.

To justify the application of O. 41, R. 4 the appeal should have been preferred against the whole decree but for the application of R. 33 it is not essential that the appeal should be directed against the entire decree nor need the order be made in favour of the persons who are parties to the appeal or have filed objections in the Court below. AIR (Vol 3) 1916 Cal 654: 22 CLJ 61: 30 Ind Cas 868 (DB).

——O. 41, Rr. 4 and 33 — Common decree — Appeal by one party — Reversal.

When there is no bar to the application of O. 41, R. 4, it is not necessary to invoke the aid of O. 41, R. 33 which is couched in very wide terms and gives the Courts of appeal very wide powers for the purpose of doing justice between the parties. For the application of O. 41, R. 4, it is enough if the decree proceeds on any ground common to all the parties. Every ground need not be common to the parties. AIR (Vol 2) 1915 Cal 618: 42 Cal 451: 19 CWN 233: 28 Ind Cas 446 (DB).

——O. 41, R. 4 — The policy of the Legislature in enacting O. 41, R. 4 is that the appellate Court should have full power to do justice to all parties whether before it or not, provided the whole case is gone into at the instance of parties representing all the necessary contentions in the case. (1913) 14 MLT 177: (1913) MWN 687: 25 MLJ 248: 20 Ind Cas 952 (DB).

4. "Common ground".

——O. 41, R. 4 — Decree for possession or ejectment against trespassers — Each has independent right of appeal — Only one of them appealing — Effect of allowing appeal, upon rights of non-appealing trespassers, stated.

Where a person claiming to be the true owner of certain property obtains a decree for possession of that property against trespassers, each trespasser has an independent right to appeal against the decree and the mere circumstance that one of the defendants does not appeal from the decree or even confesses judgment, would not disentitle the other to appeal.

In effect and in substance in a case of this type there are as many decrees for ejectment or dispossession as there are trespassers. One trespasser agreeing to a decree being passed against him or not appealing from a decree after it has been passed, has the effect only of dislodging him from the property. If his other co-defendant files the appeal and succeeds, it cannot be said that in consequence of the acceptance of his appeal two inconsistent decrees will come into existence. The decree that becomes final against the non-appealing defendant is only a decree for his ejectment.

The effect of the acceptance of the appeal of the co-defendant will be that he cannot be ejected.

Both the defendants claiming under wholly independent rights, one will not be affected by the decree passed against the other. AIR (Vol 33) 1946 Lah 399 : 48 PLR 14 (FB).

——O. 41, R. 4 — Appeal abating by death of appellant — Order 41, R. 4, if applies.

Order 41, R. 4, applies to the case of an appellant whose appeal has abated by his death, because the effect of the abatement is that to all intents and purposes there is no appeal on behalf of the appellant whose appeal has abated.

Where during the pendency of an appeal by the defendants against a decree in a suit against them for malicious prosecution on the ground that they had conspired to implicate the plaintiff in a false charge of dacoity, one of the appellants dies and his heirs are not brought on the record, O. 41, R. 4, applies. No decree could be passed against the defendants unless the charge of conspiracy was proved. The decree appealed from thus proceeds on a ground which is common to all the defendants. AIR (Vol 25) 1938 Pat 147 : 19 PLT 398 : 4 BR 429 : 174 Ind Cas 388.

——O. 41, R. 4 — Several persons obtaining leave to institute suit, whether constitute one plaintiff.

Per Jai Lal, J.—Order 41, R. 4, does not apply to cases where the several persons who have obtained the leave of the Collector have consequently instituted a suit, because they must be deemed to be one plaintiff.

Per Skemp, J.—It is not right to say that all the persons who obtained the sanction of the Advocate-General or of the Collector constitute one plaintiff although they no doubt have a joint interest. AIR (Vol 22) 1935 Lah 251 : 16 Lah 782 : 158 Ind Cas 465 (DB).

——O. 41, R. 4 — Where an appeal against the whole decree is preferred by one defendant, on a ground common to all, it can be set aside as against all. AIR (Vol 16) 1929 Mad 230 : 56 MLJ 255 : 52 Mad 322 : 29 MLW 220 : 116 Ind Cas 844 (DB).

——O. 41, R. 4 — Rule not applicable.

A brought a suit for redemption against B and C of two houses, one in possession of B and the other in possession of C. B pleaded bar of limitation and C pleaded that A was entitled to redeem only on paying a certain amount. Trial Court decreed plaintiff's suit on condition of his paying the amount claimed by C. B appealed against the decree impleading other defendant as respondent. The lower appellate Court set aside the trial Court's decree both as against B and C.

Held, that the decree against C could not be set aside under O. 41, R. 4. AIR (Vol 14) 1927 All 177 : 99 Ind Cas 280.

——O. 41, R. 4 — The plaintiffs brought a suit against the defendants to recover possession of certain land, claiming that it was their zerait but that they had been dispossessed. There was some dispute between three defendants as to in whose possession the property was; but as against the plaintiffs, they were on common ground in maintaining that the property was not the plaintiff's zerait. The trial Court decreed the suit. Defendants Nos. 1 and 2 only appealed against the decree but the appeal was allowed in favour of all the three defendants.

Held, that the dismissal of the suit against all the defendants was not illegal in view of the provisions of O. 41, R. 4. AIR (Vol 14) 1927 Pat 103 : 8 PLT 316 : 98 Ind Cas 846.

——O. 41, R. 4 — Common ground is the test.

The appellate Court has no power to order remand, on appeal by one of the plaintiffs, the whole case including that of the non-appealing plaintiffs, if the decree of the lower Court does not proceed on a ground common to all the plaintiffs, and it does not make any difference if the grounds of appeal cover the whole decision. AIR (Vol 13) 1926 Lah 303 : 8 LLJ 132 : 27 PLR 249 : 94 Ind Cas 557.

——O. 41, Rr. 4 and 33 — Power of Appellate Court — Modification of decree.

On an appeal by one of several defendants the Court can examine the grounds of the decision appealed against in respect of all, especially where the appellant is not a stranger to the property in suit. AIR (Vol 7) 1920 Cal 388 : 31 CLJ 75 : 24 CWN 463 : 55 Ind Cas 154 (DB).

——O. 41, R. 4 — Order 41, R. 4 deals with the case where the decree passed by the trial Court proceeds on any ground common to all the plaintiffs or to all the defendants. AIR (Vol 7) 1920 Low Bur 114 : 13 Bur LT 163 : 63 Ind Cas 973.

——O. 41, Rr. 4 and 33 — Common ground — Appeal by some — Effect.

The decision of an Appellate Court in favour of appellants extends to others who did not appeal if the grounds of decision were common to all others. AIR (Vol 5) 1918 Mad 794 : 40 Mad 846 : 6 LW 253 : 41 Ind Cas 546 (DB).

——O. 41, Rr. 4 and 33 — Common ground — Mortgage decree — Appeal by one of the parties — Effect on others.

An order in an appeal by one of several defendants enures to the benefit of the other defendants only if the interests of the latter are inseparable from the interest of the defendants appellant. A decree in a mortgage suit made all the properties covered by the mortgage liable to sale and a person who had purchased one of the properties at a revenue sale appealed from decree, and the appellate Court exonerated him from liability under the mortgage.

Held that the result of the appeal was to free only the property in which the defendant appellant had an interest leaving untouched the property in which the mortgagor and puisne mortgagees were concerned. AIR (Vol 4) 1917 Pat 152 : 3 Pat LJ 166 : 44 Ind Cas 762 (DB).

——O. 41, R. 4 — Common ground — Reversal of decree — Appeal by one defendant.

A mortgage decree may be wholly reversed on an appeal being made by one defendant alone, if it is found that the mortgage was without consideration. (1910) 5 Ind Cas 388 (Cal).

——O. 41, R. 4 (S. 544 old Code) — "Ground common to all defendants" — Decree, meaning of — Court, power of, to pass a decree in favour of a party not appealing.

The word "decree" in S. 544 of the Civil Procedure Code has reference to the appeal which is lodged against the decision of the first Court. It is not the decision or judgment which is appealed against, but the decree which is appealed against; and in interpreting the section, the Court is entitled to consider the ground or finding upon which the decision or judgment is based, and not merely the operative decree which grants or withholds relief, as the case may be.

When the first Court has made a decree against several defendants upon a finding which applies equally to all of them, then under S. 544 of the Civil Procedure Code any one of the defendants may appeal against the whole decree and the appellate Court may reverse or modify that decree in favour of all the defendants. (1909) 9 CLJ 461 (464) : 4 Ind Cas 166 (DB).

——O. 41, R. 4; O. 8, R. 6 (Ss. 544, 583 old Code) — Set off in restitution — Equitable relief — Ac-

counts, taking of — "He who seeks equity must do equity".

Defendant took a lease from one Z in 1882. Plaintiff took another lease from Z's successor in 1890. The plaintiff sued the defendant and his lessor's then representative for a declaration that the lease to defendant was invalid and for possession. Plaintiff obtained a decree for possession on condition of his paying a certain amount as compensation to the defendant. The defendant delivered possession on receipt of the compensation amount. The representative of the lessor appealed from the decree making the defendant a party. The decrees of the lower Courts were upset by High Court in August 1897.

Held, that under S. 544, C. P. C., old Code the reversal of the decree by the High Court enured to the benefit of the defendant also; that the defendant was entitled to demand possession of the lands from the plaintiff by way of restitution; that the refunding of the compensation amount by the defendant was not a condition precedent to his obtaining relief by way of restitution, and that the defendant was entitled to ask that the amount may be adjusted by setting off mesne profits, which the plaintiff has wrongfully received against the compensation money as on the date of the decree of the High Court.

Held, that it was not equitable that the defendant should be permitted in effect to postpone applying for restitution until mesne profits had amounted to a sufficient sum to wipe off the amount of the compensation money. (1908) 18 MLJ 39 (41, 42) (DB).

——O. 41, R. 4 (S. 544 old Code) — Appeal against whole decree — Ground common to all defendants.

Section 544, C. P. C., is applicable in all cases where the appeal is against the whole decree and the decree of the appellate Court proceeds upon a ground common to all the defendants even though only one or some of them may have appealed. A reversioner sued for a declaration of title to five items of properties which formed part of the estate of a deceased Hindu. The first defendant claimed title to all the items under a gift by the widow. The second defendant claimed title to item 5 only under a verbal gift by the last male owner.

Defendants 3 and 4 claimed title to a portion of items 3 and 4 as their own. Plaintiff got a decree in the first Court. The first defendant alone appealed and the District Judge reversed the whole decree in appeal on the simple ground that plaintiff had failed to prove his reversionary right.

Held, that the decree of the first Court did proceed upon a ground common to all the defendants i.e., that the plaintiff was the reversionary heir of the deceased Hindu and that it was, therefore, competent to the District Judge to reverse the whole decree on appeal by the first defendant against the whole decree. (1907) 17 MLJ 119 : 30 M 470 (472) (FB).

——O. 41, R. 4 — Appellate Court, functions of — Suit dismissed against one of two defendants — Power of appellate Court to make a decree against him upon appeal by the other defendant where plaintiff does not appeal or put in a memo of objections. Decree held did not proceed on common ground. (1905) 15 MLJ 212: 28 M 229 (232) (DB). Also (1909) 6 ALJ 643 : 31 All 521 : 2 Ind Cas 552 (552).

——O. 41. R. 4 (S. 544 old Code) — Ground common to all defendants.

Where the ground of defence was that the mortgage sued on was sham and, therefore, common to all defendants: Held, that on appeal by one of the defendants, the whole decree may be set aside. (1905) 15 MLJ 28 : 28 M 122 (124) (DB).

——O. 41, R. 4 (S. 544 old Code) — A sued B, C, D for declaration of title to a land and for possession of it alleging dispossession by them. They pleaded that the suit was bad for misjoinder of parties, and that he had no title. The first Court decreed the suit. B and C appealed and the District Court reversed the decision of the first Court on the ground that A had no title:

Held, the lower appellate Court could allow the appeal in favour of D also, as the decree appealed against proceeded on ground common to all the defendants. 17 M 265, dissented from. (1903) 30 C 429 (432) (DB).

5. Death of party.

——O. 41, R. 4 and O. 22, Rr. 3, 11 — Appeal in partition suit — Death of one of appellants — L. Rs. not brought on record — Power of appellate Court to vary decree. AIR (Vol 36) 1949 Nag 91 : 1948 NLJ 349.

——O. 41, R. 4 — O. 22, R. 3 and O. 41, R. 4 — Appeal by all plaintiffs or defendants from decree proceeding on ground common to all — One of them dying — No substitution made within time — Appellate Court cannot reverse or vary decree in favour of all appellants.

By reason of the provisions of Rr. 3 and 11 of O. 22 the appeal in so far as it concerns the deceased appellant abates and as the abatement, if not set aside has the force of decree, the matter becomes final as against the deceased appellant. There is nothing in O. 41, R. 4 which permits the Court to disturb that finality of the decree as against the deceased appellant. The words "and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be" in O. 41, R. 4 suggest that all the plaintiffs or defendants are alive at the time when the decree of the Appellate Court is passed. The wording is not appropriate to a case where one of the plaintiffs or defendants-appellants has died during the pendency of the appeal. Hence the Appellate Court has no power to proceed with the hearing of an appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under O. 41, R. 4, if all the plaintiffs or defendants appeal from the decree and one of them dies and no substitution is effected within time and the application for setting aside the abatement, so far as the deceased appellant is concerned, has been refused assuming that the decree appealed from proceeded on a ground common to all the plaintiffs or defendants. Case law reviewed. 19 Pat 172 : AIR 1940 Pat 341 : 185 Ind Cas 685, Overruled. AIR (Vol 27) 1940 Pat 346 : 6 BR 737 : 21 PLT 597 : 19 Pat 870 : 188 Ind Cas 745 (FB).

——O. 41, R. 4 — O. 22, R. 3; O. 41, R. 4 and O. 1, R. 13 — Decree in partition suit — Appeal by all defendants on common grounds — Death of one appellant pending appeal.

Where all the defendants in a partition suit appeal from the decree on grounds common to them all and one of them dies during the pendency of the appeal, the surviving appellants can continue the appeal under O. 41, R. 4 without the legal representatives of the deceased being substituted.

Where the appeal is heard and decided within the prescribed period for substitution, the heirs of the deceased can complain, if the result of the appeal has been to their detriment, that the Court should not have heard the appeal without waiting for the prescribed time for substitution. But the respondent to the appeal who has not objected to the defect of parties in the lower Appellate Court is precluded from raising it for the first

time in second appeal by reason of O. 1, R. 13. Overruled in AIR 1940 Pat 346 (FB). AIR (Vol 27) 1940 Pat 341 : 19 Pat 172 : 185 Ind Cas 685.

——**O. 41, R. 4 — Appeal abating on death of one of appellants — Court, if can vary decree.**

The provisions of O. 41, R. 4, enable the Court to vary the decree as a whole even though the appeal of one of the appellants might have abated by reason of death. AIR (Vol 25) 1938 Mad 374: 179 Ind Cas 125.

——**O. 41, R. 4, O. 22, R. 3 — Suit for ejectment and khas possession — Title declared but no khas possession granted — Defendant dying during pendency of first appeal—Sons on record—Second appeal—One of the sons dying — Maintainability of appeal against whole decree.**

A suit was brought by the plaintiffs for a declaration of their title to certain lands and for recovery of 'khas' possession in respect of the same. The first Court granted a declaration of the plaintiff's title to a fractional share in the lands in suit but dismissed the plaintiffs' suit for 'khas' possession.

On appeal the lower Appellate Court set aside that decision and decreed the plaintiffs' suit in full. Defendant No. 1 died during the pendency of the appeal in the lower Appellate Court and his two sons were substituted as the heirs on the record of the appeal. The appeal to the High Court was filed on behalf of both the sons, one of the sons died during the pendency of this appeal and his heirs were not brought on the record within the time allowed by law:

Held, that O. 41, R. 4, enabled one of the two heirs of the defendant, to maintain the appeal from the whole decree, and it was competent to the Appellate Court to reverse or vary the decree in favour of all the plaintiffs or of all the defendants as the case may be, although one of the defendants or one of the defendants' heirs did not join in the appeal. AIR (Vol 21) 1934 Cal 703: 59 CLJ 362: 38 CWN 743: 61 Cal 879: 154 Ind Cas 147 (DB).

——O. 41. R. 4 — Where out of four defendants constituting partnership only three appealed against the decree which was for a sum of money alleged to have been lent to the partnership and one of the appellants died during the pendency of the appeal and his legal representative was the non-appealing defendant who was not brought on record.

Held, that O. 41. R. 4 would enable the Court to grant relief to appellants, in view of the fact that taking of accounts was not necessary in the case. AIR (Vol 12) 1925 Mad 235: 20 MLW 402: 1924 MWN 789: 82 Ind Cas 420.

——O. 41, R. 4 — Under O. 41, R. 4, an appellate Court has power to reverse a judgment in favour of a deceased defendant as regards the whole of the plaintiff's claim and not only as regards that part of it which the surviving defendant or defendants were particularly interested in. AIR (Vol 10) 1923 Mad 58: 16 MLW 330: 1922 MWN 674: 32 MLT 124: 70 Ind Cas 168 (DB).

——**O. 41, R. 4 — Common ground — Decree in the case where heirs are not brought on record.**

The Appellate Court has power to vary or reverse the decree in favour of all the appellants including heirs of the deceased not brought on record on grounds common to all. AIR (Vol 3) 1916 Oudh 188: 3 OLJ 279: 35 Ind Cas 743 (DB).

——**O. 41, R. 4; O. 22, R. 2; S. 107 (2) (Ss. 544, 362, 512 Old Code) — Death of one of several defendants — Right to appeal — Practice.**

Where a decree is passed against several defendants and two of them appeal, but pending the hearing one of the appellants dies and no legal representative of the deceased appellant is brought on the record, it is competent to the Court to reverse the whole decree, on the appeal of the other defendant appellant where the ground of appeal is common to all the defendants. (1903) 5 Bom LR 90: 27 B 284 (286) (DB).

6. Interpretation.

——O. 41, R. 4 — Though Rr. 4 and 33 of O. 41 and R. 3 of O. 22 are independent, yet there is no inconsistency or conflict between them. (Their scope indicated). AIR (Vol 28) 1941 Oudh 155: 1940 OWN (CC) 1155: 13 RD 232: 1940 AWR (CC) 473: 16 Luck 382: 191 Ind Cas 234.

——**O. 41, Rr. 4, 33 — Distinction between R. 4 and R. 33.**

There is a distinction between O. 41, R. 4, and O. 41, R. 33. Rule 33 applies to a case where the appeal is as to a part only of the decree, while R. 4 applies to a case where the appeal is from the whole decree.

Order 41, R. 4, is based on two considerations: firstly to give the Appellate Court full power to do justice to all parties whether before it or not, secondly, to prevent contradictory decisions in the matter in the same suit. In order to apply R. 4 it is essential that the decree appealed from should have proceeded on a ground common to all the plaintiffs or defendants and the whole case is gone into in the Appellate Court at the instance of the parties representing all the necessary contentions in the case. AIR (Vol 24) 1937 All 796: (1937) ALJ 1111: 1937 RD 548: 1937 AWR (HC) 916: 1937 ALR (HC) 8: 172 Ind Cas 635.

——**O. 41, R. 4 — Meaning of word 'may'.**

The use of the word 'may' in O. 41, R. 4, means that the Appellate Court is given a discretion to reverse the decree in favour of some only or of all the defendants or plaintiffs. It is not bound to do so in favour of all of them unless all of them have appealed. AIR (Vol 19) 1932 Lah 71: 32 PLR 787: 133 Ind Cas 556(2) (DB).

——O. 41, R. 4 merely enables one of several plaintiffs or defendants to appeal from a decree which proceeds on a ground common to them all. It does not provide that the plaintiffs or defendants who do not join with the appellant should be considered to be appellants for any purpose. AIR (Vol 18) 1931 All 349: (1931) ALJ 266: 53 All 521: 131 Ind Cas 877 (DB).

7. "May reverse the decree..... .... .. all the plaintiffs or defendants."

See also N. 5.

(a) **"May".**
(b) **Non-appealing party — Necessity of impleading.**
(c) **Decree reversed against non-appealing party.**
(d) **New decree against non-appealing party while setting aside decree.**
(e) **Enuration of benefit to non-appealing party.**
(f) **Decree varied or reversed in favour of all.**

(a) "May."

——O. 41, R. 4 — A Court is not bound to exercise its discretion in favour of a non-appealing party under O. 41, R. 4. AIR (Vol 13) 1926 All 64: 6 LRA Civ 495: 88 Ind Cas 535.

——**O. 41, Rr. 4 and 33 — Reversal of decree — Common ground.**

Under Rr. 33 and 4 of O. 41, the Appellate Court can reverse the decree against all based on a common ground though only one appeals from it. The rules prevent two contrary decisions in the same suit. AIR (Vol 3) 1916 Pat 400: 1 Pat LJ 143: 35 Ind Cas 547.

——**O. 41, R. 4 — Reversal of decree — Appeal by one unsuccessful deft. — Suit if may be dismissed against all — Discretion of Court.**

Relief can be given to non-appealing parties if their grounds of attack are the same as those of the appealing party. AIR (Vol 2) 1915 All 367: 31 Ind Cas 886.

——**O. 41, R. 4 — Discretion of court — Reversal of decree on common ground — Appellate Court — Discretion.**

The reversal or variation of a decree in favour of a non-appealing party, on the ground common to all the defts. is in the discretion of the court. AIR (Vol 1) 1914 All 74: 36 All 510: 12 ALJ 883: 24 Ind Cas 439 (DB).

——**O. 41, R. 4 — Reversal of decree — Appeal by some.**

Where the lower Court has passed a decree against several defts. upon a finding common to all, any one of them may appeal against the whole decree and the appellate court may reverse or modify the decree as to them all. (1909) 9 CLJ 461: 4 Ind Cas 166 (DB).

(b) Non-appealing party — Necessity of impleading.

——O. 41, R. 4 — Only some of the several plaintiffs against whom a decree was passed appealed. The decree had proceeded on a common ground. The memorandum of appeal in the lower Appellate Court showed that the whole decree was being appealed against. The prayer thereon was that "the claim of the plaintiffs be decreed" and not "the claim of the appellants." The valuation of the appeal and the valuation of the suit were the same. In the memorandum of appeal, it was stated that the reason why the other plaintiffs had not joined in appeal was that they were away and so they had been impleaded as pro forma respondents:

Held, that it was proper for the Judge to exercise his discretion under O. 41, R. 4, Civil P. C., and decree the suit in favour of all the plaintiffs. AIR (Vol 27) 1940 All 428: 1940 AWR (HC) 387: 191 Ind Cas 602.

——O. 41, R. 4 — Where one only of several plaintiffs, whose suit is dismissed appeal, the appellate Court can decree the appeal in favour of all, especially when the non-appealing plaintiffs are joined as respondents. AIR (Vol 14) 1927 Nag 406: 99 Ind Cas 1041.

——**O. 41, Rr. 4 and 33 — Power of appellate court to vary decree — Parties not appealing.**

Except under O. 41, R. 4 of the C. P. C., an appellate Court cannot vary a decree of a lower court as regards its adjudication on the rights and liabilities of the parties who have not joined in the appeal and who are not parties to the litigation in the appellate court. O. 41, R. 33 of the C. P. C., does not apply to a person who is not a party to the appeal. AIR (Vol 5) 1918 Cal 287: 44 Ind Cas 480 (DB).

(c) Decree reversed against non-appealing party.

——**O. 41, Rr. 4, 33 — One defendant alone appealing — Others not impleaded — Decree proceeding on a common ground.**

Reading Rr. 4 and 33, O. 41, together, there can be no doubt that one of the defendants can file an appeal without impleading the other defendants as respondents, if the decree appealed from proceeds on a ground common to all of them and that the Appellate Court may thereupon exercise the power of varying the decree in favour of the non-appealing defendants, although they have not been made parties to the appeal and O. 41, R. 33, authorizes the Appellate Court to pass a decree in favour of a party who has not been heard.

It does not authorize the Court to pass a decree against a person who is not a party to the appeal, or in other words, powers under R. 33 cannot be exercised to the prejudice of a person who is not given a hearing. A person who has been heard in appeal, cannot object to a decree being passed in favour of a person merely because that person is not a party to the appeal and has not been heard. AIR (Vol 22) 1935 Cal 24: 61 Cal 919: 154 Ind Cas 101.

——**O. 41, R. 4 — Whether Appellate Court can pass a decree against those who have not appealed — Pro forma defendant — Procedure.**

Under O. 41, R. 4, it is open to one of several defendants where the decree appealed from proceeds on any ground common to all of them, to appeal from the whole decree. When such other defendants are also made parties, it is open to the Appellate Court to pass a decree under O. 41, R. 33 in favour of persons who have not appealed. In a certain contingency, a decree may be passed which may be prejudicial to those defendants who have not appealed and who are made pro forma respondents. Such defendants if they had not been made parties originally can be made parties by the Court, under O. 41, R. 20. AIR (Vol 21) 1934 All 89: (1934) ALJ 446: 4 AWR (H C) 1519: 151 Ind Cas 294 (DB).,

——**O. 41, R. 4 — Appellate Court, if can pass or modify decree to the detriment of any person not party to appeal — Cross-appeal not filed — Cross-objections alone filed.**

Order 41, R. 4, merely authorises the Appellate Courts to reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be. It does not authorise the Appellate Court to reverse or vary the decree of the trial Court to the detriment of the plaintiffs or the defendants, as the case may be. AIR (Vol 21) 1934 Oudh 496: 11 OWN (C C) 1263: 10 Luck 243: 1934 OLR (CC) 830: 152 Ind Cas 304 (DB).

——**O. 41, R. 4 — Reversal of decree — Common ground — Power to reverse against party — Not appealing.**

Where the ground of reversal is common to all, the appellate court can reverse the decree even against parties not appealing. AIR (Vol 1) 1914 Mad 696: 1 LW 169: 23 Ind Cas 620 (DB).

——**O. 41, R. 4 — Power of Appellate Court — Dismissal of suit as against one of the defts. — Appeal by the deft. against whom suit was decreed — Decree.**

Plff.'s suit was dismissed against the 1st deft. but decreed against the 2nd deft. The second deft. appealed. Plff. neither appealed nor filed a memo of objections in respect of dismissal against the 1st deft. The Appellate Court decreed plff's suit against both defts.

Held, that the Appellate Court could not pass a decree against the 1st deft. on second deft.'s appeal. 28 Mad 229, Foll. (1910) 8 MLT 221: (1910) MWN 612: 7 Ind Cas 217 (DB).

——**O. 41, Rr. 4 and 33 — Parties — Persons not impleaded — Powers of High Court.**

Neither the High Court nor the Lower Appellate Court can pass a decree in appeal against a person who was party to the original suit, but not a party to any of the appeals. (1909) 31 All 521: 6 ALJ 643: 2 Ind Cas 552 (DB).

——O. 41, R. 4 — Appellate court functions of — Suit dismissed against one of two defts. — Power of appellate court to make a decree against him upon appeal by the other defendant where plaintiff

does not appeal. 1904 AWN 155 (156) : 1 ALJ 358 : 27 A 23 (DB).

(d) New decree against — Non-appealing party while setting aside decree.

——O. 41, R. 4 — Trial Court's decree against A and B on common ground — Appeal by A alone — Appellate Court held, while allowing appeal and dismissing suit against A, can dismiss it with costs against B also. AIR (Vol 29) 1942 Cal 257: ILR (1941) 2 Cal 556: 46 CWN 227: 204 Ind Cas 618 (DB).

——O. 41, R. 4 — Decree, if can be set aside against those not appealing.

Where some of the defendants appeal against the decision of the trial Court, the Appellate Court cannot set aside the decree for injunction passed against those not appealing. AIR (Vol 21) 1934 Lah 684 : 37 PLR 351 : 154 Ind Cas 919.

——O. 41, R. 4 — Though a decree against several defendants which proceeds upon a ground common to them all can be set aside on appeal at the instance of one of them, it cannot be so set aside when the appealing defendant values the appeal for a sum representing the amount decreed against him alone. Such an appeal is not one against the entire decree at all. (1921) 63 Ind Cas 95 (Cal) (DB).

——O. 41, Rr. 4 and 33 — Power of appellate Court — Setting aside decree from which no appeal was filed — Jurisdiction.

There is no provision of law which enables a court in the course of the decision of an appeal from one decree, to set aside the decree which dismisses a separate suit and from which no appeal has been lodged. AIR (Vol 6) 1919 Lah 201 : 116 PR 1919 : 53 Ind Cas 883.

——O. 41, Rr. 4, 33 and 22 — Powers of appellate Court.

Where a suit claiming reliefs alternatively against A and D is decreed against B and he prefers an appeal, it is not necessary for the plaintiff respondent to file a cross objection against A in order to enable the Appellate Court to settle the rights of the respondents inter se. AIR (Vol 5) 1918 Cal 223 : 42 Ind Cas 548 (DB).

——O. 41, R. 4 — Reversal of decree — Appeal by some of the unsuccessful plaintiffs — Common ground — If whole decree could be set aside.

Where only some of the plaintiffs, appealed, but the decree proceeded on a ground common to all, the appellate Court under O. 41, R. 4 can set aside the whole decree. AIR (Vol 1) 1914 Lah 298: 11 PLR 1914 : 22 PWR 1914 : 63 PR 1914 : 23 Ind Cas 91 (DB).

——O. 41, R. 4 — Parties — Suit for possession decreed — Decree reversed at the instance of one defendant — Second appeal by plaintiff — Other defendants if should be made respondents.

Where a suit for possession decreed and one of the defendants alone appealed, the appellate Court has the power to reverse the entire decree of the first Court, but this appellate decree so far as it is in favour of the defendants that have not been made parties to the appeal, cannot be set aside in their absence and they should necessarily be made parties. (1913) 18 CLJ 621: 22 Ind Cas 90 (DB).

(e) Enuration of benefit to non-appealing party.

——O. 41, Rr. 4 and 33 — Ex parte defendant — Reversal of decree.

(Per Seshagiri Iyer, J.)— Where in a suit against two defendants one alone defended the suit & the others remained ex parte and where a joint decree for possession was passed against both the defendants and the contesting defendants alone appealed, the appellate court has no power, under O. 41, R. 4 to dismiss the whole suit as against the ex parte defendant, but if the sale deed on foot of which the suit was brought, was a sham one, a decree even against the ex parte defendant can be supported under O. 41, R. 33 of the Code. Order 41, R. 33 gives full power to the Appellate Court to pass the decree which should have been passed by the court of first instance on the findings arrived at by the Appellate court and in favour of any of the parties to the suit, whether such a party is a party to the appeal or, not.

(Per Sadashiva Iyer, J.) The High Court will not interfere in second appeal with a finding of fact by the Lower Appellate Court even though a few of the reasons for the finding are unsatisfactory. AIR (Vol 2) 1915 Mad 227: 1 LW 376: 24 Ind Cas 924 (DB).

——O. 41, R. 4 — Reversal of decree in appeal — In whose favour and against whom it operates — Omission to substitute the heirs of a defendant — Its effect.

When a plaintiff obtains a decree against several defendants and that decree is reversed in appeal by some of the defendants on a ground common to all the defendants, the reversal of the decree and the consequent dismissal of the suit enures for the benefit of all the defendants so that the reversal of that decision on second appeal by the plaintiff, is not binding against the heirs of those defendants who die during the pendency of the appeal either in the lower appellate court or in the High Court if the plaintiff does not bring in those heirs on the record of the second appeal as respondents. The decree obtained on second appeal under such circumstances cannot be executed against those persons. (1905) 1 CLJ 144 (147) (DB).

——O. 41, R. 4 — (Case under S. 544, old Code) — Appellate Court, functions of — Appeal by one defendant — Power of appellate court to declare liability of another defendant — Contribution suit — Practice — Procedure.

In a suit for contribution wherein plaintiff asked for relief against all the defendants separately, the appellate court could upon appeal by one of the defendants impleading another defendant who was exonerated in the lower court, alter the decree, so as to make the other defendant liable. (1904) 8 CWN 496: 31 C 643 (646) (FB).

——O. 41, R. 4 (S. 544 old Code) — Decree for contribution against several defendants — Appeal by one alone — Plaintiff found not entitled to any contribution — Courts power to dismiss the whole suit.

Where in a suit for contribution against several defendants a decree was passed against three of them and one of them alone applied, and the appellate Court found that the plaintiff was not entitled to any contribution, the appellate Court has jurisdiction to dismiss the whole of the plaintiff's suit. (1902) 6 CWN 794 (796) (DB).

(f) Decree varied or reversed in favour of all.

——O. 41, Rr. 4 and 33 and U. P. Tenancy Act (XVII of 1939), S. 180 — Joint decree of ejectment against husband and wife sued as trespassers — Appeal by husband only with wife made a respondent — Sustainability — Decree in favour of the wife — Power of appellate Court to pass.

Where in a suit against the husband and wife as trespassers a decree for ejectment is passed against them, and an appeal is preferred by the husband only with the wife added as a respondent the case is covered by Rule 4 of O. 41, C. P. Code,

because it is the common defence of the husband and wife that they were holding not as trespassers but as persons with a title. In such a case the appellate Court can under O. 41, R. 33, pass a decree in favour of the wife though she had not appealed. (1948) 1948 RD 329: 1948 AWR (Rev) 275.

——O. 41, R. 4 — Decree appealed from proceeding on common ground — All plaintiffs need not join in appeal — Court has power under O. 41, R. 4, to reverse or vary the decree appealed from in favour of all the plaintiffs. AIR (Vol 20) 1933 Lah 933 (2): 149 Ind Cas 527.

——O. 41, R. 4 — Under O. 41, R. 4, the Court has ample power to vary a decree in favour of a party who has not preferred an appeal. AIR (Vol 19) 1932 All 710: 139 Ind Cas 718 (DB).

——O. 41, R. 4 — The appellate Court is entitled to pass a decree in favour of all the plaintiffs on an appeal filed by only one plaintiff. AIR 1923 All 211, Not Foll. AIR (Vol 16) 1929 All 393: 119 Ind Cas 434.

——O. 41, R. 4 — All need not be parties.

When the decree appealed from proceeds on any ground common to all the plaintiffs or all the defendants, and when only some and not all the plaintiffs or defendants have appealed against the decree of the trial Court, the power vested in an appellate Court by O. 41, R. 4, to reverse or vary the decree appealed from in favour of all the plaintiffs or all the defendants is not restricted to cases in which the plaintiffs or defendants who have not appealed are made parties to the appeal; that power can be exercised by the appellate Court even if the plaintiffs or defendants who have not appealed are not made parties to the appeal. AIR (Vol 14) 1927 All 311 : 100 Ind Cas 346.

——O. 41, R. 4 — If a decree is passed against several defendants on a common ground, the appellate Court can on appeal by one defendant only, vary the decree in favour of all. AIR (Vol 7) 1920 Cal 646: 60 Ind Cas 460 (DB).

——O. 41, R. 4 — Reversal of decree — Non-appealing defendant.

Order 41, Rule 4 of the C. P. C. gives the appellate Court power to reverse the decree in favour of all the defendants, even though the appeal is preferred by only some, when the decree proceeds on any ground common to all of them. AIR (Vol 5) 1918 Cal 76: 23 CWN 372 (DB).

——O. 41, Rr. 4 and 33 — Common ground — Damages — Decree in favour of person not appealing.

Where only one plaintiff claimed in his appeal damages for an infringement of right, but the right was common to all the plaintiffs, the appellate court could pass a decree in favour of all. (1912) 15 Ind Cas 409 (Mad) (DB).

8. Partial abatement.

——Order 41, R. 4 — Appeal by all defendants — Abatement as against some — Court can still reverse or vary the decree as a whole if the nature of the case is such that if some of the defendants had alone appealed, the Court could have reversed or varied the decree as a whole under O. 41, R. 4. AIR (Vol 20) 1933 Mad 665: 38 MLW 278: 146 Ind Cas 26 (DB).

——Order 41, R. 4 — Where during the pendency of an appeal by the plaintiffs in a suit instituted by several contestants under S. 104-H, some of the plaintiffs die and the suit abates so far as they are concerned the appeal does not abate as a whole. AIR (Vol 19) 1932 Cal 134: 58 Cal 1341: 135 Ind Cas 797.

——O. 41, R. 4 — Partial abatement — Appeal — Competency — Test.

So long as the orders of abatement remain it must be considered to have determined the rights between the parties. To allow an appellant whose appeal has abated to gain the advantage of O. 41, R. 4 will result in the anomaly that so far as that appellant is concerned, there will be two decrees in the same suit in existence at the same time one in his favour and one against him. Tenants of a certain holding brought a suit against landlords who were four in number under S. 106, Beng. Ten. Act, on the allegation that the rent was really Rs. 7 instead of Rs. 10 as entered in the record and got the decree.

The landlord-defendants appealed, but before the hearing of the appeal, one of the appellants died and his heirs were not brought on the record and consequently the appeal, so far as he was concerned, abated.

Held, that the appeal as it stood was incompetent for one of the necessary parties in whose absence the appeal could not proceed was not on the record.

Mallik, J.— For the determination of the question whether the appeal is competent after partial abatement the true test seems to be whether the appeal can be heard in the absence of the appellant who is dead. Whether the appeal can be heard in the absence of one of the appellants will depend on the nature of the suit and the decree made. AIR (Vol 15) 1928 Cal 184: 107 Ind Cas 726: 47 CLJ 82: 32 CWN 299 (DB).

——O. 41, R. 4 — Appeal can proceed on their behalf only.

Plaintiffs brought a suit for possession of a strip of land together with a tree and for damages for removing bows of the trees against defendants 1 to 6, alleging unlawful possession by defendants 1 to 3 in collusion with defendants 4 to 6. Their claim was decreed, and was affirmed on appeal by defendants. During pendency of this appeal, defendant 1 had died. Other defendants then preferred an appeal on behalf of all defendants except one who confessed judgment. Defendant 1 was not represented by any legal representative.

Held, that the remaining appellants excluding defendant 1 had an independent right of appeal under the circumstances and so the appeal could proceed on their behalf alone. AIR (Vol 15) 1928 Lah 737: 29 PLR 410: 112 Ind Cas 455.

——Order 41, R. 4 — Several suits were decided by one judgment. Only one defendant appealed and succeeded.

Held, that the appellate decree does not affect the other cases unless a specific direction to that effect is contained in the appellate decree. AIR (Vol 12) 1925 Oudh 732: 91 Ind Cas 121: 2 OWN 894 (DB).

——O. 41, R. 4 — Abatement.

Where one of the parties to an appeal against a decrees dies and his legal representative is not brought on record within the period of limitation, the appeal abates so far as the deceased is concerned but the other appellants are not precluded from prosecuting the appeal as O. 41, R. 4 empowers any one of the parties to appeal against the whole decree. AIR (Vol 1) 1914 Lah 382: 88 PR 1914: 235 PLR 1915: 26 Ind Cas 486 (DB).

——O. 41, R. 4 — Common interest — Several appellants — Death of one — Legal representative.

Where several co-defts. jointly appeal against a joint decree to which S. 544 of the old Code applies the death of one appellant, his legal representatives not being brought on record within limitation period has only the effect of causing the ap-

peal to abate, so far as the deceased is concerned but it has no effect on the appeal as a whole. 22 All 222 overruled. (1911) 10 Ind Cas 27 (All.) (DB).

9. Transposition of parties.

——O. 41, R. 4, O. 1, R. 19 (2) — Power of Court to allow transportation of parties — Appeal by plaintiff No. 2 only against part of decree affecting him — Appeal withdrawn as result of compromise between him and defendants Nos. 5 to 8 — Application by plaintiff No. 1 and defendant No. 1 to prosecute appeal.

It is apparent from the provisions of O. 41, R. 4 and O. 1, R. 19 (2), Civil P. C., that the Court has very wide powers to allow parties to be added to the array of plaintiffs or appellants or to allow parties to be transposed from the array of defendants to the array of plaintiffs. Whether it is just & equitable to grant an application for such a transposition, however, is a question which must be decided upon the facts and circumstances of each particular case.

Plaintiff No. 2 appealed from the decree of the trial Court in so far only as the decree determined his share in the estate. During the hearing of the appeal, the appellant filed an application in which it was averred that the appellant and defendants Nos. 5 to 8 had concluded a compromise and intimated that in these circumstances he did not wish to press his appeal which might be dismissed. Thereupon defendant No. 1 and plaintiff No. 1, filed applications in which they prayed that in the circumstances they be permitted to prosecute the appeal:

Held, that taking all the facts and circumstances into consideration, the case was not one in which the Court should exercise its discretion in favour of the applicants. AIR (Vol 27) 1940 All 365: (1940) ALJ 373 : ILR (1940) All 425 : 1940 AWR (HC) 343 : 190 Ind Cas 314 (DB).

——Order 41, R. 4 — Reading O. 1, R. 10 along with S. 107 (2) there is no doubt that the appellate Court has power to transfer a respondent to the array of appellants and pass a decree in his favour under O. 41, Rr. 4 and 33, in case it is just and equitable. AIR (Vol 17) 1930 All 786 (DB).

——O. 41, R. 4 — To decide common question.

Where a joint decree was passed against two defendants but one only appealed against it making the co-defendant as Respondent on grounds common to both and the defendant respondent filed cross-objections to the decree, the Court directed the defendant-respondent to be transferred from the array of respondents to that of Appellants and proceeded to determine the appeal on the ground common to both. AIR (Vol 11) 1924 All 605: 80 Ind Cas 737: 5 LRA 536 (DB).

——O. 41, R. 5.

See also Civil P. C., S. 151 and O. 41, R. 6.

1. Appeal and revision.
1A. Communication of order.
See Note 2.
2. Effects of stay order.
3. Inherent powers.
4. Powers of Appellate Court.
5. Powers of trial Court.
6. Practice.
7. Scope and object.
8. Security.
9. Substantial loss.
10. Surety.
11. When granted.
See Notes 7 and 8.

1. Appeal and revision.

——O. 41, R. 5 — Discretion of Court — Interference in revision.

Under O. 41, R 5, C. P. Code, the Court which passed the decree has the discretion to grant or refuse stay of execution proceedings. If the exercise of the discretion on its part is judicial and not arbitrary, there can be no justification for interference on the revision side. AIR (Vol 36) 1949 Ajmer 1: 1949 AMLJ 83.

——Order 41, R. 5 — An order granting stay of execution or refusing to vacate the stay order already passed under O. 41, R. 5, is not a decree within the meaning of S. 2 (2). AIR (Vol 30) 1943 Nag 282 : 1943 NLJ 389 : ILR (1943) Nag 453 : 211 Ind Cas 237 (DB).

——Order 41, R. 5 — An order by the Appellate Court passed under O. 41, R. 5, refusing to stay execution is not a decree and hence is not appealable. AIR (Vol 26) 1939 Bom 65: 40 Bom LR 1198: 180 Ind Cas 34.

——O. 41, R. 5 — Operation of decree, if suspended by appeal.

An original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. AIR (Vol 21) 1934 Rang 329: 154 Ind Cas 153.

——O. 41, R. 5 — Restitution — Stay of.

An application for restitution can be made as soon as a decree is varied or reversed and it ought not to be stayed under O. 41, R. 5, because an appeal has been filed. AIR (Vol 16) 1929 Nag 138: 117 Ind Cas 288.

——Order 41, R. 5, — Order staying execution is not appealable. AIR (Vol 14) 1927 Lah 852: 28 PLR 607: 100 Ind Cas 23: 9 LLJ 193.

——O. 41, R. 5 — Order continuing execution — Appeal.

Order rejecting security and ordering execution to continue is not appealable. AIR 1924 Lah 602 and 631, and AIR 1924 Lah 671 and AIR 1925 Lah 69, not Foll. AIR (Vol 14) 1927 Lah 527: 102 Ind Cas 621.

——O. 41, R. 5 — Order refusing stay — Appeal.

No appeal lies from an order refusing stay of execution. AIR (Vol 14) 1927 Lah 235: 100 Ind Cas 76.

——O. 41, R. 5 — Injunction to stay execution — Judgment — Appeal.

An order granting injunction staying execution proceedings passed by a single Judge of the High Court is a judgment and is appealable. AIR (Vol 14) 1927 Mad 592: 52 MLJ 670: 102 Ind Cas 396: 38 MLT 364: 1927 MWN 259 (DB).

——O. 41, R. 5 — Stay of execution — Appeal.

No appeal lies from an order staying execution of a decree. AIR (Vol 13) 1926 Cal 830 : 94 Ind Cas 352 (DB).

——O. 41, R. 5 — Appeal lies against stay of execution.

An appeal lies under the Letters Patent against the order of a single Judge refusing stay of execution pending the disposal of an Appeal of Second Appeal in this Court. The fact of there being a declaration is no bar to this Court staying the execution of the decree. AIR (Vol 11) 1924 Mad 597: 46 MLJ 138: 79 Ind Cas 109: 47 Mad 316: 19 MLW 427: 34 MLT 32: 1924 MWN 167 (DB).

——O. 41, R. 5 — Appeal — Judge refusing security — Order not appealable.

An injunction was granted to stay execution on the condition of filing security. The judgment-debtor thereupon offered to hypothecate his immovable property by way of security. The Judge,

however, refused to accept this security as sufficient and allowed two week's time to the judgment-debtor to produce some other person as surety.

Held, it is well settled that interlocutory order passed in the course of execution proceedings is not appealable, and that an appeal lies only from a decree which must conclusively determine the rights of the parties with regard to all or any of the matters in controversy. The order attacked is not appealable. AIR (Vol 10) 1923 Lah 446: 75 Ind Cas 793.

1A. Communication of order.

See Note 2.

2. Effects of stay order.

——O. 41, R. 5 — Stay order — When comes into operation.

Under O. 41, R. 5, C. P. Code, an order made by the High Court staying the execution of a decree or order under appeal operates from the time that such order is made and not from the time it is communicated to the executing Court. 50 A 41; 33 M 74; 41 M 151 and (1945) 2 MLJ 19, not foll. AIR (V 36) 1949 Lah 108 : Pak LR (1949) Lah 83 (FB).

——O. 41, R. 5 — Operation of stay order, when begins.

An order for stay of execution of decree was obtained from Appellate Court on July 9, 1942, but it was not communicated by that Court to the trial Court until the latter rose for the day. A warrant of attachment of movables was issued on the same day and the amin had attached the movables early on the next morning in spite of the communication by the judgment-debtor that the stay order had been obtained:

Held, that the mere fact that the order reached the office late in the evening of 9th did not mean that it reached before the office business commenced on the next morning. Therefore, the authority of the trial Court to execute the decree was not ousted.

Held, also that the authority of the agent or of the officer was not taken away until the Court which granted the authority terminated it and informed the agent or the officer that it had been terminated. The amin, therefore, could not stay the attachment on communication by the judgment-debtor. AIR (Vol 32) 1945 Mad 391: 1945 MWN 256: (1945) 2 MLJ 19.

——O. 41, R. 5 — Appellate Court passing stay order — Lower Court's act or order in ignorance of stay order.

Where the Appellate Court passes an order for stay the proceedings are not withdrawn from the lower Court. They still remain pending in that Court; only the matter which is covered by the stay order is kept in abeyance during the period of its operation. The lower Court does not lose jurisdiction over those proceedings. An order passed by a Court, or an act done by it, in contravention of the stay order would be an irregular one, may even be regarded as illegal, but it would only be an order passed or an act done in the illegal exercise of its jurisdiction and so would not be a nullity. It will have to be set aside by appropriate proceedings. The Court which passed the order or did the act may itself re-call it, and ought to do so, when it is later on apprised of the stay order. The Appellate Court which had issued the stay order may set it aside, if it is brought to its notice, but till re-called or set aside it cannot be totally ignored in another suit or other independent proceeding. AIR (Vol 30) 1943 Cal 319: 76 CLJ 83: 47 CWN 186: ILR (1943) 1 Cal 274: 208 Ind Cas 309 (DB).

——O. 41, R. 5 — Order of Appellate Court staying execution — Whether operates from time of its passing or communication.

Quaere:— Whether an order passed by the Appellate Court staying execution by the lower Court operates from the time of its passing or from the time of its communication to the lower Court. AIR (Vol 30) 1943 Cal 319: 76 CLJ 83: 47 CWN 186: ILR (1943) 1 Cal 274: 208 Ind Cas 309 (DB).

——O. 41, R. 5 — Decree transferred for execution to another Court — Appeal preferred against decree and execution stayed — Appeal dismissed and stay discharged — Fresh transfer certificate and execution application not necessary for continuation of execution proceedings. AIR (Vol 29) 1942 Oudh 84: 1941 RD 976: 1941 AWR (CC) Rev 1031: 1941 OWN (CC) 1186: 197 Ind Cas 94 (DB).

——O. 41, R. 5 — Stay order passed but not communicated — Validity.

A stay order passed by a higher Court takes effect from the date on which it is pronounced and not on the date on which it is communicated. A sale held despite the passing of such a stay order even though the same is not communicated, is ultra vires. AIR (Vol 29) 1942 Oudh 24: 1941 CWN (CC) 1044: 1941 RD 795: 17 Luck 189: 1941 AWR (CC) Rev 734: 202 Ind Cas 273.

——O. 41, R. 5 — Appellate Court vacating stay — Parties knowing it — They must appear before trial Court on following adjourned date — Failure — Effect.

Upon an order of the Appellate Court, the proceedings in the trial Court were stayed. The trial Court adjourned the proceedings in consequence of the stay order from time to time, in view of the date fixed for hearing in the Appellate Court. The Appellate Court in due course disposed of the matter and vacated the stay order. The parties were aware of the same:

Held, that the date following the order of the Appellate Court to which the proceedings in the trial Court stood adjourned became effective and the parties were bound to appear before the trial Court on that date and on the failure of any of them to appear, the Court would be justified in proceeding ex parte. AIR (Vol 25) 1938 Nag 173: ILR (1939) Nag 413: 175 Ind Cas 897 (DB).

——O. 41, R. 5 — Record consigned to record room — Revival of proceedings.

Where the execution record was simply consigned to the record room as a matter of convenience instead of being kept in the Court, where room is more valuable, but the proceedings were kept pending, awaiting the decision of a higher Court, the proceedings can be revived. AIR (Vol 20) 1933 Lah 638: 14 Lah 744: 34 PLR 1066: 146 Ind Cas 872.

——O. 41, R. 5 — Stay during pendency of appeal — Decree-holder entitled to mesne profits, if appeal dismissed — Setting aside of decree.

Where the execution of a decree is stayed pending an appeal and the decree-holder is granted the right to mesne profits if the appeal were to be dismissed, the stay order ceases to have effect when the decree is set aside and by virtue of that order mesne profits cannot be granted. AIR (Vol 22) 1933 Lah 485: 34 PLR 938: 146 Ind Cas 301 (DB).

——O. 41, R. 5 — Stay of sale — Sale by officer in ignorance of Court's order.

Where after the executing Court has passed an order staying the sale of attached property, the officer of the Court conducting the sale sells the property by auction, the sale is illegal and void, his ignorance of the stay order being immaterial. The effect of the order for postponement of the sale deprives the officer conducting it of all legal authority to hold it on the date previously fixed and he

is 'functus officio'. AIR (V 20) 1933 Rang 416 : 11 Rang 410: 147 Ind Cas 700.

——O. 41, R. 5 — Execution sale — Appeal by mortgagee — Sale confirmed — Stay of delivery of possession, propriety of.

The petitioner claimed to be a mortgagee of certain property which the respondent had purchased in execution of a decree obtained by him. During the pendency of an appeal which, he had preferred to establish that his mortgage was made before the attachment of the property in execution of the decree he applied for stay of the confirmation of sale in favour of the decree-holder. An order of stay had been passed on certain conditions but not being communicated to him, the sale was confirmed. The petitioner, therefore, applied for stay of delivery of possession of the property to the decree-holder:

Held, that it was not fair at that stage to decline to give possession of the property sold to the decree-holder but that the decree-holder should be directed to give security for mesne profits. AIR (Vol 18) 1931 Lah 289 (1): 32 PLR 171: 133 Ind Cas 128.

——O. 41, R. 5 — Sale after stay — When good.

A stay passed by the High Court does not have the effect of nullifying a sale held before the stay order could be communicated either to the Court below or to the officer conducting the sale where the purchaser is not the decree-holder. 12 All 96, Diss. from. AIR (Vol 14) 1927 All 401: 25 ALJ 530: 39 MLT 85: 102 Ind Cas 665 (FB).

——O. 41, R. 5 — Receipt of stay order by executing Court — Subsequent acts are void.

When an appellate Court orders the stay of execution pending an appeal, the Court before which the execution proceedings are pending has no power to proceed with the execution after the receipt of the order. It would be opposed to all principle to hold that, because the stay order was not perused by the Court executing the decree or that it had no time to pay any attention to it, the attachment and other proceedings susbequent to the receipt of the order are good. The fact that the stay was not made absolute does not affect the question. When an appellate Court pending an appeal orders the stay of an execution, that order is good till it is vacated and nothing done in contravention of the order can become good by reason of the order being ultimately vacated. To hold that the dismissal of the execution petition at a later stage would give validity to proceedings which in their inception were illegal would be opposed to all principle & to all authority. Anything done during the trial when the stay order is in force is not only irregular, but is altogether void, as the Court has no jurisdiction to do anything after it is prohibited from doing it. AIR (Vol 14) 1927 Mad 450: 99 Ind Cas 989.

——O. 41, R. 5 — Receiver — Appeal — Interim order directing Receiver not to act pending decision, validity of — Revision, whether lies.

An order by Appellate Court, on an appeal against an order appointing a Receiver directing him not to act till further orders, is an order within the jurisdiction of the court and the High Court has no power to interfere under C. P. C., S. 115. Where a Receiver is appointed by writ, an appellate Court may stop the issue of the writ and if already issued may direct him through the lower Court, not to act. AIR (Vol 7) 1920 Pat 567: 4 PLJ 642: (1920) Pat HCC 40: 54 Ind Cas 222 (DB).

——O. 41, Rr. 5 and 6 — Effect of order — Sale held after 'ex parte' order for stay — Stay subsequently cancelled.

An ex parte order for stay on an execution sale was obtained but was subsequently discharged by the Judge who passed it. Before the 'ex parte' order was set aside the sale was held and the property sold.

Held that the sale was not void. AIR (Vol 5) 1918 All 384: 16 ALJ 46: 43 Ind Cas 656 (DB).

——O. 41, R. 5 — Effect of order — Order becomes effective only when communicated.

An order by the Appellate Court for stay of execution takes effect only when it is communicated to the lower courts. An attachment ordered by the Lower Court after passing of the order for stay of execution but before it was communicated is valid. 33 C. 927, not Foll. AIR (Vol 5) 1918 Mad 391: 33 MLJ 515: 22 MLT 330: (1917) MWN 785: 6 LW 617: 41 Mad 151: 43 Ind Cas 214 (FB).

——O. 41, R. 5 — Effect of order — Ad interim order — Date of operation.

An ad interim order issued by an appellate Court for stay of execution of a decree under appeal takes effect from the time it is pronounced and not from the time it is officially communicated to the lower Court and proceedings subsequent to and contrary to such order will be set aside. It is the practice of the Chief Court of Punjab not to stay execution for mere costs. AIR (Vol 4) 1917 Lah 336: 53 PWR 1917: 41 Ind Cas 752.

——O. 41, R. 5 — Effect of order — Proceedings stayed by appellate Court.

A Subordinate Court cannot proceed with a sale in execution when it knows, e.g., by telegram from a Vakil that the Appellate Court has stayed all proceedings in execution of the decree, though no official communication has been sent to it. AIR (Vol 1) 1914 Mad 261 : 38 Mad 766 : (1914) MWN 46: 15 MLT 151: 26 MLJ 275: 1 LW 22: 22 Ind Cas 99 (DB).

(But see AIR (Vol 5) 1918 Mad 391 : 41 M 151 : 43 Ind Cas 214.)

——O. 41, R. 5 — Power of trial court.

When an appeal is preferred to High Court, the lower court cannot stay execution, it can only stay its own hands. Where the decree for possession is executed, the decree cannot be stayed pending appeal. The Court cannot oust the decree-holder and put the judgment-debtor in possession. (1913) 35 All 119: 11 ALJ 83: 17 Ind Cas 728 (DB).

——O. 41, R. 5 — Effect of order — Effective on communication.

A sale completed before the interim order for stay of the sale was received from the appellate court is valid though the order for stay had been passed at the time of the sale. 33 C. 927, not Foll. (1910) 33 Mad 74: 6 MLT 159: 3 Ind Cas 82 (DB).

——O. 41 ,R. 5 — Validity — Sale after stay of sale by superior court but before communication:

An order for stay of sale becomes effective only on communication to the subordinate Court; and a sale held before the order was communicated is valid. (1909) 33 M 74 (75): 6 MLT 159: 3 Ind Cas 82 (DB).

——O. 41, R. 5 (S. 545 Old Code) — Stay of execution — Order for, when operates — Communication not necessary :

An order for stay is made on the day it is pronounced, and not on that on which it is drawn up or communicated. Consequently an execution carried out after an order for stay is invalid. 1 CWN 226 diss. from. (1904) 3 CLJ 67: 33 C 927 (934) (DB).

3. Inherent powers.

——Order 41, R. 5, S. 151 — Stay of passing of final decree pending disposal of appeal against dismissal of application for setting aside ex parte preliminary decree can be ordered under inherent power. AIR (Vol 31) 1944 Mad 161: 1943 MWN

731: 56 MLW 698: (1943) 2 MLJ 557: 216 Ind Cas 44.

——Order 41, R. 5 — The Court of Collector or of Sub-Divisional Officer is not subordinate to Chief Court and the jurisdiction exercised by these Courts under Ss. 18 and 35, U. P. Encum. Estates Act (XXV of 1934) is quite independent of Civil Courts. Therefore, there can be no question of the exercise of any inherent powers of Chief Court in staying proceedings contemplated by Ss. 18 and 35 of the Act. Further the application under Ss. 18 and 35 of the Act cannot be regarded as an application for execution of decree of Special Judge and O. 41, R. 5, Civil P. C., also can have no application. AIR (Vol 24) 1937 Oudh 359: 1937 OWN (CC) 473: 1937 RD 200: 13 Luck 581: 168 Ind Cas 180 (DB).

——O. 41, R. 5 — Inherent powers — Delegation to Registrar — Proceedings in pursuance of preliminary decree — Registrar cannot stay — Patna High Court Rules Ch. 2, R. 13 (9).

Proceedings held in pursuance of a preliminary decree are proceedings in the suit and not in execution.

The only application contemplated by O. 41, R. 5, is an application for stay of execution, and the only order contemplated by O. 41, R. 5 is an order for stay of execution. The Court has, of course, complete jurisdiction to order stay of proceedings pending the disposal of an appeal, but it does so, not by virtue of statutory power under O. 41, R. 5 but in the exercise of its inherent power for the ends of justice. As the exercise of this power has not been delegated to the Registrar of the Patna High Court he has no jurisdiction to order stay of proceedings in a suit (as distinct from proceeding in execution) pending the disposal of an appeal. AIR (Vol 8) 1921 Pat 328: 59 Ind Cas 883: 2 PLT 70 (DB).

——O. 41, R. 5 — Inherent power — Stay of execution — Appeal under Chota Nagpur Tenancy Act.

As the C. P. C. does not in itself apply to cases under the Chota Nagpur Tenancy Act and as the Chota Nagpur Tenancy Act which alone gives a right of appeal to the High Court does not provide for stay of execution, the right of the High Court to stay proceedings in cases of this nature cannot be exercised under O. 41, R. 5, C. P. C. The High Court has inherent jurisdiction as a Court of appeal to stay proceedings in the lower court as auxiliary to its powers as an appellate court to reverse the decision of the court below. AIR (Vol 6) 1919 Pat 343 : 1919 Pat HCC 145 : 4 Pat LJ 371 : 52 Ind Cas 185 (DB).

——Order 41, R. 5 — The Chief Court has no inherent power to stay the execution of decrees not appealed against. (1910) 5 LBR 124: 4 Ind Cas 309 (DB).

4. Powers of Appellate Court.

——O. 41, R. 5 (1) — Power to stay further proceedings in case under appeal — Registrar of Bombay High Court — Power to direct stay — Bombay High Court (A. S.) Rules, R. 11 (n).

It is clear that under O. 41, R. 5 (1), the appellate Court has power to direct stay of proceedings, and when that power has been delegated to the Registrar of the High Court under the rules, for instance under R. 11 (n) of the Bombay High Court Appellate Side Rules, the Registrar has power to direct stay of further proceedings in an appeal to the High Court. AIR (Vol 38) 1951 Bom 288: 52 Bom LR 612.

——O. 41, R. 5, O. 39, R. 2 — Interim injunction — Power of Appellate Court to order stay.

Under O. 41, R. 5 (1), an Appellate Court has power to order stay of proceedings when an appeal is filed from an interim injunction. The expression 'stay of proceedings' does not mean stay of proceedings in the Court itself but entitles the Appellate Court to interfere with the operation of the injunction which had been already issued. When the Appellate Court means by the order that there should be a stay of proceedings under the interim injunction, the order is one which it has power to make and there is no ground for revision. AIR (Vol 24) 1937 All 528: 1937 AWR (HC) 381: (1937) ALJ 377: 168 Ind Cas 32 (DB).

——O. 41, R. 5 — Connected suits — Same question in issue — Appeal in one suit only — Stay.

Held, that the Court had no power to grant an injunction staying execution of the mortgage decree under Ss. 94 or 151 or under O. 39 or O. 41, R. 5 Civil P. C. AIR (Vol 23) 1936 Mad 276: (1936) MWN 51: 70 MLJ 257: 43 MLW 383: 59 Mad 744: 161 Ind Cas 721 (DB).

——O. 41, R. 5 — Appeal against order refusing leave to defend — No appeal from decree — Power to stay execution of decree.

Where a wrong order has resulted in the passing of a wrong decree and the order has been appealed against the Court may, under O. 41, R. 5, make an order for staying the execution of the decree, even though no appeal has been preferred against the decree itself. AIR (Vol 22) 1935 Mad 43: 40 MLW 650: 68 MLJ 16: 58 Mad 116: 152 Ind Cas 687 (2) (DB).

——Order 41, R. 5 — Order confirming sale under O. 21, R. 92 — Appeal against, by judgment-debtor pending — Application by auction-purchaser to executing Court for delivery of properties under O. 21, R. 95 — High Court can under O. 41, R. 5 (or even if O. 41, R. 5 does not apply, under S. 151) order stay of proceedings in execution. AIR (Vol 19) 1932 All 655: (1932) ALJ 582: 141 Ind Cas 612 (DB).

——O. 41, R. 5 — Scope — Stay of proceeding in Revenue Court — Power of High Court.

Order 41, R. 5 cannot be construed so as to empower the High Court to stay the proceedings of a Revenue Court which is not subordinate to the High Court. The section contemplates proceedings of Court subordinate to the appellate Court which passed the decree. AIR (Vol 18) 1931 All 57: 1930 ALJ 1469.

——Order 41, R. 5 — The High Court has power to stay partition proceedings in a Revenue Court if the terms of S. 112, U. P. Land Revenue Act (III of 1901) are applicable but it cannot do so in any other circumstances. AIR (Vol 18) 1931 All 57 (2): 14 RD 651: (1930) ALJ 1469: 53 All 189: 132 Ind Cas 42.

——O. 41, R. 5 — Applicability — Order under S. 104 (f).

No power is given to an appellate Court to stay execution of a decree when an appeal is preferred from an order under S. 104 (f). AIR (Vol 14) 1927 Lah 494: 102 Ind Cas 11.

——O. 41, R. 5 — Appeal — Stay by trial Court.

After an appeal is filed it is only the appellate Court which can order stay of execution under O. 41, R. 5 (1) and recourse cannot be had by the Trial Court to S. 151, in order to override the provisions of that rule. AIR (Vol 11) 1924 Lah 602: 76 Ind Cas 174.

——O. 41, R. 5 — Vacation Judge, powers of.

A single Judge of the High Court sitting as a Vacation Judge has no jurisdiction to grant stay of execution unless appeal is actually pending although he is assured that appeal will be filed as

soon as the vacation is over and the assurance is also made good. AIR (Vol 8) 1921 All 342: 43 All 198: 60 Ind Cas 131 (DB).

——O. 41, R. 5 — Appellate Court — Stay of Sale — When can order.

An appellate Court cannot order stay of sale unless it has seisin of the case in which the sale was ordered to take place. AIR (Vol 8) 1921 All 214: 63 Ind Cas 837: 43 All 513: 19 ALJ 462 (DB).

——O. 41, R. 5 — Insolvency Appeal — Sentence, Prov. Insol. Act — Ss. 43 and 47.

Under O. 41, R. 5 read with S. 47 (2) Prov. Insol. Act the High Court can suspend the sentence of imprisonment under S. 43 of Prov. Insol. Act till the disposal of the appeal from the sentence. AIR (Vol 7) 1920 Bom 58: 44 Bom 673: 22 Bom LR 322: 56 Ind Cas 449 (DB).

——O. 41, R. 5 — Stay of execution — Power of appellate court to stay execution of decree — Scope — The C. P. Code is not exhaustive.

Where there is no express section in the Code providing for the passing of a particular order it does not follow that the order cannot be passed. An appellate court generally can do while the appeal is pending, what the original Court could do while the suit was pending before it. 82 P. R. 1910 : 149 P. L. R. 1910 : 122 P. W. R. 1910 : 7 Ind Cas 1017.

——O. 41, R. 5 — Functions of — Power to stay, proceedings — Guardians and Wards Act, appeal under.

Per Curiam : — An appellate Court having seisin of an appeal has power to make an order staying proceedings in a lower Court pending the hearing of the appeal to that Court. The power to stay proceedings is ancillary to the power of the appellate Court to reverse the order of the inferior Court. (1905) 3 C. L. J. 29 (34) (DB).

——O. 41, R. 5; O. 20, R. 16 (Ss. 545, 215-A, old Code) — Appeal against preliminary decree for account — Power of appellate Court to stay further proceedings.

Where an appeal is pending in the High Court against a preliminary order made by a Subordinate Court under S. 215-A, C. P. C., the High Court having seizin of the appeal can, apart from the question whether the case fell within S. 545, C. P. C., make an order staying the carrying out of such order pending the hearing of the appeal. (1904) 8 C. W. N. 572 : 31 C. 722 (724) (F. B.)

——O. 41, R. 5 (S. 545 Old Code) — Jurisdiction of Court to stay execution after appeal — Obiter.

S. 545 does not authorize the Court of first instance to stay execution pending an appeal, after the appeal has been preferred, the power of ordering stay of proceedings in such a case being exercisable only by the appellate Court. (1904) 31 C 373 (376) (DB).

——O. 41, R. 5; (Ss. 47, 545, 244 Old Code) — Order refusing stay of execution — Decree — Appeal — Discretion of the lower Court — Appellate Court, functions of.

An order passed by an appellate Court under S. 545, C. P. C., refusing stay of execution is one against which no appeal lies. 12 B. 279 doubted. Courts of appeal should not lightly interfere with a discretion deliberately exercised by a lower Court. (1904) 6 Bom. L. R. 780 : 29 B 71 (72, 73) (DB).

——O. 41, R. 5; O. 9, R. 13 (Ss. 545, 546 and 108 Old Code) — Appeal against order refusing to set aside ex parte decree — Jurisdiction of Court to stay execution.

It is not competent to an appellate Court to stay proceedings in execution of a decree of a Subordinate Court merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside a decree under S. 108, C. P. C. (1904) 31 C 1081 (1083) : 9 C W N 123 (DB).

5. Powers of trial court.

——O. 41, R. 5 — Executing Court, pending appeal from the decree can stay execution on taking security.

Rule 5 (1) of O. 41 provides that an appeal shall not operate as a stay of execution, so that where a decree is under appeal a Court may proceed with its execution and may in the course of execution do all such things as may be legal and just as it might do if no appeal had been preferred. It has power to stay execution on taking security from the judgment-debtor. 38 MLT 143: 1927 MWN 202: 100 Ind Cas 841: AIR (Vol 14) 1927 Mad 416: 52 MLJ 182 (DB).

——O. 41, R. 5 — Application to set aside ex parte decree refused.

During the pendency of an appeal against an order refusing to set aside an ex parte decree, the original court has discretion to stay execution proceedings pending the disposal of the appeal but the appellate court has no such power. 35 Ind Cas 443 : AIR (Vol 3) 1916 Pat 397 (DB).

——O. 41, R. 5; O. 45, R. 13 — Stay of proceedings — Partition suit — "Except so far as the Appellate Court may order" — Stay of proceedings after preliminary decree pending appeal to Privy Council — Jurisdiction of High Court.

From Order 41, R. 5, it is clear that the Legislature intended that the Court which should have the power to stay proceedings after a preliminary decree is the Court which has seizin of the appeal and not the Court which passed the decree. Order 45, R. 13 gives the Court which passed the decree power to stay execution of the decree though not the power to stay proceedings under the decree. In an appeal from a preliminary decree for partition to the Privy Council it is the Privy Council that has the power to stay further proceedings and not the High Court. (1909) 9 CLJ 561 (562, 563) : 13 CWN 690: 6 MLT 11 : 1 Ind Cas 812 (FB).

6. Practice.

——O. 41, R. 5 — Discretion of Court — Appeal from preliminary decree for redemption — Stay of further proceedings for final decree pending appeal.

Where a mortgagee appealing from a preliminary decree passed in a suit for possession by redemption of property, files a petition under O. 41, R. 5, Civil P. Code, praying that till the decision of his appeal further proceedings in the trial Court with respect to the passing of the final decree be stayed, the Court should not grant his prayer unless he makes out a good case. When the relationship between the parties is one of mortgagor and mortgagee and the mortgagor undertakes to deposit in Court the balance of the mortgage money in dispute, the Court should not exercise its discretion in favour of stay of proceedings for the passing of a final decree. The Court should not prevent an owner of an equity of redemption from getting rid of the burden of a mortgage by unnecessarily staying which will prevent such a person as a mortgagor from getting his own property. AIR (Vol 37) 1950 EP 203.

——O. 41, R. 5 — Judicial order — Order to send case to record room is administrative and case remains pending.

An order to send a case to the record room is merely an administrative order and is not a judi-

cial order. It is in no sense a final disposal of the case. The case, therefore, remains pending no judicial order having been passed on it to terminate it. AIR (Vol 25) 1938 All 552: 1938 AWR (HC) 542: 177 Ind Cas 695 (DB).

——O. 41, R. 5 — Stay order by High Court — Subsequent order by lower Court in the matter.

When the High Court orders proceedings to be stayed, they are to be stayed, and no order is to be made in the matter by the Court below much less an order disposing of the whole suit. AIR (Vol 24) 1937 Pat 530 : 18 PLT 763: 4 BR 42: 171 Ind Cas 607.

——O. 41, R. 5 — Where an appeal has been preferred from a preliminary decree in a suit for partition, the usual practice of the Court is to stay further proceedings in pursuance of the preliminary decree during the pendency of the appeal. AIR (Vol 20) 1933 Lah 790: 34 PLR 579 & 788 (1): 144 Ind Cas 596 (1).

——O. 41, R. 5 — Appeal against preliminary decree.

Where an appeal has been preferred against a preliminary decree in a mortgage suit, the Appellate Court has power to stay further proceedings in the lower Court and it is a general rule to do so where no loss would be caused to the decree-holder by the stay of proceedings. AIR (Vol 19) 1932 Lah 271 : 33 PLR 123 (1) : 136 Ind Cas 729 (1).

——O. 41, R. 5 — Appeal against preliminary decree — Stay of further proceedings.

It is desirable that further proceedings in connexion with the final decree should be stayed pending the hearing of the appeal against a preliminary decree. (1928) 111 Ind Cas 383: 29 PLR 262.

——O. 41, R. 5 — Appeal against preliminary decree — Stay of proceedings.

Where a preliminary decree was passed on a mortgage which was under appeal, the appellant-mortgagor had applied for stay of a final decree until his appeal was disposed of.

Held, that it was best to stay all further proceedings in the suit until the disposal of the appeal. (1928) 107 Ind Cas 486 (Lah).

——O. 41, R. 5 — Where application is dismissed by appellate Court as premature, delivery of possession should not be granted through an execution Court.

The applicant applied in the appellate Court for stay of delivery of possession, but the application was dismissed on the respondents' representation that the application was premature, inasmuch as he had taken no steps whatever for delivery of possession; after this the respondent went straightway to the execution Court and obtained delivery of possession through that Court.

Held, that this has been something in the nature of overreaching of the Court on the part of the respondent and delivery of possession should not be allowed to stand. 8 PLT 712 : 106 Ind Cas 194: AIR (Vol 15) 1928 Pat 49 (DB).

——O. 41, R. 5 — Appeal against preliminary decree pending — Final decree passed — Stay.

After the final decree for sale is passed, the trial Court has no jurisdiction suo motu to stay the sale of the property which is directed to be sold by virtue of the final decree on the ground that an appeal is pending from the preliminary decree. 101 Ind Cas 629: AIR (Vol 14) 1927 Lah 760.

——O. 41, R. 5 — Interest — Payment of, as condition for stay.

Where on an application for stay of execution of award pending appeal, the question of the liability of the opposite party for interest on the amount of the award was reserved for further consideration, when the appeal was to be heard,

Held, that the contention that payment of interest was imposed as one of the terms of staying execution would not be allowed. 98 Ind Cas 238: AIR (Vol 13) 1926 Cal 1119 : 53 Cal 735.

——O. 41, R. 5 — Revision.

Where the petitioner applied for stay of execution of decree from which an appeal was pending and the application was dismissed by the District Judge as being made too late.

Held (Graham J. dissenting): The District Judge though he had jurisdiction over the subject-matter, exercised the jurisdiction irregularly and the High Court had jurisdiction to interfere in revision with the order of the District Judge and set aside his order.

Per Graham J.— The power conferred by O. 41, R. 5 of the C. P. Code upon the appellate Court is discretionary, though of course the discretion has to be exercised judicially. The rule contemplates that the application for stay of execution should be made as soon as possible after an appeal has been filed. 82 Ind Cas 435 : AIR (Vol 12) 1925 Cal 254 (DB).

——O. 41, R. 5 — Notice must be given before final order of stay.

Before an order for stay is passed under O. 41, R. 5 of the C. P. Code, it is necessary that notice of the application should be given to the decree-holder and he should be called upon to show cause as to why execution should not be stayed, though the appellate Court can pass an ad interim order for stay pending the hearing of the application. 79 Ind Cas 1: 5 PLT 556: 2 Pat LR 263: AIR (Vol 11) 1924 Pat 715.

——O. 41, R. 5 — Execution when stayed.

If the decree-holders shall have sufficient security in the property itself which will remain under attachment, execution ought to be stayed. 75 Ind Cas 791: AIR (Vol 10) 1923 Lah 445.

——O. 41, R. 5 — Costs to be paid to respondent's solicitor on latter undertaking personally to repay if appeal succeeds.

In an application for stay of execution of the decree as to costs where the respondent is an insolvent, the Court should make an order directing the appellant to pay the costs to the respondent's solicitor, on the latter personally undertaking to repay the same to the appellant in the event of the success of the appeal. Practice of the Court of Appeal in England followed. 70 Ind Cas 784: 16 MLW 975: 1923 MWN 73: 31 MLT 440: AIR (Vol 10) 1923 Mad 229 (DB).

——O. 41, R. 5 — Balance of convenience.

In an application by the judgment-debtor for stay of execution pending the disposal of the appeal, the judgment-debtor alleged that on the land in question stood his coolie shed and tram lines for the purpose of working colliery and the opposite party denied the existence of any coolie shed or the tram lines.

Held, that the balance of convenience lay in staying the execution and delivery of possession of the property in dispute pending the disposal of the appeal on the judgment-debtor furnishing sufficient security for the restitution of the same to the decree-holder in the event of the appeal being dismissed. 4 PLT 508: 76 Ind Cas 49: 79 Ind Cas 188: 1 Pat LR 393: AIR (Vol 10) 1923 Pat 597 (DB).

——O. 41, R. 5 — Probable loss and expense to appellant if no stay order passed — Order for stay should be passed.

Where if an order for stay was not made, the appeal which is pending will become useless and the business of the appellant firm will be seriously disturbed by their account books passing into the hands of the Receiver in execution, and the process is likely to be a protracted and expensive one, the balance of convenience is in favour of staying the execution rather than proceeding with it. 77 Ind Cas 327: AIR (Vol 9) 1922 Lah 185 (DB).

——O. 41, R. 5 — Power of appellate Court — Stay of execution — Cancelment of previous order — Mode of.

An appellate Court has no power to grant a stay of execution in a matter of which it is already not seised in appeal. During the period before the filing of the appeal, the Court which passed the decree alone has jurisdiction to grant such stay. A stay order properly obtained though it is subsequently discharged is effective as far as it goes and as long as it lasts. The proper way for a Judge to cancel an order which he has already passed is by writing out a fresh order and not by scratching out or attempting to obliterate a previous order. AIR (Vol 8) 1921 All 342: 18 ALJ 1121: 60 Ind Cas 131 (DB).

——O. 41, R. 5 — Original side of High Court — Stay — Practice.

Stay application on the Original Side of the High Court should ordinarily be made to Judge who tried case and should be made without delay. 48 Cal 796: 25 CWN 928: 66 Ind Cas 198: AIR (Vol 8) 1921 Cal 541 (DB).

——O. 41, R. 5 — Execution when stayed — No application for stay.

A stay of execution cannot be directed where there is no application for execution pending before the executing Court. (1921) 63 Ind Cas 897 (Lah).

——O. 41, R. 5 — Partition suit — Preliminary decree — Stay of further proceedings.

If the proceedings pursuant to a preliminary decree for partition are bound to be protracted, and the expense involved in the taking of accounts is likely to be great, the appellate Court will exercise a proper discretion in staying proceedings; otherwise, in the event of the decree being reversed on appeal, such expense would be wholly thrown away. If the proceedings, however, are not likely to be of any length, as, for instance, proceedings to ascertain the market value of certain stocks and shares, there is no object to be gained by stay of proceedings, and the appellate Court will refuse to stay proceedings. 59 Ind Cas 883: 2 PLT 70: AIR (Vol 8) 1921 Pat 328 (DB).

——O. 41, R. 5 — Order when made.

When there is no application for execution of a decree, under appeal, no order for stay of execution can be made. AIR (Vol 7) 1920 Lah 373: 58 Ind Cas 302.

——O. 41, R. 5 — Pre-emption decree — Stay of execution.

The practice of the Lahore High Court is to stay execution of a pre-emption decree, except as to costs, provided the decree-holder is permitted to recover from the Court the money deposited by him without prejudice to his right to re-deposit it in the event of the failure of the appeal. AIR (Vol 7) 1920 Lah 326: 12 PWR 1920: 79 PLR 1920: 55 Ind Cas 933 (DB).

——O. 41, R. 5 — Execution cannot be stayed because a prior mortgage claim is pending.

The execution of a mortgage-decree to be realised from the mortgaged property and the balance if any, from the judgment-debtor's other property, cannot be stayed simply because a claim by a prior mortgagee is pending. The hypothecated property should be sold, and after retaining out of the sale proceeds the amount sufficient to meet the claim, the balance should be paid to the decree-holder. 60 Ind Cas 378: 57 PWR 1920: AIR (Vol 7) 1920 Lah 300.

——O. 41, R. 5 — Execution sale — Application to stay — Where to be made.

An application for stay of an execution sale should be made to the Court executing the decree although an appeal is pending in a higher Court against that decree. (1911) 11 Ind Cas 22 (All) (DB).

——O. 41, R. 5 (3) — Discretion of Court.

Where an appeal has been preferred against a decree, the appellant may ask for stay of execution of the decree though he has in the meanwhile failed to carry out the terms of the decree and has been guilty of contempt. (1910) 10 CLJ 631: 4 Ind Cas 746 (DB).

——O. 41, R. 5 — Judicial proceedings — Letter from District Judge — Stay of sale — Execution of mortgage decree.

Proceedings in execution of a mortgage decree were pending in the court of a Subordinate Judge. The District Judge appointed a common manager of the estate of the judgment-debtors and wrote a letter to the Subordinate Judge asking him to postpone the sale for eight months. The Subordinate Judge stayed the sale accordingly.

Held, that the course adopted was entirely irregular. The proceedings before the Subordinate Judge were Judicial proceedings and could be stayed only upon a proper application presented in court in due course.

Held, also, that if good grounds were made out for the stay of sale, the court would make the order only upon terms and would take care to protect the decree-holder from loss and direct payment of costs to him. (1909) 10 CLJ 456 (457) : 4 Ind Cas 373 (DB).

——O. 41, R. 5 and O. 45, R. 13, Cl. (c) and (d) — Preliminary decree — Appeal — Stay of proceedings.

Proceedings after a preliminary decree are proceedings in the suit and not in execution. So the proper court which can stay such proceedings is the court to which an appeal has been preferred from the preliminary decree. (1909) 13 CWN 690: 9 CLJ 561 : 6 MLT 11 : 1 Ind Cas 812 (FB).

——O. 41, R. 5 (2) — Power of executing Court.

If good grounds are shown, an executing court should not refuse to grant to the judgment debtor reasonable time for obtaining an order for stay of execution from the Higher Court. 63 PWR 1909: 52 PLR 1909: 4 Ind Cas 552.

7. Scope and object.

——O. 41, R. 5 — Appeal against preliminary decree in redemption suit filed by mortgagee's tenant — Latter, if can ask for proceedings for final decree to be stayed.

A tenant of a mortgagee who has filed an appeal from a preliminary decree passed in a suit for redemption by the mortgagor, cannot ask for stay of proceedings for the passing of a final decree. 52 PLR 339: AIR (Vol 38) 1951 Simla 203.

——O. 41, R. 5 — A obtaining decree against B and purchasing property in execution — C obtaining another decree against B — In C's decree same property sold — A filing suit for declaration simpliciter and applying for stay of confirmation of C's sale — Auction-purchaser not made party to suit — Held, application cannot be granted.

C obtained a decree against B and caused certain property to be sold in execution. A who had

purchased the same property in execution of his decree against B without preferring any objection in execution filed a suit for declaration simpliciter and applied for stay of confirmation of the sale. The auction-purchaser was not made a party to the suit:

Held, that the suit as framed did not prevent the other side from selling the property either before or after the suit. It might or might not prevent the passing of a valid title. But as it did not operate to prevent a sale then the steps which the vendee would take to perfect his title as against his vendor could not be obviated by the temporary powers whether of stay, injunction or otherwise. The relief of a permanent injunction was open and available to the plaintiff and there was no reason why the plaintiff should be afforded a relief temporarily, which he did not trouble to seek permanently. AIR (Vol 33) 1946 Nag 428.

——O. 41, R. 5 — Rule does not apply to proceedings not under decree or order appealed from.

Order 41, R. 5 only applies to proceedings under an order or decree appealed from; where the proceeding of which a stay is sought does not arise out of the decree under appeal the Court has no jurisdiction to proceed under O. 41, R. 5. AIR (Vol 33) 1946 Nag 428.

——O. 41, R. 5 — Appeal to Privy Council by special leave.

An admission of an appeal by special leave of the Privy Council does not operate ipso facto as a stay of further proceedings. AIR (Vol 24) 1937 Cal 670 : ILR (1937) 1 Cal 621: 172 Ind Cas 112 (DB).

——O. 41, R. 5 — Power to order stay without taking security.

Where an appeal is preferred from an order passed by the executing Court dismissing the judgment-debtor's objection that the property proceeded against is not saleable, the Court can stay execution even though no security is furnished. Order 41, R. 5, applies to cases in which the decree under appeal is capable of execution and is sought to be executed, and is not applicable to cases where the appeal is not from the decree which is sought to be executed. AIR (Vol 20) 1933 All 664: 146 Ind Cas 764.

——O. 41, R. 5 — The Court granted stay of delivery of possession in execution of a decree conditional on the defendant paying the rent to the plaintiff by the end of February each year, first payment to be made by February 1932 — Rent not paid — Court granting extension of time and continuing stay:

Held, that the order for stay was not under O. 41, R. 5 (3) but under S. 151. AIR (Vol 20) 1933 Mad 563 : 38 MLW 201 : 65 MLJ 538 : 143 Ind Cas 903.

——O. 41, R. 5 — Appeal against preliminary decree — Stay of proceedings.

Order 41, R. 5, is not confined to stay of execution proceedings only but contemplates other proceedings as well. Thus if a preliminary decree is appealed against, further proceedings shall generally be stayed. 119 Ind Cas 489: 1930 Cr C 92: 31 PLR 268: AIR (Vol 17) 1930 Lah 108.

——O. 41, R. 5 — Appeal — If operates as stay.

Order 41, R. 5 expressly provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from, except so far as the appellate Court may order, and the fact that an appeal has been preferred does not operate to stay proceedings under O. 34, R. 3. AIR (Vol 17) 1930 Pat 227 (DB).

——O. 41, R. 5 — Applicability.

Order 41, R. 5, does not apply to a revision. 117 Ind Cas 815 : AIR (Vol 16) 1929 Lah 167.

——O. 41, R. 5 — Scope.

An interim order of stay cannot be made absolute as regards the money already paid to decree-holder under the decree. 102 Ind Cas 11: AIR (Vol 14) 1927 Lah 494.

——O. 41, R. 5 — Stay order and injunction distinguished.

A sale held in ignorance of the order for stay passed by an appellate Court is without jurisdiction and must be set aside. An order to stay passed by an appellate Court is an order to a Subordinate Court to stay its hand, and in that sense it bears no analogy to an injunction, which is an order to a party to refrain from doing a certain act. The former takes effect from time of its pronouncement and its communication is only needed to make it known to the Court which is directed to carry it out. Its force is not suspended till it is formally communicated to the Court concerned. An injunction is, however, binding on, the party to whom it is issued from the time it is communicated, for, there can be no attempt unless the party concerned knows what he is required to do, or to abstain from doing and a Court cannot punish a man for doing what he did not know he was forbidden to do. 96 Ind Cas 137: 24 ALJ 519: AIR (Vol 13) 1926 All 457 (DB).

——O. 41, R. 5 — Matters relating to stay of execution fall within S. 47. 75 Ind Cas 789: AIR (Vol 12) 1925 Lah 69

——O. 41, R. 5 — The expression "an order relating to execution of a decree" under S. 47 is comprehensive enough to include an order relating to the stay of execution thereof. 75 Ind Cas 615: AIR (Vol 11) 1924 Lah 631.

——O. 41, R. 5 — Effect of appeal — Operation of original decree not suspended or interrupted by presentation of appeal.

Whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by the presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. 46 Cal 670: 17 ALJ 514: 36 MLJ 557: 23 CWN 721: 21 Bom LR 632: (1919) MWN 258: 30 CLJ 71: 26 MLT 131: 10 LW 416: 50 Ind Cas 444 : AIR (Vol 5) 1918 PC 151.

——O. 41, R. 5 — Execution — Appeal — Application to stay execution, whether maintainable on execution side of High Court.

The provisions of Rule 5 apply 'mutatis mutandis' to applications on execution side. An application by an appellant pending the appeal to the execution side of the High Court for stay of execution proceedings is maintainable under R. 5. 37 Ind Cas 752 : AIR (V 4) 1917 All 40.

——O. 41, R. 5 (2) — Power of trial Court.

An appellant can before filing an appeal obtain an order for stay. 23 CLJ 310: 33 Ind Cas 685 : AIR (Vol 3) 1916 Cal 272 (FB).

——O. 41, R. 5 — Object of.

The policy underlying the legislature is that the decree-holder is not to be prevented from reaping the fruits of his decree unless sufficient cause is established for stay of execution. (1911) 38 Cal 754: 13 CLJ 365: 15 CWN 475: 9 Ind Cas 862 (DB).

——O. 41, R. 5 (S. 545) — Stay of order appointing a guardian — Appeal under Guardians and Wards Act.

Quaere:— Whether S. 545, C. P. C., applies to an application for the stay of proceedings in the lower Court under an order appointing a guardian of an infant. (1905) 3 CLJ 29 (34) (DB).

——O. 41, R. 5 (S. 545 old Code) — Stay of execution — Appeal against an order in execution alone — Applicability of S. 545—S. 647.

Per Maclean C. J.— The words 'for any reasonable cause" are wide enough to allow an appellate Court staying execution of a decree pending an appeal against an order in execution.

Per Banerji J.— The section may not apply in such cases.

Quaere.— Whether S. 545 read with S. 647 may give such power. (1901) 28 Cal 734 (735, 736) : 5 CWN 67 (DB).

——O. 41, R. 5 (S. 545 old Code) — Stay of execution — Execution, meaning of.

When there still remains something substantial to be done under a decree before it can become thoroughly effectual that 'decree' has to be executed within the meaning of S. 545, C. P. C. A decree directing the issue of probate to the propounder of a will is one that is capable of execution, and stay of execution of such a decree could be granted under S. 545, C. P. C. The principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation and not obtain merely a barren success. Stay granted on appellant undertaking to expedite the appeal and to give security for any damages which may accrue to the estate by the stay, the respondent being given liberty to apply to the Court below that the Receiver may be ordered to pay him out of the estate such sum as it may deem reasonable in respect of the costs incurred and the costs of the appeal, and to apply further that the Receiver might carry on the testator's business. Though generally the cost of this appeal should be paid by the appellant as he came into the Court for a favour, the Court allowed them the costs in the appeal as the respondent boldly contested every point. (1901) 5 CWN 781 (795, 796, 797, 798): 24 All 13: 28 IA 181 (PC).

8. Security.

(a) Forfeiture.
(b) General interpretation.
(c) Sufficiency.

(a) Forfeiture.

——O. 41, R. 5 — Bond lost — Oral evidence — Presumption.

Where owing to the loss of the bond and the lapse of time it is not possible to accept oral evidence of terms of the security bond, executed as per order staying further proceedings, it is permissible to fill in the details which have been obliterated by time, with presumptions. The only reasonably presumption is that the bond was executed according to the tenor of the Court's order, and in accordance with the prevailing practice of which the Court can take judicial notice. AIR (Vol 22) 1935 Nag 16 : 31 NLR 172: 154 Ind Cas 461.

——O. 41, R. 5 (3) — Attachment of security by other creditors — Power of Court to order payment of costs in addition to damages out of security.

Where, in a matrimonial suit, a decree for damages was passed against the co-respondent and the latter obtained stay of execution pending appeal so far as damages were concerned on depositing in Court a sum of money as security as directed by the Court, and some of the creditors of the co-respondent attached this amount:

Held, (i) that though the amount was fixed having regard to the amount of damages decreed, it was not money which was answerable for damages and for nothing but damages;

(ii) that the security was given for the due performance of such decree or order as would ultimately be binding upon the co-respondent and it was competent to the Appellate Court to direct that the sum of money so deposited, if it was more than sufficient to answer the damages ultimately awarded, should be applied towards payment of the costs notwithstanding the fact that in the meantime the fund had been attached by the creditors.

An attaching creditor has in a case of this kind no higher right than the debtor whose money he has attached. AIR (Vol 18) 1931 Cal 474: 58 Cal 1: 133 Ind Cas 97 (DB).

(b) General interpretation.

——O. 41, R. 5 — Appeal against decree — Security bond demanded — Duty of executing Court in respect of such bond stated.

Where a security bond is executed in appeal preferred against the decree sought to be executed, the executing Court must carefully scrutinise the form of the security bond used, before accepting it and where the personal liability is intended, it should be clearly specified so as to avoid further litigations arising from an ambiguity thereof. A legal mortgage cannot be created in favour of the Court since the Court is not ordinarily a juristic person capable of acquiring an interest in the immovable property or of making a valid assignment. Hence a security bond creating a charge on immovable property should not be executed in favour of the Court but either in favour of some actual person such as an officer of the Court or one of the parties. AIR (Vol 29) 1942 Lah 6: 43 PLR 569: 198 Ind Cas 638 (DB).

——O. 41, R. 5 — Rights of decree-holder.

An order was passed, on an appeal by a judgment-debtor to stay execution on his depositing the decretal amount. This was done and the decree-holder was allowed to withdraw the sum on furnishing security but he did not do so. On this, the judgment-debtor made a fresh application and accordingly the amount deposited was invested in Government promissory notes. By the time the final decree was passed, the investment had largely appreciated owing to a rise in the value of the securities. The decree-holder claimed the securities:

Held, that under the decree, all that the decree-holder could claim was the sum found due with interest which had been awarded at six per cent. and that no more could be given to him, while the profit must go to the person who made the deposit. AIR (Vol 22) 1935 Bom 200: 37 Bom LR 200: 156 Ind Cas 244 (DB).

——O. 41, R. 5 — Order as to security, if compulsory.

Under Cl. (3), R. 5, O. 41, no order for stay of execution can be made unless certain conditions are fulfilled, one of which is the furnishing of security. But no such limitations are imposed when proceedings, as distinct from execution of a decree, are stayed. The difference is that the furnishing of security is compulsory in the one case, but within the discretion of the Court in the other. AIR (Vol 22) 1935 Nag 16: 31 NLR 172: 154 Ind Cas 461.

——O. 41, R. 5 — A security bond executed in accordance with an order passed under O. 41, Rr. 5 or 6, Civil P. C., staying execution of a decree pending decision of the appeal, whereby the surety hypothecated his immobavle property for satisfaction of such decree as might be passed by the Appellate Court and which is duly accepted by the Court and execution stayed accordingly, does not

require to be registered. AIR (Vol 21) 1934 Lah 138: 15 Lah 282: 36 PLR 386: 149 Ind Cas 300 (FB).

(Overrules AIR (Vol 6) 1919 Lah 8 : 53 Ind Cas 463.)

——O. 41, R. 5 — Security bonds executed under O. 41, R. 5, Civil P. C. are not bonds executed to secure the due performance of contract within meaning of Art. 57, Sch. I, Stamp Act (II of 1899) and are chargeable to duty under Art. 40 and not Art. 57 of the Act. AIR (Vol 18) 1931 All 189 : (1931) ALJ 41: 52 All 844: 131 Ind Cas 675 (FB).

——O. 41, R. 5 — Title as well as name of presiding Judge omitted from bond — But reference made in bond to Court — Bond held to be valid and assignable by Court.

The common form of a security bond is a bond in favour of the presiding officer of the Court either expressed by name with qualification that he is the presiding officer of that Court or expressed as Judge of that District.

Pending revision in the High Court, a security bond was executed and execution stayed. Although Form No. 2, Appendix G, C. P. Code, directs title to be put as the heading of the bond, still the title as well as the name of the presiding officer of the Court was omitted. But, in the body of the bond, there was reference to the Court of the Judge in whose favour the bond was executed.

Held, that the mere omission of the title and the name of the presiding officer of the Court would not make the bond invalid. The bond, therefore, was valid and could be assigned by the Court. AIR (Vol 18) 1931 All 65: 1930 ALJ 913 (DB).

——O. 41, R. 5 — Security bond — Withdrawal of.

Judgment-debtor cannot cancel security bond when he has obtained stay thereon on the ground that it had not yet been accepted by the Court. 116 Ind Cas 224 : 30 PLR 278: AIR (Vol 16) 1929 Lah 769.

——O. 41, R. 5 — Refusal to accept security.

A Court is fully justified in refusing to accept the security of a person over whose property or person it has no jurisdiction. 112 Ind Cas 689: AIR (Vol 16) 1929 Lah 161.

——O. 41, R. 5 — Woman decree-holder — Stay of decree.

Stay of execution cannot be granted on the ground that the decree-holder is a woman possessed of no property. The judgment-debtor's interest can be amply safeguarded by taking security for restitution from the decree-holder. 107 Ind Cas 780 : AIR (Vol 15) 1928 Lah 329.

——O. 41, R. 5 — Security — What is.

The forms given in Appendix G of the C. P. Code for security bonds in such cases indicate clearly that what is required is a mortgage of property to secure the decree and such a mortgage would naturally require registration in cases where the property exceeded the value of Rs. 100. 84 Ind Cas 302 : 2 Rang 429 : AIR (Vol 12) 1925 Rang 55 (DB).

——O. 41, R. 5 — Stay on security.

Stay order on condition of security by appellate Court comes into effect when security is given. 22 ALJ 413 : 83 Ind Cas 1028: 5 LRA (Civ) 769: AIR (Vol 11) 1924 All 698 (DB).

——O. 41, R. 5 — A Court has no authority to stay execution upon a mere vague speculation; and cannot allow a judgment-debtor the benefit of staying execution if he failed to give security required by law which security he can ask the Court to fix. The order to stay the execution can be done only before the decree is executed. AIR (Vol 7) 1920 Lah 464 : 58 Ind Cas 442.

——O. 41, R. 5 (3) — Security — Land given as — Realisation of — Execution.

Where immoveable property is given by a judgment-debtor as security under O. 41, R. 5, Cl. (3) of the C. P. C., the property can be realised by the decree-holder in execution without a separate suit. AIR (Vol 5) 1918 Mad 442 : 41 Mad 327 : 6 LW 762: (1917) MWN 872: 34 MLJ 84: 43 Ind Cas 187 (DB).

——O. 41, Rr. 5 and 6 — Security — Mortgage decree.

In a redemption suit the mortgagor having obtained a decree paid the amount of the decree into the court and applied for execution. The court directed them to pay a security for the probable amount of mesne profits claimable by the mortgagees in case the decree is reversed. The decree-holders mortgagors applied that the deposit may itself be treated as a security.

Held in appeal that the amount may be treated as a valid security.

Per Sundara Iyer, J. — The plaintiff mortgagor had no disposing power over the amount and under S. 6, T. P. Act an expectant possibility of something cannot be transferred and separate security must therefore be tendered. (1912) 11 MLT 248: (1912) MWN 397: 15 Ind Cas 383 (DB).

——O. 41, R. 5 — Security — Right to.

Under O. 41, R. 5, Cl. 3 proviso (c) security is to be given by the applicant for the due performance of such decree or order ultimately binding upon him. The appellant can withdraw the deposit on satisfying such decree. The appellant is entitled to refund of the deposit in a proper application offering to satisfy that decree. The proviso does not contemplate a decree or order in a separate proceeding in future by the decree-holder. (1912) 22 MLJ 190: 10 MLT 426: (1911) 2 MWN 432: 12 Ind Cas 692 (DB).

——O. 41, R. 5 (S. 545 old Code) — Security bond — Registration, necessity for — T. P. Act, S. 59 and S. 3 of Act VI of 1904 — Registration Act, S. 17.

A security bond under S. 545, C. P. C., whereby immoveable property exceeding Rs. 100 in value is pledged to the Court which is accepted by the Court requires registration in order to make it effective against the property. (1908) 31 Mad 330 (332, 333) : 3 MLT 317 (DB).

——O. 41, R. 5 (3) — (S. 545 old Code) — Security bond — T. P. Act, S. 67 — Mortgage of property — Sale by decree-holder — Suit under, necessity for.

The relationship between a decree-holder and a judgment-debtor who executes a security bond under S. 545, C. P. C., mortgaging properties for the due performance of any decree or order that may ultimately be passed by the appellate Court, is not that of a mortgagee or mortgagor. Hence the decree-holder may sell properties mortgaged by the security bond without a suit under S. 67, T. P. Act. (1903) 7 CWN 914: 30 Cal 1060 (1062) (DB).

(c) Sufficiency.

——O. 41, R. 5 — Appellate Court ordering stay on security being furnished by a prescribed date — Tender of security with draft bond within the time — Sufficiency and effect — Testing the security also need not be within that time.

When stay is ordered by an appellate Court on security being furnished within a particular period what the Court contemplated was the tender of security within that time.

It would be manifestly inequitable if for no fault of his, a petitioner obtaining such stay is

penalised by time being taken for objections to a draft security bound and then finding himself in the position of not being able to file a fair security bond within the time prescribed. It is sufficient if the security is tendered with a draft security bond within the time prescribed by the Court. This does not mean that in the event of the security tendered being found insufficient it is open to the petitioner to file fresh security. He must take his stand on the security that he furnishes and if this is found to be insufficient then his petition for stay fails. It is up to him to see that sufficient and acceptable security is tendered by him in the first instance. AIR (Vol 39) 1952 Mad 601 : 1949 MWN 598 : (1949) 2 MLJ 13.

——O. 41, Rr. 5 and 6 — Security bond — Sufficiency of security — Mere acceptance of report of ministerial officer — Propriety.

Determination of the sufficiency or otherwise of security offered by the parties pursuant to an order of Court, is a judicial act and such act has to be performed judicially. Mere acceptance of the report of a ministerial officer on the point without applying the judicial mind to the consideration of the various factors bearing on it cannot be said to be a proper or adequate performance of a judicial act. 85 CLJ 6: AIR (Vol 37) 1950 Cal 325 (DB).

——O. 41, R. 5 — Decree against minor by only creditor — Execution of decree — Attachment of property of minor — Appeal against decree — Sale should be stayed pending appeal — Another security, if necessary.

Where the estate of the minor is under the management of the District Judge, and there are no other creditors of the minor except the decree-holder seeking execution of decree by attachment and sale of minor's property, the stay of the sale should be granted and the property should be allowed to remain under attachment pending the appeal filed by the minor against the decree of the decree-holder, without insisting on any other security. AIR (Vol 24) 1937 Lah 841 : 39 PLR 601 : 172 Ind Cas 578.

——O. 41, R. 5 — Practice.

While taking security for the payment of mesne profits, the proper course for the Court is not to fix the amount of security at the time of taking it, but to take a security for an indefinite amount to be determined when the question of mesne profits would arise. 112 Ind Cas 689 : AIR (Vol 16) 1929 Lah 161.

——O. 41, R. 5 — Security.

Under O. 41, R. 5, C. P. C., a stay of execution cannot be granted unless the judgment-debtor gives security, but if the decree is secured on the property it is unnecessary to require him to furnish security for that amount. AIR (Vol 7) 1920 Lah 485 : 2 Lah LJ 330 (DB).

——O. 41, R. 5 — Security — Acceptance of without considering objections.

Where the High Court allowed execution on security being furnished the executing court was wrong in accepting the securities without holding any enquiry into their sufficiency and the case must go back to the executing Court for making the necessary enquiries. 22 CWN 657: 44 Ind Cas 156: AIR (Vol 6) 1919 Cal 471 (DB).

9. Substantial loss.

——O. 41, R. 5 — Stay of execution — If must be allowed where decree is for possession of immovable property — "Substantial loss" — Meaning of.

It is not a universal rule that stay of execution should be allowed in all cases where the decree under appeal is for possession of immovable property, and all the surrounding circumstances have to be considered. The words "substantial loss" in O. 41, R. 5, C. P. Code, mean something in addition to and different from the loss by disturbance of possession. AIR (Vol 36) 1949 Ajmer 1: 1949 AMLJ 83.

——O. 41, R. 5 (3) — Substantial loss — Nature of, stated.

No order for stay of execution can be made unless substantial loss may result to the party applying for stay. No temporary or fleeting loss, no protem inconvenience which can be set right or be compensated for in damages will do. The loss must be substantial and it can only be that if it is substantially beyond repair. As a rule, exceptional cases apart, there can be no substantial loss unless a party is likely to be deprived of the fruits of his litigation by reason of the act which is sought to be stayed. This condition does not obtain when the party applying for stay cannot on the very face of it get that which he seeks in the stay application in the suit itself. AIR (Vol 33) 1946 Nag 428.

——O. 41, R. 5 — The mere fact that an appeal has been filed against a preliminary decree is no justification whatsoever for staying the hand of the Court below, and ordering it not to go in the ordinary course with the proceedings leading up to final decree. The final decree would not do any harm to any party and if the defendant's appeal is unsuccessful, the execution of the decree, whatever it may be, would be expedited. AIR (Vol 22) 1935 Lah 181 (1) : 37 PLR 259 : 158 Ind Cas 894.

——O. 41, R. 5 — Under O. 41, R. 5, no order of stay of execution during the pendency of an appeal can be made unless the Court is satisfied that substantial loss may result to the applicant and this rule applies to immovable equally with movable property.

Where the land, the subject-matter of appeal, was under a permanent lease, at a uniform rent and the respondents owned landed house property and were prepared to give adequate security for restitution in case the decree in their favour was reversed on appeal:

Held, that it could not be said that substantial loss would result to the applicant if the execution were not stayed. AIR (Vol 22) 1935 Lah 140: 35 PLR 727: 153 Ind Cas 213.

——O. 41, R. 5 — Partition suit — Preliminary decree — Appeal — Subsequent proceedings in lower Court not causing substantial loss — Final decree, if passed, entailing some loss.

Where there is no material which may show that the proceedings in the lower Court will be of protracted nature and that their continuance will cause any substantial loss to the petitioner, it is unnecessary to stay all further proceedings. But if the passing of the final decree in a partition suit, however, will cause some loss to the petitioner by obliging her to file another appeal from the final decree, the proceedings in the lower Court should continue until the stage of the passing of the final decree is reached, but that the final decree should be passed if the petitioner gives adequate security for the income of the property. AIR (Vol 21) 1934 Lah 184: 149 Ind Cas 1010.

——O. 41, R. 5 (1) (3) — Burden of proof.

Ordinarily execution is not to be stayed pending an appeal. Although the Court is given power to stay execution it is subject to certain strict limitation. Although ex parte orders staying execution are often made on insufficient grounds, and they some-

times go unchallenged, this is no justification for the practice, and still less a reason, for refusing to scrutinise an order when it is challenged. Therefore, when an order is challenged it behoves the Court to scrutinise the petition for stay with care and see that the provisions of the Code are not transgressed; and the burden is on the appellant to show that substantial loss may result unless execution is stayed. It is not enough merely to repeat the words of the Code and state that substantial loss will result; the kind of loss must be specified, details must be given, and the conscience of the Court must be satisfied that such loss will really ensue. This necessarily involves the filing of an affidavit.

Order 41, R. 5, does not empower the Court to impose terms, but equally it expressly prohibits stay except in the circumstances mentioned in Sub-Cl. (3). Therefore, the only possible justification for a stay order in such circumstances is the consent of the decree-holder. Orders can sometimes be passed ex parte in anticipation of such consent and that is usually done, but they ought never to be passed except on such conditions as a decree-holder is likely to agree to and certainly never when the decree-holder objects to a stay except on conditions. AIR (Vol 21) 1934 Nag 160: 150 Ind Cas 59.

——O. 41, R. 5 — Absence of proceedings to execute decree — Power of Appellate Court to order stay.

Under O. 41, R. 5, it is open to an Appellate Court to order stay of execution of the decree appealed from, even though the decree-holder may not have applied to execute the decree.

The object of O. 41, R. 5 is to protect an appellant from substantial loss or hardship which might result from the execution of a decree which is under appeal and which is liable to be set aside in appeal. AIR (Vol 20) 1933 Bom 118: 57 Bom 202: 35 Bom LR 135: 144 Ind Cas 995 (DB).

——O. 41, R. 5 — Necessity of.

The mere fact that an appeal from a preliminary decree is pending in the Appellate Court does not preclude the trial Court from passing a final decree. Consequently the question of stay of further proceedings after a preliminary decree has been passed depends upon the particular facts of each case. For an order of stay to be made, the conditions of R. 5, O. 41, should be fulfilled, that is, there must be likelihood of substantial loss to the party applying, who must also give full security. AIR (Vol 20) 1933 Lah 724 : 150 Ind Cas 248.

——O. 41, R. 5 — Where arrest of the judgment debtor was applied for pending his appeal and he applied for stay of execution. Held that the loss would be irreparable if the appeal succeeded and that execution should be stayed regarding arrest only. (1930) 31 PLR 216.

——O. 41, R. 5 — Vendee's possession should not be disturbed till final decision of the appeal.

In cases relating to immoveable property where the decree is under appeal, disturbance of status quo ante does result in substantial loss to the party in possession. This, however, is not a universal rule and all the surrounding circumstances have to be borne in mind. In a suit for pre-emption the defendant vendee is in possession of the property under a perfectly valid title obtained for consideration from the original owner. Such possession should not be disturbed till the plaintiff has finally established his title and the vendee has exhausted all his remedies for retaining such possession. AIR (Vol 14) 1927 Lah 169: 9 LLJ 130: 99 Ind Cas 767.

——O. 41, R. 5 — No prospect of substantial loss to petitioner — Order for stay should not be made.

Where it had been found that the sale in favour of the petitioner, rival pre-emptor, was not genuine and that he waived his right of pre-emption, held; unless it is shown that substantial loss would result to the petitioner, an order to stay execution would not be made specially where he has deposited a large sum of money which would be idle and where he would be placed in the same position as the petitioner with respect to the collection of rent. AIR (Vol 9) 1922 Lah 364: 99 Ind Cas 763.

——O. 41, R. 5 — Sufficient cause.

Sub-section (3) applies to immoveable as well as to moveable property. Sufficient cause is not deemed as shown merely by putting in an affidavit containing a bare statement that the appellant will suffer substantial loss. AIR (Vol 8) 1921 Lah 24: 2 Lah 61: 61 Ind Cas 77: 67 PLR 1921 (DB).

——O. 41, R. 5 — Taking accounts — Stay of.

Unless irreparable injury will otherwise be caused, stay of proceedings for taking accounts will not be allowed. (1921) 61 Ind Cas 9 (Pat) (DB).

——O. 41, R. 5 — An order by a inferior Court to a superior Court to stay a sale does not take away the jurisdiction of the latter Court to sell, especially where an appeal lies to the superior Court. A sale, held in ignorance of the order is only an irregularity and will not be set aside unless the judgment debtor was materially prejudiced. AIR (Vol 7) 1920 Nag 12: 54 Ind Cas 928 (DB).

——O. 41, Rr. 5 and 6 — Sufficient cause.

In an application for stay of execution the Court, has to be satisfied that the appellant is likely to sustain substantial injury by execution taking place before the disposal of the appeal. The appeal itself must raise fairly original questions. Where no pecuniary or tangible loss is shown the Court cannot grant stay merely on the ground of annoyance to feelings. (1912) 23 MLJ 316: 17 Ind Cas 219.

——O. 41, R. 5 — Sufficient cause — Substantial injury.

On appeal from a decree in a suit for declaration that certain property is not liable to attachment and sale in execution of a decree, the appellate Court should stay execution as otherwise it would be difficult for the claimant to recover the property in the event of his succeeding in the appeal. The property should remain under attachment pending decision of the appeal. 94 PWR 1912: 15 Ind Cas 876.

——O. 41, R. 5 (1, 2, 3) (S. 545 old Code) — Stay of execution — Appeal — Contempt of Court.

A party against whom a decree has been made which specifies a time for its performance is not merely by reason of his failure to carry out the orders of the Court guilty of such contempt so as to disentitle him to protection from the appellate Court. If the appeal is lodged with diligence and application is made for stay of execution and it is proved that material injury is likely to result from execution of the decree, the appellate Court will grant stay on terms, though the party may be constructively guilty of contempt of Court. (1909) 10 CLJ 631 (636) : 4 Ind Cas 746 (DB).

——O. 41, R. 5 (Ss. 545, 546, Cl. (3) old Code) — Discretion, exercise of — Appellate Court's duty to stop sale in execution of money-decree.

Per Mookerjee, J.— The discretion to be exercised under Section 545 is a judicial discretion and it is also made obligatory upon the Court to satisfy

itself that substantial loss may result if execution is not stayed. In staying a sale in execution of a money-decree the appellate Court must exercise the power under S. 545, C.P.C., in the light of and with due regard to the provisions of S. 546, Cl. (3) (1907) 34 C 1037 (1054, 1055): 11 CWN 1030: 6 CLJ 298 (FB).

——O. 41, R. 5 (S. 545 old Code) — Stay of execution — Proof of substantial loss necessary.

Proof of the resulting substantial loss should be shown before an order for stay of execution is made under S. 545, C. P. C. (1901) 3 Bom LR 367: 25 B 243 (244) (DB).

10. Surety.

——O. 41, R. 5 — Security bond does not require registration — It is liable for payment of court-fee under Court Fees Act.

A security bond under Order 41, R. 5 hypothecating the immovable property of the surety for the performance of the decree that may be passed in appeal does not require registration either under the Registration Act or the T. P. Act.

As regards the court-fee or the stamp payable on the security bond held, that the security bond is not liable to be stamped under the Stamp Act but is liable for payment of court-fee under the Court Fees Act. AIR (Vol 34) 1947 Nag 26: (1946) NLJ 10.

——O. 41, R. 5 or 6 — When a mortgage deed is executed by a surety under O. 41, R. 5 or 6, Civil P. C. it is liable to a court-fee under Art. 6 of Schedule II, Court Fees Act, and to stamp duty under Art. 57, Sch. I, Stamp Act. This is so only in relation to deeds executed in the mofussal. AIR (Vol 23) 1936 Sind 41: 30 Sind LR 1: 161 Ind Cas 945 (DB).

——O. 41, R. 5 — Surety, undertaking to be bound by decree that may be passed, is also bound by a consent decree that is passed, unless there is fraud or collusion, or the decree comprises matters beyond limitation. AIR (Vol 22) 1935 Nag 16: 31 NLR 172: 154 Ind Cas 461.

——O. 41, R. 5 — Stay of execution of mortgage decree — Surety — Bond by surety — Application to enforce bond :

Held, that it was not open to the defendants sureties to take the plea that the application should have been made by an independent suit, having regard to the fact that the point had never been taken before, and that if it was allowed to be taken in appeal and succeeded, the appellants would be barred by lapse of time, although their original application was in time. AIR (Vol 19) 1932 PC 131: 36 CWN 701: 55 CLJ 413: 36 MLW 111: 63 MLJ 85: 14 PLT 273: 136 Ind Cas 629.

——O. 41, R. 5 — Surety for stay of execution — If can be proceeded against before proceeding against the judgment-debtor.

The liability of a surety for stay of an execution of an appeal pending the appeal is co-extensive with that of the judgment-debtor and consequently, the surety is liable along with the judgment-debtor jointly and severally for the satisfaction of the decree unless a contrary intention appears from the surety bond. As soon as the decree of the trial Court is affirmed by the appellate Court, it becomes the duty of a judgment-debtor to satisfy it irrespective of any demand by the decree-holder and failure to do so brings into operation the liability of the surety. (1929) 117 Ind Cas 65 (Lah).

——O. 41, R. 5 (S. 545 old Code) — Temporary Stay — Surety — Discharge of surety.

Where the appellant made an application, under S. 545 of the C. P. C., for stay of execution of the decree of the Court below and the appellate Court passed an order directing temporary stay on the appellant furnishing security under the said section and the lower Court stayed execution after the appellant had furnished security, the security bond executed in consideration of a temporary stay was in itself binding on the surety for the period during which it was allowed to operate for the benefit of the principal. It was not a mere "offer" by the surety, but the acceptance of an offer having been executed by the surety in consideration of ad interim stay, it was binding pending the discharge of the rule, and its operation during that period could not be cancelled by the Court. The surety thereby made himself liable for such sum as on a consideration of all the equities the Court might adjudge to be fair compensation for losses sustained by the decree-holder owing to the temporary stay. (1906) 8 Bom LR 557 (564) (DB).

——O. 41, R. 5 (Ss. 253, 545 (c), 546, old Code) — Surety — Execution — Suit.

A surety for the appellant or the respondent under Section 545 (c), or S. 546, C. P. C., respectively should be proceeded against in execution and not in a separate suit. (1901) 3 Bom LR 35: 25 B 409 (416) (DB).

11. When granted.

See Notes 7 and 8.

——O. 41, R. 6.

1. **Appeal.**
2. **Conditional Stay.**
3. **Jurisdiction.**
4. **Revision.**
5. **Scope and Applicability.**
6. **Security.**

1. Appeal.

——O. 41, R. 6 — Subordinate Court accepting security as sufficient — Appeal.

The question whether an appeal lies against the order of the Subordinate Court in cases where he accepts security as sufficient can arise only if the order is passed by the Subordinate Court suo motu as a Court of execution and not where he has passed an order not on his own initiative but under the direction of the High Court. AIR (Vol 24) 1937 Pat 380: 3 BR 663: 18 PLT 621: 170 Ind Cas 139 (DB).

——O. 41, R. 6 — Appeal.

Quaere.— Whether an appeal lies from an order under O. 41, R. 6. AIR (Vol 21) 1934 Bom 252: 36 Bom LR 499: 58 Bom 485: 151 Ind Cas 78 (DB).

——O. 41, R. 6 — Appeal from order.

Section 47 is comprehensive enough to include an order under O. 41, R. 6, and permits the institution of an appeal against an improper order passed under that section. AIR (Vol 14) 1927 Lah 915: 9 LLJ 189: 28 PLR 617: 102 Ind Cas 25.

——O. 41, R. 6 — Order refusing stay — Appeal.

An order refusing to stay a sale of immoveable property in execution of a decree during the pendency of an appeal in the High Court under O. 41, R. 6 (2) of the Civil Procedure Code is appealable as a decree under S. 47. AIR (Vol 11) 1924 Lah 671: 75 Ind Cas 1001.

2. Conditional Stay.

——O. 41, R. 6 — Stay conditional on paying full amount to Decree-holder — Order is against spirit of the rule.

Where the Executing Court ordered that the sale be stayed on condition that the decretal amount

be deposited and paid to the decree-holders, who, however, were not required to furnish security.

Held, that the order which the Lower Court passed is clearly against the spirit of the rule, as it is tantamount to an order refusing to stay of sale. AIR (Vol 12) 1925 Lah 69: 75 Ind Cas 789.

——O. 41, R. 6 (2) — Stay of sale of immoveable property.

The court which passed a rent decree is bound to stay the sale of immoveable property in execution of its decree during the pendency of an appeal though the judgment-debtor is entitled to have a sale set aside on deposit of the purchase money. But the court can make it a condition of the order that the money decreed should be deposited in cash. (1911) 15 CWN 432: 9 Ind Cas 323 (DB).

3. Jurisdiction.

——O. 41, R. 6 (2) — Application for stay of execution made under O. 41, R. 5 (1) refused by Appellate Court — Lower Court can and must stay sale on terms as to security or otherwise. (1941) 44 CWN 701: 73 CLJ 297.

——O. 41, R. 6 (2) — Appeal from mortgage decree directed only against interest decreed, pending — Executing Court if can stay sale of mortgaged property on taking security from judgment-debtor.

An order passed by the executing Court under O. 41, R. 6 (2), Civil P. C., in execution of a mortgage-decree which is not separable, staying the sale of the mortgaged property pending disposal of the appeal directed only against the interest decreed by the trial Court, on condition that the judgment-debtor should furnish security for further interest, is not without jurisdiction and cannot be interfered with in revision. AIR (Vol 28) 1941 Pat 483: 22 PLT 236: 7 BR 568: 193 Ind Cas 592 (DB).

——O. 41, Rr. 6, 5 — Stay under O. 41, R. 5, refused — Court refusing jurisdiction under R. 6.

If an order has been made for sale and an application under O. 41, R. 6, Civil P. C., has been made to the Court, the Court should stay the sale on suitable terms and the Court must consider what terms are suitable. The fact that the stay has been refused under O. 41, R. 5 does not justify the Court in refusing to exercise the jurisdiction vested in it under O. 41, R. 6. AIR (Vol 27) 1940 Cal 582: 44 CWN 1150: 193 Ind Cas 109 (DB).

——O. 41, R. 6 (2) — Power of Court passing decree, to stay sale.

The Court which passed a decree has, under the provisions of O. 41, R. 6 (2), Civil P. C., full powers to stay a sale on taking security from the judgment-debtor. It need not, and ought not to, grant a limited stay order and ask the judgment-debtor to obtain a further order of stay from the High Court. AIR (Vol 27) 1940 Cal 543: 45 CWN 382 (1): 191 Ind Cas 144 (DB).

——O. 41, R. 6 (2), O. 21, R. 66 (2) — Decree for sale — Appeal pending — Application for stay of sale — Court proceeding to sell — Whether illegality.

Under Sub-R. 2 of R. 6, O. 41, Civil P. C., when an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor, to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. There is no limit to the discretion of the Court in imposing terms and the Court has power to deal with a vexatious judgment-debtor in this way if the Court is obliged to stay the sale when such an application is made. When the Code says the executing Court shall not sell in certain circumstances and the Court nevertheless proceeds to sell, the Court commits what is more than an irregularity. It amounts clearly to an illegality. AIR (Vol 27) 1940 Mad 82: 50 MLW 645: (1939) MWN 1154: (1940) 1 MLJ 460: ILR (1940) Mad 420: 190 Ind Cas 19 (DB).

——O. 41, R. 6 — Subordinate Court directed by High Court to take security — High Court — Interference.

The Court which directs security to be furnished is directly interested in seeing whether its orders have been complied with or not, and though it may have delegated the function of enquiring into the sufficiency of security to a Subordinate Court and left it entirely to that Court to decide the sufficiency or otherwise of the security, it can always intervene if the Subordinate Court misdirects itself in conducting the enquiry. At the same time if certain matters have been left to the discretion of the Subordinate Court, the High Court will interfere only when the Court below has acted perversely or either misconstrued or misdirected itself on any principle of law and justice. It will do so on the principle that it cannot suffer any wrong or unreasonable order to be passed when such order has in law the same force and sanctity as an order passed by the Court. The Subordinate Court must examine the title of the sureties carefully and be reasonably satisfied as to the validity and sufficiency of the bonds so that no difficulty should arise in their enforcement if need be. AIR (Vol 24) 1937 Pat 380: 3 BR 663: 18 PLT 621: 170 Ind Cas 139 (DB).

——O. 41, R. 6 — Where a claimant after succeeding under O. 21, R. 58 fails in an action brought by the decree holder to establish his right to sell the property in suit, the Court cannot order stay of execution either under O. 21, R. 29 or O. 41, R. 6 (2) but can order stay only in its inherent jurisdiction and the Court acts without jurisdiction if in such a case stay is ordered without putting the unsuccessful claimant to terms. AIR (Vol 21) 1934 Pat 637: 1 BR 87: 15 PLT 783: 152 Ind Cas 686.

——O. 41, R. 6 — Application for stay of execution — Proper Court — Appeal.

Any application under O. 41, R. 6, for stay of execution must be made to the executing Court and if the application is rejected, the proper course is to appeal from the order of the executing Court and not to make a fresh application to the Appellate Court. AIR (Vol 19) 1932 Lah 30 (1) : 32 PLR 756 : 135 Ind Cas 207 (1).

——O. 41, R. 6 — Sale when stayed.

Where, in execution of a money decree, house property belonging to a judgment-debtor has been attached and ordered to be sold and the judgment-debtor has appealed to the District Judge and applied for stay of the sale under O. 41, R. 6, Cl. (2) the Court is in such circumstances bound to stay the sale on such terms as to giving of security or otherwise as it thinks fit. (1928) 108 Ind Cas 272 (Lah).

——O. 41, R. 6 — Appeal to Privy Council pending — Trial Court cannot pass order under.

Where after a suit was decreed by the High Court on appeal, there was an appeal to the Privy Council.

Held, that the Trial Court had no jurisdiction to pass an order under O. 41, R. 6 against the decree-holder for security for the property of which he obtained possession. The proper Court to deal with the matter was not the original Court, but the

High Court which had to be moved under O. 45, R. 13. AIR (Vol 12) 1925 Rang 254: 88 Ind Cas 992: 4 Bur LJ 50: 3 Rang 158 (DB).

——O. 41, R. 6 — Stay of sale — Inherent power of Court.

An appellate Court can direct stay of sale of immoveable property in execution of the decree under appeal before it. The inherent powers given to appellate courts by O. 41, R. 5 are not restricted or cut down by the special and emergency powers given to executing Courts under O. 41, R. 6 (2). 23 MLJ 677 Dissented from. AIR (Vol 6) 1919 Mad 1144: 41 Mad 813: 34 MLJ 470: 7 LW 612: 24 MLT 18: (1918) MWN 502: 45 Ind Cas 30 (DB).

——O. 41, R. 6 — Stay of sale — Appellate Court.

According to R. 6 (2) of O. 41 an application for stay of an order for sale of an immoveable property should be made only to the court making the order. (1912) 23 MLJ 677: 17 Ind Cas 763.

(Dissented from in AIR (Vol 6) 1919 Mad 1144: 41 Mad 813: 45 Ind Cas 30.)

——O. 41, R. 6 (Ss. 546, Cl. (3), 545, 582, old Code) — Jurisdiction of Appellate Court to stay sale in execution of money-decree pending appeal — Inherent jurisdiction.

By Brett, Mitra, Woodroffe and Mookerjee JJ.: —An Appellate Court has jurisdiction, pending the disposal of the appeal, to pass an order staying the sale of immoveable property of the judgment-debtor in execution of the decree.

Per Brett and Mitra JJ.:—The Appellate Court has got the power under S. 546, Cl. (3), (vide also S. 582, C. P. C.)

Per Woodroffe J.:—The jurisdiction exists, whether under S. 545 or inherently.

Semble:—S. 546, Cl. (3) probably refers to an order by the Court of First Instance.

Per Mookerjee J.:—It does not exist by reason of S. 546 (3). But it does exist by reason of S. 545 and as an incident of inherent jurisdiction.

Per Rampini J.:—There is no jurisdiction to pass the order under S. 546, Cl. (3). (1907) 11 CWN 1030: 6 CLJ 298: 34 C 1037 (1043, 1050, 1058) (FB).

——O. 41, R. 6 — Power to stay proceedings — Guardians and Wards Act, appeal under.

Per Curiam:—An appellate Court having seizin of an appeal has power to make an order staying proceedings in a lower Court pending the hearing of the appeal to that Court. The power to stay proceedings is ancillary to the power of the appellate Court to reverse the order of the inferior Court. (1905) 3 CLJ 29 (34) (DB).

——O. 41, R. 6 (S. 546, Cl. (3) Old Code) — Stay of Sale — Court to which application should be made — Jurisdiction — Court which passed the decree — Appellate Court.

An application for stay of sale of immoveable property under the 3rd paragraph of S. 546, C. P. C., must be made to the Court which passed the decree and not to the Court in which the appeal is pending. (1904) 8 CWN 381 (382) (DB).

4. Revision.

——O. 41, R. 6 — Incorrect order under R. 6 (2) — Revision lies. (1941) 44 CWN 701: 73 CLJ 297.

——O. 41, R. 6 — Where security was ordered to be paid to stay a sale of immoveable property pending appeal, without making any enquiry as to the value of the property attached,

Held, that the order was liable to be set aside in revision. AIR (Vol 12) 1925 Lah 256: 6 LLJ 510.

5. Scope and Applicability.

——O. 41, R. 6 (2), O. 21, R. 66 — Order for sale of immovable property in execution of decree — Appeal pending — Judgment debtor's stay application.

Where an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

Where the objection of the judgment-debtor was that the valuation was fixed by the executing Court on the judgment-debtor's property which was to be sold before the date on which he was called upon to show cause against the valuation proposed to be made, but it appeared, however, that the property was valued by an order of the Munsif and the order was signed, before the petitioner on the same day on which he made an application under O. 21, R. 66 of the Code:

Held, that there was no substance in the objection. AIR (Vol 23) 1936 Pat 443: 2 BR 394: 161 Ind Cas 936.

——O. 41, R. 6 (2) — Power to stay sale on condition of depositing decree amount — "Or otherwise", meaning of.

The expression "on such terms as to giving security or otherwise" in O. 41, R. 6, does not merely mean on giving security or without security. The Court has power under this rule to make an order for stay conditional on the judgment-debtor depositing the decree amount in Court. AIR (Vol 21) 1934 Mad 709: (1934) MWN 975: 40 MLW 704: 67 MLJ 656: 58 Mad 230: 153 Ind Cas 630 (DB).

——O. 41, R. 6 — Order 41, R. 6 (2) only empowers the Court against whose decree an appeal is pending to stay the application for execution and not to dismiss it. AIR (Vol 20) 1933 All 732: 55 All 983: 147 Ind Cas 178 (DB).

——O. 41, R. 6 — Where in a suit on a mortgage-deed a preliminary decree for sale is passed and when an appeal against it is pending, the final decree is passed the appeal against the preliminary decree is also by implication an appeal against the final decree and O. 41, R. 6 (2) applies to the case. AIR (Vol 20) 1933 All 732: 55 All 983: 147 Ind Cas 178 (DB).

——O. 41, R. 6 — The scope of O. 41, R. 6 is different from that of O. 41, R. 5. AIR (Vol 20) 1933 Mad 662: 38 MLW 604: 65 MLJ 387: 145 Ind Cas 993.

——O. 41, R. 6 (2) — Stay of sale — Execution Court, if obliged to stay sale in every case.

By O. 41, R. 6 (2), Civil P. C., it is not intended to impose on the Court which ordered the sale an obligation to stay the sale in every case merely because the property to be sold is immovable property. AIR (Vol 19) 1932 All 551: (1932) ALJ 603: 54 All 874: 138 Ind Cas 847.

——O. 41, R. 6 — Practice.

According to the well-established practice of the Court execution of a money-decree cannot be stayed. Execution may continue but the decree-holder must furnish security for a refund of any sums realized by him with interest at 6 per cent. should a refund become necessary as a result of the appeal. (1932) 33 PLR 799 (1).

——O. 41, R. 6 — Applicability — Sale under O. 34.

Where an order has been passed for sale of immoveable property by virtue of a decree under O. 34, C. P. Code, the proceedings taken in pursuance of such order are to be deemed proceedings relating to the execution of a decree and O. 41,

R. 6 applies as it is applicable irrespective of the nature of the claim. AIR (Vol 16) 1929 Lah 552: 117 Ind Cas 88: 30 PLR 371.

——O. 41, R. 6 — Rule is applicable up to confirmation of sale.

The trial Court is bound to stay the sale when it is brought to its notice that the decree had been appealed against. Even where the property has been sold, but the sale has not yet been confirmed, the rule applies. AIR (Vol 16) 1929 Lah 68: 108 Ind Cas 605.

——O. 41, R. 6 — Execution against person.

Where an order is passed for stay of sale of immoveable property, the mere fact that security has been given under O. 41, R. 6 (2), does not prevent the execution of the decree in accordance with law, either against the person or moveable property of the judgment-debtor. AIR (Vol 13) 1926 Lah 463: 93 Ind Cas 897.

——O. 41, R. 6 — Rule mandatory.

Under O. 41, R. 6 (2) the Court in the case of an order for the sale of immoveable property in execution of a decree is bound, where an appeal is pending from such decree, to stay the sale on the application of the judgment-debtor on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of. AIR (Vol 11) 1924 Lah 671: 75 Ind Cas 1001.

——O. 41, R. 6 — Summary dismissal.

Summary dismissal improper — Application for stay of execution cannot be summarily dismissed. AIR (Vol 11) 1924 Lah 631: 75 Ind Cas 615.

——O. 41, R. 6 — Execution when stayed.

Where B attached certain properties in execution of a decree and A put in a claim which was dismissed, whereupon A filed a claim suit and on its dismissal on appeal, held, that he cannot in appeal apply for stay of execution of B's decree under O. 41, R. 6. That rule applies only when an appeal is pending against the decree sought to be executed. A's appropriate remedy will be under O. 39. C. P. Code. AIR (Vol 9) 1922 Lah 58: 77 Ind Cas 116: 4 LLJ 188.

——O. 41, R. 6 (1) (S. 546, para 3 Old Code) — Appellate Court's power to demand security after execution.

Per Woodroffe J.—S. 546 does not apply after execution has been carried out; but an appellate Court has an inherent jurisdiction to demand security after execution has been fully taken out.

Per Mookerjee J.:—S. 546 should not be read in a restricted sense. An appellate Court has power to demand security even after execution has been fully taken out. (1904) 3 CLJ 67 (70, 79): 33 C 927 (DB).

——O. 41, R. 6 (S. 546 Old Code) — "The Court which passed the decree" — Decree — Appeal — Stay — Security — Jurisdiction.

It is not competent to an appellate Court to pass an order under S. 546, C. P. C., where no order has been made for the execution of the decree appealed. (1901) 3 Bom LR 142: 25 B 583 (583) (DB).

6. Security.

——O. 41, R. 6 — Suit for possession — Plaintiff succeeding — Appeal by defendant — Stay order — Plaintiff allowed to execute decree on furnishing security "for the due performance of the decree that might ultimately be passed by the Court" — Surety given — Defendant succeeds in appeal — Defendant claims mesne profits from surety — Surety whether liable.

A security bond has to be construed strictly according to its terms, and only when there is a doubt about its true construction can it be considered in the light of the order directing security to be given:

Held, on facts that the terms of the security bond were clear and excluded all possibility of the argument that mesne profits were included. The defendant, therefore, could not claim mesne profits. AIR (Vol 34) 1947 Nag 91: 227 Ind Cas 250: 1946 NLJ 583: ILR (1946) Nag 666.

——O. 41, R. 6 — Member of joint Hindu family executing security bond.

Where a member of a joint Mitakshara family executes a security bond, when the family consists of other members including minors, it should not be accepted. AIR (Vol 24) 1947 Pat 380: 3 BR 663: 18 PLT 621: 170 Ind Cas 139 (DB).

——O. 41, R. 6 — Surety bond — Language ambiguous — Construction.

A surety bond should be strictly construed in favour of surety. If there is any ambiguity in the language of the bond it should be construed in favour of the surety. AIR (Vol 30) 1943 Bom 243: 45 Bom LR 510: ILR (1943) Bom 636: 209 Ind Cas 161 (DB).

——O. 41, R. 6 — Surety bond referring to appeal in High Court — Liability.

If the terms of the surety bond refer only to a particular appeal pending in the High Court, the sureties' liability cannot be extended to a decision given by the Privy Council reversing the decision of the High Court. AIR (Vol 30) 1943 Bom 243: 45 Bom LR 510: ILR (1943) Bom 636: 209 Ind Cas 161 (DB).

——O. 41, R. 6 — The High Court cannot go behind the finding of sufficiency of security arrived at by the Registrar. (1937) 66 CLJ 169: 42 CWN 188 (DB).

——O. 41, R. 6 — Properties deteriorating in value — Security from judgment-debtor for deficiency that may occur on sale.

Where the properties, subject of a mortgage decree, are deteriorating in value and are not insured, and most of them are capable of being destroyed by fire, earthquake or other similar causes it is only fair before staying the sale at the instance of the judgment-debtor, to order him to give security for any deficiency that may occur in the recovery of the amount due to the decree-holder under the decree on the sale of the mortgaged property. AIR (Vol 21) 1934 Lah 117 (1): 148 Ind Cas 941 (1).

——O. 41, R. 6 — Security when demanded.

Security for restitution — No waste by the respondent — Debts by him secured on his property — Respondent a successful party — Order to give security cannot be passed. AIR (Vol 15) 1928 Pat 187: 9 PLT 87: 109 Ind Cas 323.

——O. 41, R. 6 — Contract Act, S. 130.

A suretyship under O. 41, R. 6 of the C. P. C., is not a continuing guarantee within S. 130 of the Contract Act. AIR (Vol 4) 1917 Cal 594: 32 Ind Cas 807 (DB).

——O. 41, R. 6 — Surety's position after the death of decree-holder.

A surety under O. 41, R. 6, C. P. C., is not entitled to be discharged on the death of the decree-holder for whom he was surety. No arrangement between the decree-holder and the suerty can bind the judgment debtor's interest on reversal of the decree. AIR (Vol 4) 1917 Cal 594: 32 Ind Cas 807 (DB).

——O. 41, R. 7.

——O. 41, R. 7 — Certificate under S. 205, Government of India Act, 1935 given — Person aggrieved is entitled to go to the Federal Court

provided he complies with so much of R. 7 of O. 41, as is incumbent upon him i.e., makes the necessary deposit to cover the expenses of translating, transcribing, indexing and transmitting the record to Federal Court. AIR (Vol 29) 1942 Mad 70: 54 MLW 295: (1941) 2 MLJ 514: 200 Ind Cas 886 (DB).

——O. 41, R. 8.

——O. 41, R. 8 — Power of Registrar to hear applications under — Patna High Court Rules, Chap. III, R. 12 — Affidavit filed by Advocate's clerk based on information supplied by client.

Under the Patna High Court Rules, the Registrar has no power to hear an application under O. 41, R. 8.

Where an affidavit, for an application for stay of execution, was sworn to by the Advocate's clerk on the information supplied to him by the client and the mofussil lawyer of the client:

Held, that there was no reason why it should not be a good affidavit within the meaning of R. 12, Chap. III of the Patna High Court Rules. AIR (Vol 19) 1932 Pat 217: 13 PLT 254: 138 Ind Cas 334.

——O. 41, R. 9.

——O. 41, R. 9 — Appeal dismissed as withdrawn on appellant's application — Mistake of law.

An appeal which was dismissed on the application of the appellant himself that he wished to withdraw it, cannot be restored even if the appellant had acted under a mistake of law. AIR (Vol 29) 1942 All 253 (1): (1942) ALJ 382: 1942 AWR (HC) 161: 201 Ind Cas 768 (DB).

——O. 41, R. 10.

See also, Civil P. C., S. 145.

1. Appeal and revision.
2. Applicability and scope.
3. Grounds for.
4. Powers of High Court.
5. Practice.
6. Restoration.
7. Security.
8. Specified time.

1. Appeal and revision.

——O. 41, Rr. 10 (2), 19 — Order rejecting appeal — Order refusing to restore such appeal, if appealable.

An order rejecting an appeal under O. 41, R. 10 (2), Civil P. C., is not a decree and is not therefore appealable as such. It is not appealable even as an order under O. 43, R. 1. AIR (Vol 26) 1939 All 733: (1939) ALJ 998: 1939 AWR (CC) 739: ILR (1940) All 19: 187 Ind Cas 31.

——O. 41, R. 10 (3) (added by Allahabad High Court) S. 109 — Final order — Leave to appeal.

Second appeal rejected and dismissed for want of prosecution under R. 10 (3) for failure of appellant to furnish security — Subsequent application for restoration also dismissed — Application for leave to appeal to Privy Council from subsequent order, since the application for leave to appeal against the first order was already barred:

Held, that the order in question was not a final order within the meaning of S. 109 (a), nor was it a fit case within S. 109 (c);

Held also, that the order was not an order passed in appeal but that it was an order passed in the exercise of appellate jurisdiction. AIR (Vol 24) 1937 All 566: (1937) ALJ 796: 1937 AWR (CC) 695: 171 Ind Cas 29 (DB).

——O. 41, Rr. 10, 19, 21, 23, O. 43, R. 1, S. 115 — Order rejecting appeal — Appeal from order, if can be treated as revision.

There can be no appeal against an order rejecting an appeal under O. 41, R. 10, because the only orders under O. 41, which are appealable under O. 43, R. 1, are orders under Rr. 19, 21 and 23. The order rejecting the appeal, is therefore, final, and cannot be questioned on appeal at all. Nor can the appeal be treated as an application for revision. The discretion of a Court to ask for security is absolute; and when a Court has absolute discretion to pass an order given it by the Code, it is impossible to say that an order which it makes in this way is without jurisdiction. AIR (Vol 23) 1936 Rang 109: 161 Ind Cas 233.

——O. 41, R. 10 — Notice to show cause — Dismissal of appeal — Irregularity — Revision.

A notice was issued to the appellant to show cause why he should not be required to furnish security before his appeal was heard. The notice did not put the appellant on his guard that the security must be ready in Court in the event of sufficient cause not being shown. The Court dismissed the appeal unheard for not showing the cause.

Held, that the dismissal by the Court of the appeal was under the circumstances a material irregularity liable to be set aside in revision. 29 Ind Cas 59: AIR (Vol 2) 1915 All 133 (DB).

——O. 41, R. 10 — S. 78 (Ss. 549, 391, old Code) — Application to set aside order rejecting appeal under S. 549, C. P. C.

No application lies for setting aside an order rejecting an appeal under S. 549, C. P. C. (Act XIV of 1882.) (1909) 19 MLJ 304 (304): 4 Ind Cas 165.

2. Applicability and scope.

(a) General.
(a-1) Original side appeals.
(b) Pauper appeals.
(c) Insolvency appeals.
(d) Letters Patent Appeals.
(e) Effect of non-compliance.

(a) General.

——O. 41, R. 10 — Scope.

Order 41, Rule 10, is expressly concerned with the costs incurred up to and in the High Court and has no bearing whatever on costs which may be dependent upon something occurring in the Privy Council. AIR (Vol 14) 1927 All 522 : 101 Ind Cas 551 (DB).

——O. 41, R. 10 — Appeal.

An order of rejection of an appeal for failure to furnish security for the costs of appeal and of the original suit under O. 41, R. 10 is not appealable either as a decree or as an order. AIR (Vol 9) 1922 Cal 246 : 49 Cal 355 : 35 CLJ 131 : 26 CWN 1020 : 62 Ind Cas 751 (DB).

——O. 41, R. 10 — Provision mandatory.

Provisions of O. 41, R. 10 (2) are mandatory and not permissive. AIR (Vol 8) 1921 PC 80 : 40 MLJ 308 : 48 Cal 481 : 48 IA 76 : 19 ALJ 281 : 23 Bom LR 681 : 25 CWN 557 : 33 CLJ 307 : 14 MLW 362 : 1921 MWN 159 : 60 Ind Cas 274.

(a-1) Original Side appeals.

——O. 41, R. 10 — Decree or orders on Original Side — Word 'suit', if covers original application on which judgment appealed from is given.

Order 41, R. 10, applies to appeals from decrees or orders made on the Original Side of the High Court.

In the expression "the original suit" in O. 41, R. 10, the word "suit" is not used in the technical sense of a proceeding commenced by plaint as provided in S. 26 of the Code. The context shows that in O. 41, R. 10, the word is used to cover the original application on which the judgment appealed from was given, whatever its nature. AIR (V 25) 1938 Bom 351 : ILR (1938) Bom 399 : 40 Bom LR 470 : 176 Ind Cas 756 (DB).

——O. 41, R. 10 — Appeals from the Original Side.

Order 41, R. 10, and its proviso apply to Original Side appeals, and security for the costs of the respondent can be ordered in an Original Side appeal. AIR (Vol 12) 1925 Mad 1132 : 21 MLW 662 : 87 Ind Cas 346 (DB).

——O. 41, R. 10 — Applies to appeals from judgments on Original Side.

Order 41, R. 10, C. P. Code, does apply to an appeal from the judgment of a Judge sitting on the Original Civil Side, in the absence of any rule of the Calcutta High Court framed in the exercise of the power to regulate its own procedure in its Original Civil Procedure. AIR (Vol 11) 1924 Cal 781 : 51 Cal 695 : 28 CWN 676 : 80 Ind Cas 275 (DB).

(b) Pauper appeals.

——O. 41, R. 10 — Applicability — Pauper appeals — Demand of security in — When would be made.

There is no justification for holding in law that the provisions of O. 41, R. 10, C. P. Code do not apply to pauper appeals. Hence an appellate Court can demand security from pauper appellants. But the demand will be made only when the Court feels that it is very necessary to demand it. Mere poverty is no ground to demand security. AIR (Vol 35) 1948 All 301 : ILR (1948) All 297 : 1948 ALW 192 : 1948 AWR (HC) 302 : 1948 ALJ 73.

——O. 41, R. 10 — Appeal in forma pauperis — Order to give security — Circumstances under which order can be made.

Whilst it is necessary that special circumstances should exist before an order for security should be directed in an appeal in forma pauperis, where the appellant is doing no more than seeking to assert a right which he has failed to assert in the trial Court, and, in addition, which his immediate predecessor-in-title failed himself to establish in a Court of law, and the suit itself is for setting aside considerable number of alienations, the first of which was 36 years old and the alienees or purchasers have given full consideration, the circumstances fall under the category of special grounds for a Court ordering security. AIR (Vol 35) 1948 Mad 351 : 61 LW 378 : (1948) 1 MLJ 362 : 1948 MWN 331 (DB).

——O. 41, R. 10 — Appellant both minor and pauper.

In exceptional circumstances, an infant plaintiff can be called on to furnish security for costs. In the case of a pauper appellant again, if special grounds are shown, he can be required to find security. Thus, the fact that the appellant is both a minor and a pauper, does not by itself entitle him to resist the application made by the respondent to demand security for costs. AIR (Vol 25) 1938 Mad 313 : 47 MLW 153 : (1938) MWN 72 : (1938) 1 MLJ 235 : 174 Ind Cas 276 (DB).

——O. 41, R. 10 — Appeal in forma pauperis — Government, if can intervene — Court-fee due to Government whether costs incurred by Government.

After the application has been allowed and the appeal has been admitted, and is only awaiting hearing, there is no scope for any intervention by the Government in the matter of court-fee, and no reason why the provisions of O. 41, R. 10, should be utilised or made available for the benefit of the Government in order to enable it to collect the court-fee which is due. Order 41, R. 10 is not a provision intended to assist the Government in collecting court-fee. It is meant for the protection of respondents in appeal and to save them from the risk of loss in the shape of costs. The court-fee that is due to Government cannot be regarded as the costs incurred by Government. When Government is not a party in appeal nor was it a party in the Court below, and even if court-fee is directed to be paid to the Government that does not convert the court-fee into costs incurred by a party:

Held, on merits that if the application of the Government for taking security from the appellant be granted, it would amount to giving an encouragement to an attempt to stifle the appeal which in the interest of justice, the pauper had been permitted to file. Moreover, if the prayer be granted the appellants would be unable to find security and the result would be a summary rejection of the appeal. This result would not only be disastrous from the point of view of doing justice between the parties to the appeal, but any chance which the Government might have of recovering the court-fee due would be lost if the appeal is rejected as it would have to be rejected for failure to give security. AIR (Vol 24) 1937 Mad 267 : 45 MLW 186 : (1937) MWN 244 : 171 Ind Cas 202.

——O. 41, R. 10(2) — Pauper appeals.

Order 41, R. 10(2), does not apply to pauper appeals and a pauper appellant cannot be required to furnish security for costs. (1934) 149 Ind Cas 453 (1) (Lah).

——O. 41, R. 10 — Pauper appellant.

Judges must be presumed to be conscious of their own powers and the limitations subject to which they can exercise them. Therefore once the leave to appeal in forma pauperis is granted it could be legitimately inferred that there was prima facie ground for holding that the case fell within the proviso to O. 44, R. 1. Under such circumstances it could fairly be laid down that both propriety and consistency of law and procedure, demand that if a Court considers any particular case to be fit for granting the leave, the granting of the leave involves the consequence, if not expressly, at least, by necessary implication that prima facie, that case is fit to be placed outside the purview of O. 41, R. 10. AIR (Vol 17) 1930 Nag 28 : 121 Ind Cas 61 : 12 NLJ 92.

——O. 41, R. 10 — Rejection on failure to give security for costs — Revision.

The District Judge permitted the Defendants to appeal against the decree of the Subordinate Judge, in forma pauperis but his successor ordered the Appellants to give security for costs and under O. 41, R. 10, rejected the appeal on failure to give security.

Held, no appeal lies from an order rejecting the appeal for failure to furnish security for costs. But held in revision, in making the order for pauper appellants to furnish security for costs, the District Judge acted illegally as O. 41, R. 10 of the C. P. Code does not apply to pauper appeals. AIR (Vol 9) 1922 Lah 87 : 3 Lah 30 : 68 PLR 1922 : 67 Ind Cas 256 (DB).

——O. 41 — R. 10 — Pauper appellant.

An Appellate Court can ask for security from a pauper appellant for the respondent's costs under R. 10 of O. 41 of C. P. C. AIR (Vol 7) 1920 Mad 318 : 43 Mad 902 : (1920) MWN 534 : 12 LW 333 : 58 Ind Cas 794 (DB).

(But see AIR (Vol 4) 1917 Bom 137 : 42 Bom 5 : 19 Bom LR 771 : 42 Ind Cas 67.)

——O. 41, R. 10 and O. 44, R. 1 — Pauper appellant — Security for costs.

A plaintiff preferring an appeal in forma pauperis cannot be required to give security for costs of the original suit or of the appeal. AIR (Vol 5) 1918 Cal 618 : 48 Ind Cas 971 (DB).

——O. 41, R. 10 and O. 44 — Pauper appellant — Security for costs.

The provisions of O. 41, R. 10, C. P. C., do not apply to pauper appeals and no security should be demanded from a pauper appellant. The maxim "Generais specialibus non derogant", applies. AIR (Vol 4)) 1917 Bom 137 : 19 Bom LR 771 : 42 Bom 5 : 42 Ind Cas 67 (DB).

(c) Insolvency appeals.

——O. 41, R. 10 — Insolvency appeal — Appeal from an order in insolvency — Security for costs.

Order 41, R. 10 applies to appeals from order of the High Court in its Insolvency Jurisdiction. AIR (Vol 4) 1917 Cal 626 : 43 Cal 243 : 20 CWN 140 : 23 CLJ 24 : 32 Ind Cas 3 (FB).

(d) Letters Patent Appeals.

——O. 41, R. 10 — Letters Patent Appeals.

High Court R. 736 is not inconsistent with O. 41, R. 10 as it merely prescribes the amount of security which an appellant shall deposit as a condition on which the appeal will be admitted. Although, undoubtedly, many of the rules in O. 41, cannot apply to appeals under the Letters Patent it would be going too far to say that none of them are applicable. AIR (Vol 10) 1923 Bom 399 : 25 Bom LR 468 : 73 Ind Cas 474 (DB).

——O. 41, R. 10 — Provisions of O. 41, R. 10, apply equally to appeals under Letters Patent as to appeals under C. P. Code. AIR (Vol 8) 1921 PC 80 : 40 MLJ 308 : 48 Cal 481 : 48 IA 76 : 19 ALJ 281 : 23 Bom LR 681 : 25 CWN 557 : 33 CLJ 307 : 14 MLW 362 : 1921 MWN 159 : 60 Ind Cas 274.

(e) Effect of non-compliance.

——O. 41, R. 10 (2) — Failure to give security — Dismissal.

Order 41, R. 10 (2), is of a mandatory character and if security is not furnished within the time allowed, the Court is bound to reject the appeal. AIR (Vol 19) 1932 Mad 170 : 61 MLJ 688 : (1931) MWN 1124 : 34 MLW 783 : 136 Ind Cas 45 (DB).

——O. 41, R. 10 — Rejection of appeal.

Non-compliance with O. 41, R. 10, entails dismissal. AIR (Vol 17) 1930 Mad 355 (DB).

——O. 41, R. 10 — Order setting aside is not appealable.

No appeal lies from an order setting aside an order rejecting an appeal for failure of the appellant to give security for costs nor is the order open to revision when it is made in the interests of justice. AIR (Vol 7) 1920 All 112 : 42 All 626 : 18 ALJ 838 : 2 UPLR (All) 283 : 60 Ind Cas 81 (DB).

3. Grounds for

——O. 41, R. 10 — Security for costs — Poverty of appellant is no ground for demanding security. (1939) 1939 O W N (C C) 152.

——O. 41, R. 10 — Appeal raising issues not jeopardizing appellant's position — His suit of vexatious character — Appellant, if can rely on poverty to resist application.

Where the liberty of the appellant is in question or where highly penal consequences will be entailed upon him by the order appealed against, the Court as a general rule will refuse to order security for costs. Where the appeal raises grave issues which vitally affect the appellant's position, the Court may well refuse to make an order, which will have the effect of stifling the appeal, although circumstances may exist which normally would justify an order for security. But where the facts are just the other way, not only is the position of the appellants not jeopardized but the suit they brought, is of a harassing and vexatious character, no Court will regard with sympathy the argument that the order for security will have the effect of putting an end to a litigation of that sort. In such a case, the Court will pass order for security for costs.

The proposition is well-established that the appellant's poverty by itself would not be sufficient to warrant his being required to furnish security. But that does not mean that the appellant can rely upon his own poverty, as being an important or decisive factor, and resist the application on that ground. A I R (Vol 25) 1938 Mad 380 : (1938) M W N 87 : 47 M L W 133 : (1938) 1 M L J 142 : 178 Ind Cas 899 (DB).

——O. 41, R. 10 — Effect of delay.

The object of the rule enabling the Court to require the appellant to furnish security for costs is to secure the respondent from the risk of having to incur further costs which he might never recover from the appellants and this being the object, an application which is made under this rule must be made promptly.

Even though the risk to the respondent is to be borne in mind in this matter, it is not conclusive in the sense that wherever there is risk to the respondent, security must be taken. If the risk is very great it may by itself be sufficient to justify an order requiring the appellants to furnish security, but where the risk is not great and the amount involved is not really very large, other considerations must be given their due weight. One must be careful to see that a poor appellant is not deprived in effect of his right of appeal. AIR (Vol 24) 1937 Mad 285: (1937) MWN 41: 45 MLW 232: 168 Ind Cas 924.

——O. 41, R. 10 — Ordinary poverty of appellant.

Order 41, R. 10, gives an absolute discretion to the Appellate Court to decide in what class of cases security is to be demanded. But where the Court has been given absolute discretion to make an order for security for costs, no Bench of Judges can lay down rules which purport to fetter the discretion of other Judges in any similar application which may be made thereafter. Even though it is quite true that as a general rule, a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty, yet each case must stand on its own facts and there might be cases in which a party, because he is poor, should be directed to give security at any rate for the costs of the appeal, before he is allowed to proceed further. AIR (V 23) 1936 Pat 433 : 17 PLT 187 : 2 BR 707 : 164 Ind Cas 93 (DB).

——O. 41, R. 10 — Security for costs of appeal.

Where the appellant in his counter-affidavit states in clear terms that he has some property, but in spite of this fact, he did not choose to pay the costs for which a decree was awarded to the respondent by the lower Appellate Court although he was committed to the civil prison in execution of the decree.

Held, that in the circumstances the appellant should be directed to furnish security for the costs which may be incurred by the respondents in appeal. A I R (Vol 23) 1936 Pat 433 : 17 P L T 187 : 2 B R 707 : 164 Ind Cas 93 (DB).

——O. 41, R. 10 — Each case depends on its own facts.

No rule of practice can fetter the discretion of the Court in respect of applications for security for costs under O. 41, R. 10. A respondent is not entitled as of course to an order for security for costs merely because the appellant may through poverty be unable to pay the respondent's costs if the appeal fails. Each case turns on its own facts, and it would not be right or expedient to lay

down any rule that would have the effect of regulating the discretion of the Court as to the circumstances under which it should make an order for security. A I R (Vol 23) 1936 Rang 294 : 14 Rang 289 : 163 Ind Cas 973 (DB).

——O. 41, R. 10 — A Court to which an application is made for ordering security for costs even by a pauper appellant is entitled to go into matters which were not gone into in the Court which granted leave to appeal as a pauper. Where the appellant herself suppressed a very material document at the time and persists in denying its possession an order made to furnish security for costs is a proper one. (1933) 1933 M W N 263.

——O. 41, R. 10 — Mere failure to pay costs of trial Court.

The mere fact that an appellant has not paid in full or in part the costs of the original suit is no ground for calling upon him to furnish security under O. 41, R. 10, unless his conduct has been shown to be vexatious that is such as indicates a wilful determination on his part not to obey the order of the Court in respect of costs. A I R (Vol 18) 1931 Lah 70 (1) : 31 P L R 950 : 130 Ind Cas 771.

——O. 41, R. 10 — Poverty.

Poverty alone is not sufficient ground for ordering the appellant to furnish security and especially where the application under O. 41, R. 10 is not promptly made, but at a late stage when the appeal is ripe for hearing and when the whereabouts of the appellant are not unknown, such application should be dismissed. A I R (Vol 17) 1930 Lah 629.

——O. 41 R. 10 — The poverty of the appellant by itself is not sufficient ground for ordering the appellant to furnish security. A I R (Vol 17) 1930 Lah 384: 114 Ind Cas 708: 11 LLJ 157 (DB).

——O. 41 R. 10 — Mere poverty of the appellant is not a sufficient ground for calling upon him to furnish security for costs. A I R (Vol 17) 1930 Lah 382 : 120 Ind Cas 538 (DB).

——O. 41 R. 10 — Appellant's poverty is no ground for dispensing with.

Mere want of means of the appellant is not a sufficient ground for dispensing with security. Whether circumstances exist which would entitle the respondent to relief under the provision, is a question to be decided with reference to the facts of each case and one of the circumstances entitling the respondent to relief is stated to be nonpayment of the costs incurred in the lower Court. AIR (V 10) 1923 Mad 204 : 70 Ind Cas 586 : 17 M L W 26 : 1922 M W N 801.

——O. 41, R. 10 — Security when demanded.

The mere fact that the appellant may lose and may not pay the costs of the appeal is not a sufficient ground for demanding security. There must be some evidence at least of facts which cast doubts on the honesty and bona fides of the appellant such an obstruction to the execution of the decree in the lower Court or the fact that the appellant is not the real litigant or, if in any way it can be shown, that the appeal is vexatious. A I R (Vol 10) 1923 Bom 399 : 73 Ind Cas 474 : 25 Bom LR 468 (DB).

——O. 41, R. 10 — Grounds for security — Poverty of appellant not sufficient.

Mere poverty of the appellant is no ground for demanding security; it must be shown that he is merely a puppet in the hands of others and that he is merely a nominal party on behalf of others, who are keeping themselves behind the scene. A I R (Vol 8) 1921 Pat 233 : 1 Pat L T 114 : 55 Ind Cas 835 (DB).

——O. 41, R. 10 — Grounds for security.

Where it cannot be said that the suit is merely vexatious, the mere fact that the appellant has no money of his own, but has got relations who can afford to pay is not a ground for demanding security for costs of the appeal. AIR (V 2) 1915 Cal 595 : 19 CWN 446 : 28 Ind Cas 598 (DB).

4. Powers of High Court.

——O. 41, R. 10 — High Court delegating to lower Court power to consider sufficiency of security — Lower Court not allowing opposite party to lead evidence as to unfitness of surety — Practice.

The powers of the High Court in regard to security for costs are plenary powers. No officer is statutorily or otherwise designated who has the duty of determining what shall be sufficient security. Consequently, that it is the Court's function to demand security and that the Court in delegating an ancillary function to one of its officers may or may not reserve revisional powers to itself.

In an application, A obtained an order from the High Court directing B to furnish security for costs to the extent of Rs. 1,470. The order did not expressly state that security was to be furnished to the satisfaction of the lower Court. But in the ordinary course, the First Class Subordinate Judge was directed to take the security. The Judge accepted a person as surety on the report of the Mamlatdar that he was solvent to the extent of Rs. 1,470. A objected on the ground that evidence offered by him as to the unfitness of the surety was not considered:

Held, that the mere fact that for reasons of convenience the High Court had delegated to the Subordinate Judge the duty of taking security did not prevent the High Court from satisfying itself that the security taken was sufficient or that it was taken after proper enquiry and that as there was no express order that the Subordinate Judge was to decide finally as to the sufficiency of the security, the High Court had power to review the order made by the Subordinate Judge:

Held, also, that although applications to interfere in such cases were not favoured, yet as the Subordinate Judge did not himself make any enquiry, the High Court would exercise the authority vested in them under O. 41, R. 10, and allow the aggrieved party an opportunity of leading evidence before the Subordinate Judge that the security was insufficient, and that the exercise of such power was not by way of interference in appeal. AIR (Vol 21) 1934 Bom 13 : 35 Bom LR 1114: 148 Ind Cas 1140 (DB).

——O. 41, R. 10 — The High Court has jurisdiction to revise, if necessary, the opinion of the Taxing Officer on the matter of the right amount for security for costs on an application just as it can after an appeal has been heard. AIR (Vol 14) 1927 Bom 499: 103 Ind Cas 637: 29 Bom LR 1031 (DB).

——O. 41, R. 10 — Dismissal of appeal — Failure to give security — Restoration.

The High Court has power to reconsider upon cause shown, an order rejecting an appeal under O. 41, R. 10 (2) C. P. C. and such a power is inherent also in Subordinate Courts of appeal. Per Kanhaiya Lal, J. Although there is an absence in O. 41, R. 10 of a specific provision similar to that contained in O. 25, R. 2(2) yet a Court which has rejected an appeal for default of filing security for costs is competent to take action in review of its order of rejection and to discharge that order and grant further time for filing the security. AIR (Vol 7) 1920 All 112: 42 All 626: 2 UPLR (HC) 283: 18 ALJ 838: 60 Ind Cas 81 (DB).

5. Practice.

——O. 41, R. 10 — Security for costs deposited by appellant — Peshawar Court.

According to the practice of the Peshawar Court the successful respondent entitled to the money lying in the Court as security for costs furnished by the appellant under O. 41, R. 10 should apply for payment of the same to the original Court and not to the Court of the Judicial Commissioner. AIR (Vol 29) 1942 Pesh 14: 199 Ind Cas 46.

——O. 41, R. 10 — Pauper appellant — Rangoon High Court.

According to the practice of the Rangoon High Court, security for costs cannot be demanded from a pauper appellant. It may be because of the frequency with which the applications for leave to appeal as paupers were granted in Madras that they found it necessary to differ from the other High Courts with regard to demanding security for costs from paupers . AIR (Vol 23) 1936 Rang 178 : 13 Rang 511: 162 Ind Cas 538 (DB).

——O 41, R. 10 — Discretion.

There is in the statute no provision which goes to the length of casting on the Court in every case the obligation, as a matter of law, to make an order that security shall be given for costs for an appeal. It is a matter absolutely in the judicial discretion of the Court. It, therefore, follows that in special circumstances, the Court may direct security to be given, but the Court is not bound to do so. Where highly penal consequences will be entailed upon the appellant by the order, the Court would, as a general rule, not be bound to make order for security of costs. 121 Ind Cas 61: 12 NLJ 92: AIR (Vol 17) 1930 Nag 28.

——O. 41, R. 10 — Where the court has been given absolute discretion to make an order for security for costs, no Bench of Judges can lay down rules which purport to fetter the discretion of other Judges in any similar application which may be made thereafter. It is quite true that as a general rule a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must stand on its own facts, and there may be cases in which a party should be directed to give security at any rate for the costs of the appeal, before he is allowed to go further. Where a minor suing through next friend failed and the costs could not be recovered from him, the appellate Court at respondent's instance ordered security for costs of appeal. 72 Ind Cas 285: 25 Bom LR 195: AIR (Vol 10) 1923 Bom 264 (DB).

6. Restoration.

——O. 41, R. 10 — An application for restoration of appeal dismissed under O. 41, R. 10 (2) is governed by Art. 168 of the Lim. Act.

Insolvency is not a disability under the Lim. Act and adjudication of a party against whom an 'ex parte' order is passed is not a sufficient ground for extending the time for making an application to set aside the order. AIR (Vol 19) 1932 Mad 170: 61 M L J 688: (1931) MWN 1124: 34 MLW 783: 136 Ind Cas 45 (DB).

——O. 41, R. 10 — Order for restoration — Legality of.

An appellant was directed to give security under O. 41, R. 10 (1) and notice of the application for security was duly served on him. With knowledge of the order for security, he failed to give security within the time ordered by the Court and applied after the expiry of that time, for extension. His application was refused on the ground that it was made after the expiration of the time allowed and that no security was given up to the date of the hearing of the application. The appeal was rejected under O. 41, R. 10 (2) and not merely struck off the file.

Held, that no order to restore the appeal could be made. AIR (Vol 16) 1929 Rang 289: 7 Rang 445 : 120 Ind Cas 140 (DB).

——O. 41, R. 10 — An appellate Court has the power to restore an appeal rejected under O. 41, R. 10. 19 MLJ 304, Not Appr. AIR (Vol 15) 1928 Mad 964 : 55 MLJ 330: 28 MLW 358: 1928 MWN 701: 117 Ind Cas 791 (DB).

——O. 41, R. 10 — The High Court has power to reconsider upon cause shown an order rejecting an appeal under O. 41, R. 10 (2), C. P. Code, and such a power is inherent also in Subordinate Courts of appeal. Per Kanhaiya Lal, J. — Although there is an absence in O. 41, R. 10 of a specific provision similar to that contained in O. 25, R. 2 (2), yet a Court which has rejected an appeal for default of filing security for costs is competent to take action in review of its order of rejection and to discharge that order and grant further time for filing the security. AIR (Vol 7) 1920 All 112: 42 All 626 : 2 UPLR (All) 283: 60 Ind Cas 81: 18 ALJ 838 (DB).

——O. 41, R. 10 (2) — Dismissal of appeal — Restoration.

A Judge has jurisdiction to re-admit an appeal by an order under cl. (2), R. 10, O. 41 but he cannot do so without notice to the other side. AIR (Vol 5) 1918 Cal 812: 28 CLJ 163: 40 Ind Cas 234 (DB).

——O. 41, R. 10 — Rejection of appeal — If can be set aside.

No application lies to restore an appeal dismissed under S. 549 C. P. C. for failure to furnish security for costs. An appeal duly rejected by a Court under S. 549 cannot be restored by the same court. (1909) 19 MLJ 304: 4 Ind Cas 165 (DB).

7. Security.

——O. 41, R. 10 (2) — Order for security for costs of appeal in favour of some respondents — Failure to comply with — Entire appeal whether liable to dismissal.

Where a number of separate causes of action against separate defendants are joined together for reasons of convenience and an order for security for costs passed in appeal in favour of some of the respondents is not complied with, it is not incumbent on the Court to dismiss the appeal in its entirety. The proper course in such a case is to reject the appeal only so far as it is against those respondents in whose favour an order for security for costs had been made, leaving it to be prosecuted against the other respondents. AIR (Vol 34) 1947 Mad 370 : (1947) 1 MLJ 20: ILR (1948) Mad 175 : 60 LW 269: 1947 MWN 627 (DB).

——O. 41, R. 10 — An order which requires a deposit of cash as security for costs may be made. (1934) 1934 MWN 590.

——O. 41, R. 10 — Collusive suit — Dismissal — Appeal — Appellant having no other property — Application for security for costs — Sustainability.

There is a distinction between an application for security for costs to be given by the plaintiff at the original trial in the first instance and such an application in connection with an appeal. The general rule is that when the Respondent shows that the appellant if unsuccessful would be unable through poverty to pay the costs of the appeal an order for security for costs should be made. Where the plaintiff sued in collusion with defendant, her husband, for a declaration that certain properties belonged to her and not to her husband and the trial Court found against the plaintiff and it appeared that the plaintiff had admittedly no other properties.

Held, that the first defendant could in appeal successfully apply for security for cost. AIR (Vol 18) 1931 Cal 40 : 34 CWN 495 (DB).

——O. 41, R. 10 — Grounds for ordering security for costs.

The mere fact that an appellant has not paid in full or in part the costs of the original suit is no ground for calling upon him to furnish security under R. 10 unless his conduct has been shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the order of the Court in respect of costs. AIR (Vol 18) 1931 Lah 70: 31 PLR 950.

——O. 41, R. 10 — Promptness —Application for security for costs, must be made promptly.

If a party to a suit or appeal desires to apply for security for costs, he must do it promptly. Otherwise, the order made on such an application may have the effect of stifling the suit or appeal. AIR (Vol 17) 1930 Cal 520.

——O. 41, R. 10 — Security for costs — Surety bond signed by representative of appellant — His authority must be proved — Appellate Court should not decide the appeal on such point. AIR (Vol 14) 1927 PC 264: 107 Ind Cas 349.

——O. 41, R. 10 — Security filed — Clerical error — Application for correction rejected — Rejection of appeal — Legality.

The jurisdiction as to the passing of the order of rejection only arises in the event of no security being filed within the time fixed by the Court. Where security has been filed but there is a clerical error as to the description of the property and the appellant has applied for its correction, the Court cannot by rejecting the application, reject the appeal. Such rejection of appeal is apt to be revised as being an excessive exercise of jurisdiction. The Court held should allow the clerical error to be corrected. AIR (Vol 12) 1925 Oudh 402: 86 Ind Cas 752: 12 OLJ 83.

——O. 41, R. 10 — Surety — Liability of.

Surety gave security for the costs of the plaintiff respondent in case the first appeal by defendant appellant failed. The said first appeal was decided against the plaintiff respondent but his second appeal was accepted with costs.

Held, the surety never became liable to pay costs. AIR (Vol 11) 1924 Cal 528: 76 Ind Cas 510: 38 CLJ 190 (DB).

——O. 41, R. 10 — Minor respondent — Costs of guardian ad litem — Failure to give security —Dismissal of appeal.

On failure of an appellant to furnish security for the costs of the guardian ad litem of a minor respondent, the appeal was dismissed as against the minor by the Dt. Judge.

Held, that the order of dismissal passed by the Dt. Judge was a proper order and binding upon the parties. AIR (Vol 6) 1919 Cal 918: 47 Ind Cas 928 (DB).

——O. 41, R. 10 — Security for costs — Delay.

Applications for security for the costs must be made promptly, not only on the ground that the respondent should apply for security for the costs before he incurs them but also on the ground that it is reasonable that security should not be applied for till the appellant has incurred the costs of the appeal. AIR (Vol 5) 1918 Lah 301: 20 PLR 1918 : 41 PWR 1918: 44 Ind Cas 23.

——O. 41, R. 10 — Government appellant — Respondent's cost — Question of.

Where the costs which the applts. had been ordered to pay amounted to 2 lacs, 50 thousand rupees, the applt. (a public servant defended by Govt.) had not much means and the prosecution of the appeal would cost a good deal to the respts.

Held, that this was a fit case in which security for costs should be directed to be given by the Secretary of State. (1912) 16 CWN 119: 13 Ind Cas 335 (DB).

——O. 41, R. 10 (S. 549 old Code) — Security for costs, non-compliance with order to furnish — No appeal for re-admission of rejected appeal on account of.

No appeal will lie from an order refusing to readmit an appeal which had been rejected under S. 549, C. P. C., on account of non-compliance with an order to furnish security for costs. (1908) 1908 AWN 53: 30 A 143 (146) : 5 ALJ 109 (DB).

——O. 41, R. 10 (S. 549 old Code) — Security for costs — Delay — Appellant appealing 'in forma pauperis'.

Though the Court has jurisdiction to demand security for costs from an appellant in forma pauperis, yet an order will not be made except under very special circumstances. Applications for security for costs should be made with due promptitude and should not be put in after the bulk of the costs has been incurred on both sides. (1907) 17 MLJ 583 (583) : 31 M 89 (DB).

——O. 41, R. 10, Ss. 141, 122, 129, 130 and 131 (Ss. 549, 647, 652 old Code) — Judgment of single Judge — Appeal under the Letters Patent — Security for costs.

Section 549 of the C. P. C., applies only to appeals preferred to the High Court from the Subordinate Courts subject to its appellate jurisdiction. 25 M. 555 referred to S. 549, C. P. C., is inapplicable to appeals under the Letters Patent from the decision of a single Judge of the High Court to two Judges; and S. 647 does not extend it to such appeals. No rule for taking security for costs having been in force in old Sudder Court in such cases, S. 9 of the Charter Act has no application. No rule has been passed by the High Court under S. 652, C. P. C., Quaere — Whether it would be competent to the High Court to pass such a rule under S. 652, C. P. C. (1904) 27 M 121 (123) : 13 MLJ 362.

——O. 41, R. 10; O. 25, R. 1 (1) (3) (Ss. 549, 380 old Code) — Security for costs.

In exercising discretion under S. 549 of the C. P. C., the appellate Court may well be guided by the provisions of S. 380 of the Code. (1903) 5 Bom LR 661 (662) (DB).

——O. 41, R. 10 — Security for — Delay —Taxation.

An application for security for costs already incurred and estimated costs of appeal should be made promptly. (1901) 5 CWN 119 (120) (FB).

8. Specified time.

——O. 41, R. 10 — Security tendered within time — Security tested after time fixed.

An order directing security for costs to be furnished within a specified time is complied with if the security is tendered before the period expired. Even if the security tendered is tested after the time fixed and is found to be sufficient it must be held to have been furnished in time. If, however, the security is not found sufficient the order directing security to be furnished within a specified time must be regarded as not complied with. AIR (V 29) 1942 Mad 29 : (1941) 2 MLJ 291 : 54 MLW 234 : 1941 MWN 748.

——O. 41, R. 10 — Extension of time.

When once an appellate Court has rejected an appeal for failure to furnish security, it has no jurisdiction to extend the time for furnishing security. AIR (V 10) 1923 Cal 317 : 67 Ind Cas 883 (DB).

——O. 41, R. 10 — In the absence of security within the time fixed by the Court the appeal should be rejected. The provisions of O. 41, R. 10 (2) are mandatory and the mere fact that the whereabouts of the client are not known is not sufficient.

Per Chevis, A. J. C. — It is the duty of every litigant to keep in touch with his case, and not to go wandering around the country at large without giving any address where a communication from the Court or from his counsel can readily find him. (1920) 68 Ind Cas 306 : 2 Lah LJ 391 (DB).

——O. 41, R. 11.

1. **Effect of dismissal.**
2. **Judgment, form and contents.**
3. **Amendment of decree.**
4. **Partial admission.**
4-a. **Practice.**
5. **Review.**
6. **Revision and second appeal.**
7. **Scope and object.**
8. **Time-barred appeal.**

1. Effect of dismissal.

——O. 41, R. 11, O. 9, R. 13, S. 24 — Ex parte decree — Applications to set it aside under O. 9, R. 13 — Meantime appeal against ex parte decree — Appeal dismissed under O. 41, R. 11 — Court passing decree, if can entertain application under O. 9, R. 13.

The ex parte decree passed by the lower Court ceases to exist the moment the Court of the High Court dismisses the appeal therefrom under R. 11 of O. 41. The lower Court consequently has no jurisdiction to deal with the application made under O. 9, R. 13, before the appeal was filed, for setting it aside.

The appropriate course which a party ought to take in such a case as this, is to request the Appellate Court to keep the appeal pending until the disposal of the application under O. 9, R. 13, or to apply to the Appellate Court immediately after the dismissal of his appeal to withdraw the application to itself under S. 24 (1) (b). That Court may after so withdrawing it re-transfer the same under sub-s. 6 (iii) to the Court from which it was withdrawn if it does not itself wish to try or dispose of it under sub-s. (1) (b). AIR (V 24) 1937 Nag 381 : ILR (1940) Nag 496 : 172 Ind Cas 603 (DB).

——O. 41, R. 11 — Suit dismissed in appeal on preliminary point — Effect.

Suit under S. 95, Agra Tenancy Act, 1901, dismissed on ground that plaintiff's right of occupancy had come to an end — Letters Patent Bench dismissing the suit on appeal without going into merits and on preliminary point that the suit is not maintainable, the plaintiffs being out of possession — Result is that all other judgments of the lower Courts are wiped out. AIR (V 19) 1932 All 134 : (1931) ALJ 1098 : 135 Ind Cas 555 (DB).

2. Judgment, form and contents.

——O. 41, R. 11 — Dismissal of appeal under — Judgment, contents of.

In dismissing an appeal under O. 41, R. 11, it is obligatory that the Court should record a proper judgment complying with the requirements of law. A simple remark that there is ample material to support the order passed by the trial Court, without any indication as to whether it considered the grounds of appeal and its view thereon, is not enough. AIR (V 24) 1937 Lah 352 : 38 PLR 431 : 168 Ind Cas 688.

——O. 41, R. 11 — Appeal dismissed — Regular formal judgment, if necessary.

In dismissing an appeal under O. 41, R. 11, it is not obligatory upon the lower Appellate Court to write a regular formal judgment giving reasons for the decision as required by R. 31 of the said Order, because R. 31, applies only to a judgment under R. 30. AIR (V 24) 1937 Sind 247 : 171 Ind Cas 625 (DB).

——O. 41, R. 11 — It is not necessary that judgment in the form prescribed in O. 41, R. 31, should be given when the appeal is dealt with under O. 41, R. 11. AIR (V 24) 1937 Sind 206 : 31 SLR 167 : 171 Ind Cas 132 (DB).

——O. 41, R. 11 — Although when the order summarily dismissing an appeal is itself subject to an appeal, the Appellate Court below must give reasons for the judgment in order to enable the second Court of Appeal to form some opinion as to whether that judgment is correct or not, it is not incumbent upon the Judge to state reasons in a case which is not subject to appeal. AIR (V 21) 1934 Cal 26 : 59 CLJ 293 : 147 Ind Cas 194 (DB).

——O. 41, R. 11 — In a judgment delivered on hearing an appeal under O. 41, R. 11, by a Court subordinate to High Court, compliance with the provisions of O. 41, R. 31, is necessary. AIR (V 18) 1931 All 597 : (1931) ALJ 875 : 54 All 220 : 136 Ind Cas 274 (FB).

——O. 41, Rr. 11, 31 — Appeal — Summary dismissal — Judgment, contents of.

An order dismissing an appeal summarily under O. 41, R. 11, should comply with the provisions of O. 41, R. 31 of the Code.

Where an order ran as follows:

"The facts are laid out in the judgment of the lower Court. The decision is a reasonable one, and as a Court of Appeal I am not justified in going against it. Rejected summarily:"

Held, that the order did not comply with the requirements of law. AIR (V 18) 1931 All 589 (1) : 53 All 528 : 132 Ind Cas 200 (DB).

——O. 41, R. 11 — Writing judgment is not obligatory.

No doubt in some cases it is desirable to give full reasons for an order of dismissal under O. 41, R. 11, e.g., when the order is likely to be attacked in second appeal, but the provisions of O. 41 do not make it obligatory on a Judge to write a judgment when the appeal is dismissed under O. 41, R. 11. AIR (V 16) 1929 Nag 68 : 25 NLR 55 : 115 Ind Cas 168 (DB).

——O. 41, R. 11 — A Judge in dismissing an appeal under R. 11 is not relieved of the necessity of writing a judgment as prescribed by R. 31. AIR (V 13) 1926 Cal 992 : 43 CLJ 499 : 96 Ind Cas 136 (DB).

——O. 41, R. 11 — Duty of writing.

A re-arrangement of a section in a new Code does not necessarily imply a change in the law. Where the words of a section are clear and unambiguous as those of O. 41, R. 31, it is hardly permissible to curtail their plain operation on a consideration of the arrangement of the section. Nor does the arrangement of the rules in O. 41, lead to the conclusion that R. 31 does not apply to judgment pronounced under O. 41, R. 11. The duty of writing a judgment in all cases is cast upon the appellate Court, no matter in what manner the appeal is disposed of, and the provision of R. 31 of O. 41 must necessarily apply to such judgments. AIR (V 13) 1926 Rang 129 : 95 Ind Cas 881 : 4 Rang 66 : 5 Bur LJ 60.

(Overruled on another point in AIR 1936 Rang 208.)

——O. 41, R. 11 — Court must write a judgment showing points raised and decided.

The dismissal of an appeal under O. 41, R. 11, C. P. Code by a Court whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment which however need not be a long one. But the judgment whatever it is should show the points raised, the decision upon those points and the reasons for the decision. AIR (V 10) 1923 Cal 558 : 76 Ind Cas 1052 : 27 CWN 501 (DB).

——O. 41, Rr. 11 and 31 — Contents of judgment.

The provisions of O. 41, R. 31, are not applicable in their entirety to the dismissal of an appeal under O. 41, R. 11. AIR (V 3) 1916 Upp Bur 9 : (1915) II UBR 92: 33 Ind Cas 666.

——O. 41, R. 11 — Summary dismissal — Contents of judgment — Civil Circular No. 51 (Bombay).

An appellate Court dismissing an appeal under O. 41, R. 11 must write a formal judgment in compliance with Civil Circular No. 51. (36 B 116, Overruled). (1913) 37 Bom 610 : 15 Bom LR 765 : 20 Ind Cas 966 (FB).

——O. 41, Rr. 11 and 31 — Summary dismissal — Contents of judgment.

A formal judgment is not necessary in the case of an appeal dismissed under R. 11 without sending notice to the lower Court or to the respondent. (1912) 36 Bom 116 : 13 Bom LR 1002 : 12 Ind Cas 564 (DB).

——O. 41, Rr. 11 and 31 — Summary dismissal — Formal judgment.

Provisions for summary disposal of an appeal in O. 41, R. 11 are not governed by O. 41, R. 31 and therefore a judge proceeding under R. 11 need not write formal judgment. (1910) 4 SLR 184 : 8 Ind Cas 941 (DB).

——O. 41, Rr. 11, 31 (Ss. 551, 574, old Code) — Subordinate Court dismissing appeals summarily — Discretion to send for records — Judgment, if must be recorded — Question of sufficiency of judgment.

There are no grounds for limiting the discretion given by the Legislature to a Court of Appeal to send for the records or not before proceeding to dismiss an appeal under S. 551 of the Civil Procedure Code. Whether the judgment of a Court of Appeal dismissing an appeal under S. 551 has sufficiently complied with the provisions of S. 574 of the Code must be decided upon the facts of the particular case and no general rule in regard to it can be laid down.

Per Coxe, J. — Section 551 of the Code is not controlled by S. 574.

Per Richardson, J. — When a subordinate Court dismisses an appeal under S. 551 it is bound under S. 571 to record a judgment and the judgment must be sufficient to meet the requirements of S. 574. But provided it substantially meets the requirements of the law, it is not necessarily defective because it is brief or because it does not repeat or recapitulate all that is contained in the judgment of the Court of first instance. (1909) 13 CWN 1031 (1035, 1037, 1038) : 2 Ind Cas 405 (DB).

——O. 41, R. 11 (Ss. 551, 574, old Code) — Appeal, summary dismissal of — Judgment, requirements of.

When an appellate Court, other than a High Court, dismisses an appeal under S. 551, C. P. C., it must write a proper judgment. Where, after stating the nature of the appeal, the District Judge says: "The lower Court has dealt with all the necessary points and there is no reason shown for differing from the view expressed:"

Held, the judgment substantially complied with the requirements of S. 575, C. P. C. (1906) 5 CLJ 348 (348, 349) (DB).

——O. 41, R. 11 (S. 551, old Code) — Dismissal of appeal before notice — Judgment.

In dismissing an appeal under S. 551, C. P. C., a District Judge is not relieved from the necessity of writing a judgment, however short, which would show the points raised, the decision thereon and the reasons therefor. (1903) 5 Bom LR 233 (233) : 27 Bom 379 (DB).

3. Amendment of decree.

——O. 41, R. 11 and S. 2 (2) — Order dismissing appeal under O. 41, R. 11 is decree — Application for amending decree lies to Appellate Court and not to lower Court.

An order dismissing an appeal in limine under O. 41, R. 11 is a decree within the meaning of S. 2 (2). It does not make any difference that in such a case notice does not go to the respondent. Such a decree supersedes the decree of the lower Court in the same way as if notice had been issued to the respondent. An application for amendment of the decree, therefore, lies to the Appellate Court and not to the lower Court. AIR (V 33) 1946 Mad 492 : (1946) 1 MLJ 393.

——O. 41, R. 11, S. 152 — Amendment of decree — High Court dismissing appeal under O. 41, R. 11 — Application for amendment of decree lies not to High Court but to District Judge. AIR (V 28) 1941 Oudh 251 : 1941 OWN (CC) 1 : 1941 AWR (CC) 44 : 16 Luck 697 : 192 Ind Cas 269 (DB).

——O. 41, R. 11 — Dismissal of appeal under O. 41, R. 11 — Jurisdiction of lower Court to amend decree.

Where an appeal is dismissed under O. 41, R. 11 the Court which passed the decree appealed from has jurisdiction to amend the decree. AIR (V 20) 1933 Nag 117 : 142 Ind Cas 143.

——O. 41, R. 11 — Summary dismissal of appeal — Amendment of decree.

Where an appeal is dismissed under O. 41, R. 11, the decree of the lower Court is left untouched, and if any amendment is to be made in the decree, it is to be made by the Court whose decree is appealed from and not by the Appellate Court. AIR (V 19) 1932 Pat 238 : 11 Pat 409 : 13 PLT 484 : 138 Ind Cas 903 (DB).

4. Partial admission.

——O. 41, R. 11 — Court cannot admit appeal in part only.

By virtue of R. 11, O. 41, Civil P. C. the Appellate Court may dismiss the appeal without serving notice on the respondent, but if it does not dismiss the appeal summarily, it must, by virtue of R. 12 (1), fix a day for hearing "the appeal". There is nothing in O. 41, which permits of severance and which suggests that appeal may be admitted in part. There are only two courses open to the Court, namely to dismiss or admit the appeal as a whole. AIR (V 27) 1940 Mad 483 : 51 MLW 694 : (1940) 1 MLJ 857 : (1940) MWN 514 : ILR (1940) Mad 785 : 189 Ind Cas 253 (FB).

(Overrules Suryanarayanamurthy v. Kamayya Sastri, S. Appeal No. 1141 of 1934.)

——O. 41, R. 11 — Practice — Appeal — Whether can be partly admitted.

There is no provision in the Civil P. C. enabling the Court of Appeal to pass an order partly admitting and partly dismissing an appeal and in the present state of the law, an appeal cannot be admitted on a limited ground only, but once it is admitted, it has to be heard as a whole. At the same time if at the time when the appeal is heard under

O. 41, R. 11, the Appellate Court is informed that the appeal will be confined to certain specified grounds only and that the other grounds are abandoned or if it is conceded on behalf of the appellant that the grounds other than those specified are not fit to be urged in appeal, there is nothing to prevent the Court before which the appeal is placed under O. 41, R. 11, from making a note of this fact. AIR (V 23) 1936 Pat 7 : 16 PLT 803 : 2 BR 268 : 15 Pat 96 : 160 Ind Cas 984 (DB).

——O. 41, R. 11 — Appeal severable — Judge, if can dismiss appeal in part and admit it in part.

Under O. 41, R. 11, if the appeal is severable, it is open to the Judge to dismiss it in part and admit it in part. AIR (V 22) 1935 Lah 34 : 36 PLR 417 : 152 Ind Cas 418.

——O. 41, R. 11 — Appeal — Admission in part — Restriction of grounds of appeal in admitted appeal.

If an appeal is severable, it is open to the Judge hearing the appeal under O. 41, R. 11, to dismiss it in part and allow it in part. But it is not open to a Judge hearing an appeal under R. 11 of O. 41, to admit it and at the same time to restrict the grounds on which the appeal is to be heard. AIR (V 21) 1934 Bom 207 : 36 Bom LR 451 : 58 Bom 406 : 149 Ind Cas 885 (FB).

4-a. Practice.

——O. 41, R. 11 — Deficiency of court-fee in lower Court — Power of Court of Appeal to stay hearing until deficit is paid — Proper course to be followed stated — Civil P. C. (1908), O. 41, R. 11. AIR (V 37) 1950 Pat 239.

——O. 41, R. 11 (2) — Absence of appellant — Discretion of Court to admit appeal.

Sub-Rule (2) of R. 11 of O. 41, C. P. Code, does not impose an obligation upon the Court to dismiss an appeal in the absence of the appellant. The words "may make an order that the appeal be dismissed" indicate that the Court can exercise its discretion in the matter and has jurisdiction to pass such order as it thinks proper in the circumstances of the case, other than an order dismissing the appeal. (1948) 52 CWN 517.

——O. 41, R. 11 — Summary dismissal of appeal — Important fact ignored — Revision.

A Judge ought to be very careful in exercising the summary powers of dismissal given to him under O. 41, R. 11, C. P. Code, especially a District Judge. Where the District Judge summarily dismissed an appeal entirely ignoring an important fact, the High Court will set aside his order in revision and direct the appeal to be heard after notice to the respondent. (1946) 50 CWN 200.

——O. 41, R. 11 — Appeal — It should not be disposed of on same day.

An appeal should not be disposed of on the same day on which it is presented in spite of the request of the Advocate for time to obtain the necessary record. AIR (V 28) 1941 Mad 604 : (1941) MWN 64 (1) : 53 MLW 75 (1) : 42 Cr LJ 551 : 194 Ind Cas 256.

——O. 41, R. 11 — Summary disposal.

Where in a case elaborate questions of fact fall to be decided and also questions of law, the Appellate Court should not dismiss the appeal summarily under O. 41, R. 11. The Judge should, in such a case, admit the appeal, hear the arguments on both the sides and apply his mind to the oral and documentary evidence in the case and then come to a decision, which in many cases, being decision on fact would be final between the parties.

Quaere. — Whether second appeal or only revision lies from an order of dismissal of an appeal under O. 41, R. 11 (1). AIR (V 25) 1938 Pat 608 : 19 PLT 210 : 5 BR 208 : 179 Ind Cas 292.

——O. 41, R. 11, S. 100 — Appeal dismissed summarily but judgment written and requirements of S. 100 satisfied — Second appeal — Practice of dismissing appeal summarily without due regard to questions of fact and law.

The mere dismissal of an appeal summarily under O. 41, R. 11, does not necessarily mean that no second appeal lies to the High Court. Where the lower Appellate Court has not dismissed the appeal summarily without giving any reasons but has, in effect, written a judgment, a second appeal is necessarily maintainable if the other requirements of S. 100 are satisfied.

The powers of dismissing appeals summarily ought not to be lightly used especially in cases where a perusal of the judgment itself (assisted by the contentions of the Advocates for the appellants) does not by any means make it clear that the questions at issue are extremely simple and do not require any further investigation.

A practice in Monghyr of dismissing appeals summarily without any due regard to the nature of the questions of fact and law that arise for consideration in the appeals presented to the District Judge deprecated.

(The order of the District Judge was set aside and the case remanded to him so that after hearing both the parties he might dispose of the appeal in accordance with law.) AIR (V 25) 1938 Pat 330 : 19 PLT 305 : 4 BR 389 : 174 Ind Cas 159 (DB).

——O. 41, R. 11 — Elaborate questions of fact falling to be decided — Existence of questions of law.

Where elaborate questions of fact fall to be decided and also a question of law as to whether a mahant had power to make certain grants, the case calls for an appellate judgment and the Judge should not dismiss it summarily under O. 41, R. 11, Civil P. C. AIR (V 23) 1936 Pat 505 : 17 PLT 607 : 2 BR 566 : 163 Ind Cas 142 (DB).

——O. 41, R. 11 — Date fixed by Clerk of Court — Absence of appellant on that date — Dismissal of appeal — Sufficient cause for absence — Presumption.

Under O. 41, R. 11, the Appellate Court is bound to fix a date for hearing the appellant with or without the record. The date of hearing is the one to be fixed by the Court and cannot be the one fixed by any ministerial officer. A date fixed by the Clerk of Court cannot strictly be regarded as a day for hearing the appellant and his mere absence on that day will not warrant a dismissal of his appeal. It is the practice of the Nagpur Judicial Commissioner's Court for the Judge to fix a date of hearing, with or without the record, after the appeal is received from the office. This practice strictly accords with the requirements of O. 41, R. 11.

Every presumption must be made in favour of the appellant's desire to prosecute the appeal. It is only in case there is misconduct or gross negligence on the part of the appellant that it would be just to deprive him of his right to a hearing. Where there is obviously no ulterior motive for the absence and it is apparent that the absence was due to the bona fide belief that the appeal was not to be heard on that day and that his presence was unnecessary, it must be held that he had sufficient cause for the absence. (1936) 160 Ind Cas 409 : 18 NLJ 157.

——O. 41, R. 11 — Practice — Patna High Court.

So far as Courts in the Province of Bihar and Orissa are concerned there is no practice of requiring lower Appellate Courts to write judgments in support of orders under O. 41, R. 11. There is no appeal from such orders and in dealing with such an order under a petition for revision, the High Court should merely examine the matters presented to the lower Appellate Court on the application for admission and see whether or not it (the High Court) would have acted in the same manner. The High Court itself never gives any judgment or reasons in support of its order that such an application for admission be allowed or dismissed. It is only a matter of practice with the Patna High Court that first appeals are admitted as a matter of course. Under the Civil P. C., all appeals whether from original or appellate decrees may be subjected to the preliminary test of admission and original appeals are as liable to summary dismissal as are appeals from appellate orders. AIR (V 21) 1934 Pat 341 : 15 PLT 293 : 13 Pat 540 : 150 Ind Cas 817 (DB).

——O. 41, R. 11 — Notice to respondent conditional on payment of decretal amount by appellant.

Where an appeal is put up for hearing under O. 41, R. 11, the Appellate Court has no power to make an order for issue of notice to the respondent conditional on payment of the decretal amount by the appellant. The admission or rejection of the appeal should be on the merits. AIR (V 19) 1932 All 511 : 54 All 968 : (1932) ALJ 722 : 139 Ind Cas 866 (FB).

——O. 41, R. 11 — Discretion under.

The discretion given by R. 11 of O. 41 is not an arbitrary discretion but a judicial discretion. AIR (Vol 3) 1916 Upp Bur 9: (1915) II UBR 92: 33 Ind Cas 666.

5. Review.

——O. 41, R. 11 and O. 47, R. 1 — Summary dismissal — Admission on review.

When an appeal summarily dismissed under O. 41, R. 11 is admitted on review without notice to respondents, it is not open to the succeeding Judge to question the order subsequently. AIR (V 6) 1919 Cal 502 : 50 Ind Cas 431.

——O. 41, R. 11 — Review — After dismissal of appeal under O. 41, R. 11 — Review by co-defendant after dismissal of appeal — Dismissal of appeal, effect of, on review.

Dismissal of an appeal under O. 41, R. 11, is a decree and supersedes the decree of the lower Court. Therefore, after the dismissal of an appeal, under O. 41, R. 11, the decree cannot be reviewed by the Court of first instance on the application of the appellant but in so far as a co-party who did not appeal is concerned, the decree of the lower Court is not affected by the result of the appeal and continues to be reviewable. A party, therefore, who was not appellant may apply for a review of judgment, though an appeal by a co-party is pending except in two cases first, where the ground for review and the ground for appeal is the same, and secondly, when as respondent in the appeal he can present to the Appellate Court the grounds of review. AIR (V 4) 1917 Cal 417 : 24 CLJ 517 : 21 CWN 430 : 36 Ind Cas 460 (DB).

6. Revision and second appeal.

——O. 41, R. 11 — Per Rowland, J. — Where an Appellate Court has recorded a finding of fact in dismissing an appeal under O. 41, R. 11, the findings are still conclusive in second appeal. AIR (V 26) 1939 Pat 267 : 5 BR 295 : 179 Ind Cas 803 (DB).

——O. 41, R. 11 — Decision not involving error of jurisdiction — Fact that had Court heard respondent, decision would have been different — No second appeal — Re-hearing of appeal.

Where an Appellate Court dismisses an appeal summarily under O. 41, R. 11, and there is no error of jurisdiction involved in the decision, the mere fact that the Court would have come to a different decision, had the respondent been heard, is no ground for ordering the Court, in revision, to re-hear the appeal in a case where there is no second appeal to the High Court. AIR (V 24) 1937 Pat 639 : 18 PLT 812 : 4 BR 124 : 172 Ind Cas 202 (DB).

——O. 41, R. 11 — Dismissal is decree.

Dismissal of appeal under R. 11 (1) is a decree within S. 2 (2) though not pronounced in form prescribed under O. 41, R. 31. AIR (V 13) 1926 Cal 638 : 30 CWN 334 : 93 Ind Cas 909.

——O. 41, R. 11 — Summary dismissal — Order under, whether decree — Revision.

An order under O. 41, R. 11 (1) is a "decree" from which an appeal lies, but if no decree is drawn up, the appeal, may be treated as an application for revision. AIR (V 1) 1914 Lah 174 : 191 PLR 1914 : 116 PWR 1914 : 23 Ind Cas 902 (DB).

7. Scope and object.

——O. 41, R. 11 — Distiction between sub-rr. (1) and (2) of R. 11, O. 41.

The difference between the wording of sub-r. (1) and sub-r. (2) of O. 41, R. 11, is significant. Sub-rule (2) provides for "an order that the appeal be dismissed", if the appellant does not appear when the appeal is called on for hearing. The intention is clear to make the order under this sub-rule not appealable; and for this there are two good reasons; first, the ground of dismissal under O. 41, R. 11 (2) being non-appearance, the Court has not considered and adjudicated on the question whether there is any merit in the appeal; secondly, the Code has provided another remedy under O. 41, R. 19, by application for the re-admission of the appeal, and if that application is refused, an appeal lies under O. 43, R. 1 (t). But an appellant has no such remedy when his appeal is dismissed under O. 41 R. 11, sub-r. (1). Such a dismissal has, so far as the Court pronouncing it is concerned, the finality which is an essential ingredient in the definition of "decree" in S. 2 (2), and in substance it expresses an adjudication within that definition, to the effect that the appeal is without merit. If so, "dismissal" under sub-r. (1) would amount to a decree but 'an order that the appeal be dismissed' under sub-r. (2) would not. AIR (V 24) 1937 Pat 349 : 18 PLT 321 : 3 BR 558 : 169 Ind Cas 359.

——O. 41, R. 11 — Provisions of O. 41, are not excluded from application to proceedings under the Ben. Ten. Act. AIR (V 21) 1934 Cal 26 : 59 CLJ 298 : 147 Ind Cas 194 (DB).

——O. 41, R. 11 — Summary dismissal — Grounds for.

A decree in a pre-emption suit directed the plaintiff to pay the pre-emption money within a month. The pre-emptor appealed against this condition of payment and while the appeal was pending, one month passed without his paying the money. The appeal was dismissed for non-payment within the prescribed period.

Held, that as the ground of appeal was the condition of payment, the suit should not have been dismissed. (1912) 10 ALJ 421 : 17 Ind Cas 868 (DB).

——O. 41, R. 11 — Grounds of appeal — Restriction of, on admission.

A Court cannot restrict grounds upon which an appeal admitted under O. 41, R. 11 is to be heard finally and any such restrictive order made at the time of the admission of the appeal is ultra vires. (1911) 15 CWN 921 : 14 CLJ 146 : 11 Ind Cas 212 (DB).

——O. 41, R. 11, (S. 152), (Ss. 551, 206, old Code) — Conditions precedent, effect of — Dismissal of appeal — Amendment only to appellate Court.

The admission of an appeal is a condition precedent to the exercise of the power conferred by S. 551, cl. (1), old Code. The hearing of the appellant, or his pleader, is also a condition precedent. The dismissal under S. 551, old Code is a decree and the amendment, if any, of the decree should be made by the appellate Court. (1908) 1908 AWN 109 : 5 ALJ 584 : 30 A 290 (292, 293).

——O. 41, R. 11 — Jurisdiction of Single Judge of the High Court -- Civil Procedure Code, Ss. 54, 583, 584, old Code — Second appeal — Rejection of application for admission.

A memorandum of appeal in a second appeal was presented to a single Judge of the High Court. He first directed that the record should be sent for at the expense of the applicant, and on a subsequent date made an order purporting to "dismiss' the appeal. Notice had not been issued to the respondent.

Held, that the order was in reality an order rejecting an application for the admission of the appeal and as such was within the jurisdiction of a single Judge. (1906) 1906 AWN 63 (64) (DB).

8. Time-barred appeal.

——O. 41, R. 11 — Summary rejection.

Summary rejection of an appeal as time-barred without fixing a date for hearing the appellant is in contravention of the law. AIR (V 12) 1925 Oudh 643 : 90 Ind Cas 115 : 2 OWN 678.

——O. 41, R. 11 — Time-barred appeal.

If a Judge receiving an appeal thinks, that it is time-barred, he should admit it if it is otherwise admissible, and should fix a time for hearing the applicant on the question of limitation under S. 551 (old Code), before issuing notice to the respondent. (1909) 5 LBR 15 : 2 Ind Cas 359.

——O. 41, R. 14.

——O. 41, R. 14 — Service of notice of appeal on party — Whether makes him party to appeal.

The service of a notice of appeal on a party does not make him in law a party to the appeal unless he is made a party to it. AIR (V 36) 1949 Pat 90.

——O. 41, R. 14 — Applicability — Respondents ex parte in trial Court — Attempt to serve, necessity of.

Where in an appeal the only respondents are the persons who had allowed the proceedings in the trial Court to go on ex parte, it is not desirable to apply the provisions of O. 41, R. 14, Civil P. C., without an attempt to serve at least one of them. AIR (V 32) 1945 Mad 86 : (1944) 2 MLJ 338 (DB).

——O. 41, R. 14 (Peshwar) and R. 20 — Appellant, if must implead as respondent all persons who were parties to original suit.

Order 41, R. 14, lays down the procedure as to the service of notice on the respondents and the proviso added by Peshawar Judicial Commissioner's Court makes it possible for the Appellate Court to dispense with the service of notice on those respondents who are not interested in the result of the appeal. Beyond this, the rule does not go. It does not necessarily lead to the conclusion that all the persons who were parties to the suit should de rigueur be made parties to the appeal. There is no other provision of law which denies to the appellant the right to implead only those persons whom he considers necessary and proper for the appeal. The appellant certainly runs a risk, but then he is to suffer if he commits a mistake.

X exchanged with Y's irrigated land his own banjar land. X then sold the irrigated land to Z. A, a co-sharer in the khata brought a suit for pre-emption alleging that the exchange by X was in fact a sale and impleaded X, Y and Z and his other co-sharers as defendants. The trial Court held that the transaction was sale and not exchange and decreed the pre-emptor's suit on payment of a certain amount. Y appealed and made the pre-emptor a party but did not implead other persons who were parties to the suit:

Held, that the appeal was properly constituted. The persons other than Y who were made parties to the original suit were not necessary parties to the appeal. AIR (V 29) 1942 Pesh 79 : 203 Ind Cas 91.

——O. 41, R. 14 — Effect of non-service.

The absence of service of notice on a respondent who has no interest in the subject-matter of appeal does not make the appeal incompetent. AIR (V 10) 1923 Cal 221 : 70 Ind Cas 687 : 49 Cal 1043 : 36 CLJ 217 (DB).

——O. 41, R. 14 — Extension of time.

Notice to respondent returned unserved — Application for issue of fresh notice not made within time — Time may be extended excusing delay under S. 148. AIR (V 14) 1927 Bom 68 : 50 Bom 815 : 28 Bom LR 1446 : 100 Ind Cas 147 (DB).

——O. 41, R. 14 — Excusing delay and extending time, for issuing fresh notice under C. P. Code, O. 41, R. 14, under heads 2 and 7 of R. 2 of the Appellate Side Rules can be done by a single Judge. AIR (V 14) 1927 Bom 68 : 100 Ind Cas 147 : 28 Bom LR 1446 : 50 Bom 815 (DB).

——O. 41, R. 14 — Procedure.

Per Madgavkar, J. — It is at least very doubtful whether, by reason of O. 41, R. 14, O. 9 including R. 5, as amended, applies to appeals. 25 MLJ 451, Diss. from.

Per Fawcett, J. — Order 41 contains specific rules covering corresponding cases that arise in appeal. AIR (V 14) 1927 Bom 68 : 100 Ind Cas 147 : 28 Bom LR 1446 : 50 Bom 815 (DB).

——O. 41, R. 14 — Proper service.

Where the notice of appeal was tendered to the eldest adult male member of the family residing in the same house with appellants but he refused to take the notice and it was served by affixation on the house.

Held, the service was sufficient. AIR (V 9) 1922 Oudh 268 : 69 Ind Cas 667 : 9 OLJ 439.

——O. 41, Rr. 14, 17 and 21 — Appeal — Notice to respondent — Appellant's duty to furnish address.

An Appellate Court should not presume that respondent has knowledge of the date of hearing of the appeal, if notice has not been duly served upon him. The appellant must give the correct address of the respondent who is not bound to communicate his address either to the trial Court or the appellate Court and his omission to do so is no abuse of the provisions of the Code. AIR (V 4) 1917 Lah 399 : 63 PWR 1917 : 136 PLR 1917 : 41 Ind Cas 889.

——O. 41, R. 14 and O. 9, R. 3 — Notice of appeal — Absence of date — Ex parte decree.

A Judge cannot decide an appeal ex parte when notice of appeal does not specify the date on which the appeal will be heard. AIR (V 3) 1916 Cal 513 : 36 Ind Cas 624 (DB).

——O. 41, R. 14 (2) — Service of notice of further hearing of appeal on advocate of party — Refusal by him on the ground of his not being in charge of the case — If sufficient notice.

Where a notice of the further hearing of an appeal was served on the advocate of the party but he endorsed on the notice that he was no longer in charge of the case, it would yet be "sufficient notice" to that party as the appointment of his counsel has not been terminated in one of the modes contemplated by O. 3, R. 4 (2), C. P. Code. AIR (V 37) 1950 Ajmer 40.

——O. 41, R. 16.

——O. 41, R. 16 — Lahore Amendment — Effect of the amendment is that the judgment-debtor is no longer to be considered a necessary party to the application by the assignee of a decree for the judicial recognition of his assignment. AIR (V 24) 1937 Lah 465 : ILR (1937) Lah 162 : 39 PLR 904 : 171 Ind Cas 91 (DB).

——O. 41, R. 16 — Cogent reasons to be given.

The Appellate Court will not upset the judgment of the trial Court where no cogent reasons are advanced for doing so. (1932) 137 Ind Cas 301 : 33 PLR 41.

——O. 41, R. 16 — Written arguments.

All that R. 16 compels the Court to do is to hear the argument if any addressed and not to permit written argument. AIR (V 16) 1929 Nag 89 : 11 NLJ 238 : 115 Ind Cas 173.

——O. 41, R. 16 — Appearance on adjourned date.

The Code does not mean that if a party to appeal fails to appear on the day fixed by notice on the Court's board, he has no right to appear at any other date to which the appeal is adjourned. AIR (V 13) 1926 Bom 424 : 28 Bom LR 738 : 96 Ind Cas 326 (DB).

——O. 41, R. 16 — Procedure.

A Court heard counsel for one of the parties after the case had been closed and in the absence of the counsel for the other party.

Held, that the Court acted illegally and its judgment was not valid. (1921) 63 Ind Cas 945 (DB) (Lah).

——O. 41, R. 17.

1. **Appeal.**
2. **Appearance — Meaning of.**
3. **Dismissal for default.**

See also Note 2.

4. **Dismissal on merits.**
5. **Dismissal for default of appeal from ex parte decree — Application to set aside ex parte decree.**
6. **Effect of dismissal.**
7. **Hearing of appeal ex parte.**
8. **Notice of date for hearing.**
9. **Restoration of appeal.**
10. **Revision.**

1. Appeal.

——O. 41, R. 17 — Dismissal of, against some respondents.

Though an appeal is dismissed against some of the respondents against whom the appellants did not want to proceed and who with the appellants were made defendants in the original suit, the appeal can proceed in the absence of these respondents. AIR (Vol 21) 1934 Cal 752 : 61 Cal 543 : 59 CLJ 383 : 152 Ind Cas 66 (DB).

——O. 41, R. 17 — The provisions of O. 41, Rr. 17 and 19 are equally exhaustive in the matter of appeals. AIR (Vol 14) 1927 Lah 622 : 28 PLR 554 : 103 Ind Cas 425.

——O. 41, R. 17 — Counsel appearing in Court but not arguing appeal — Appeal dismissed — Dismissal is for default and not appealable.

The mere attendance at the Court of a Counsel who is not prepared to argue the case does not amount to an appearance of the appellant within the meaning of O. 41, R. 17. The dismissal of the appeal in such a case will be only a dismissal for default and no appeal will lie from such dismissal. An application was made by a Counsel on behalf of the appellants asking for adjournment, on the ground that their Counsel was unable to appear that day. The Court refused to allow an adjournment, and the Counsel who filed the application on behalf of the appellants stated that he was not himself in a position to argue it. The Court then passed an order and referred to the judgment of the Court below as clear and well-reasoned, and remarked that there was nothing on the face of it to suggest that any mistake had been made either in law or in fact. It wound up: "The appellant's Counsel being unable to argue the appeal, I have no alternative therefore but to dismiss the appeal with costs."

Held, that the order dismissing the appeal was merely one dismissing it in default and was not appealable. (Case law discussed.) AIR (V 12) 1925 Oudh 549 : 28 OC 166 : 85 Ind Cas 811.

——O. 41, R. 17 — Order of dismissal of appeal for default is not appealable.

Order dismissing application for restoration of the appeal dismissed for default, is not a decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of High Court and so no appeal lies to Privy Council from the Order. AIR (Vol 11) 1924 Rang 208 : 2 Bur LJ 294 : 79 Ind Cas 504 (DB).

——O. 41, Rr. 17 and 22 — Dismissal under O. 41, R. 17 — Cross-objections.

When an appeal is dismissed under O. 41, R. 17, C. P. C., the cross-objections cannot be adjudicated upon the merits. When the appeal is dismissed under an erroneous impression as to procedural law, an appeal lies from the order of dismissal. AIR (Vol 1) 1914 Oudh 303 : 1 OLJ 485 : 25 Ind Cas 916.

——O. 41, Rr. 17 and 19 — Dismissal for default.

Under the C. P. C., 1908, no appeal lies against an order dismissing an appeal for default. An applicant for restoration of a suit or an appeal dismissed for default or decreed ex parte is entitled to be heard in support of the application and should be given an opportunity of proving that there was sufficient cause for his absence. (1909) 4 Ind Cas 816 (UB).

——O. 41, R. 17; O. 41, R. 19; S. 105 (Ss. 556, 558, 591 of old Code) — Order for re-admission of appeal dismissed for default not capable of being used by the appellant as a ground of objection to the decree.

An order under S. 558 of the Code of Civil Procedure re-admitting an appeal which had been dismissed for default under S. 556 is not appealable; neither is it 'an order affecting the decision of the case' which 'may be set forth as ground of objection in the memorandum of appeal' from the decree in the suit within the meaning of S. 591 of the Code. (1902) AWN 136 (137) : 24 A 464.

2. Appearance — Meaning of.

——O. 41, R. 17 — The fact that the plaintiff was personally present in Court when he had a vakil there who applied for an adjournment which was refused, is not an appearance by the plaintiff for the purposes of O. 41, R. 17. AIR (Vol 14) 1927 Mad 109 : 51 MLJ 684 : 99 Ind Cas 32.

——O. 41, R. 17 — Incapacity of pleader to argue must be treated as non-appearance.

On the adjourned date of hearing of an appeal the Court refused to grant further adjournment, and called upon the junior pleader to argue the

appeal. This the junior pleader said, he was unable to do. The Court thereupon passed the following order: "Pleader for Appellant states that he cannot argue the appeal. Vakil for Respondents ready. The appeal is dismissed for default with costs:

Held, that in order to constitute appearance by a pleader it is necessary to show that the pleader was ready to place materials before the Court upon which the Court could apply its judicial mind and that there was no appearance within the meaning of O. 41 and that order of dismissal for default was right. AIR (Vol 10) 1923 Pat 520 : 1923 PHCC 175 : 74 Ind Cas 941 (DB).

——O. 41, R. 17 — An appearance by a pleader who is instructed only to apply for adjournment is not such an appearance as is contemplated by R. 17. AIR (Vol 7) 1920 Low Bur 96 : 10 LBR 329 : 62 Ind Cas 57.

——O. 41, R. 17 — Dismissal for default — Presence of party to ask time to get pleader is not proper presence.

Mere appearance of the appellant on the date of hearing to ask the Court to give time to get his pleader, is not an appearance within the meaning of the Code. There an appeal dismissed in such a case should be readmitted. AIR (Vol 2) 1915 Cal 638 : 22 CLJ 72 : 30 Ind Cas 878 (DB).

——O. 41, R. 17 (Ss. 556, 558 old Code) — Dismissal of appeal for default — "Attend" — Adjournment applied for by Pleader refused — Default — Re-admission.

An application by a Counsel or Pleader who is instructed only to apply for an adjournment which is refused is not an appearance within the meaning of the Code. When in such circumstances an appeal is dismissed, the dismissal is one for default under S. 556, C. P. C., so as to entitle the appellant to apply for re-admission under S. 558 of the Code. 4 CWN 237, Overruled. (1907) 11 CWN 329 : 5 CLJ 247 (251) : 34 C 403 (FB).

——O. 41, R. 17 (S. 556 old Code) — "Default", meaning of — Appellant's pleader present but asking for adjournment as he is unprepared to argue the case — How far default — Duty of the Court in such cases.

When the appellant's pleader is present but asks for adjournment as he is unprepared to argue the case, not having the necessary papers, there is no default on the part of the appellant and the suit should not be dismis ed. If the adjournment is refused the proper course is to write a judgment and dispose of the appeal. (1902) 25 M 267 (DB).

3. Dismissal for default.

See also Note 2.

——O. 41, R. 17 and O. 32, R. 10 — Minor appellant — Next friend not appearing at hearing of appeal — Dismissal in default — Propriety — Court, if bound to stay proceedings.

When the plaintiff's next friend is absent at the time the suit is called on for hearing it can be properly dismissed in default under O. 9, R. 3 or O. 9, R. 8, C. P. Code, as the case may be. Similar is the case with an appeal, that is to say, when the appellant is a minor and his next friend does not appear when the appeal is called on for hearing the Court may make an order that the appeal be dismissed. The only difference between the appeal and the suit is that when the suit is called and the plaintiff is absent, but the defendant is present, the Court is bound to dismiss it in default under O. 9, R. 8, unless the defendant admits the claim or part thereof in which case a decree has to be passed upon such admission, while when the appellant is absent the Court may or may not dismiss the appeal in default even if the respondent is present. The word used in O. 9, R. 8 is "shall" and that in O. 41, R. 17, which relates to dismissal of an appeal for appellant's default is "may".

Stay of proceedings can only be ordered under O. 32, R. 10, C. P. Code, when the next friend of the minor retires, dies or is removed and the mere fact that the next friend does not put in appearance when the case is called on for hearing will not justify his removal. AIR (Vol 37) 1950 Pepsu 28 (DB).

——O. 41, R. 17 — Applicability — Dismissal of appeal on counsel for appellant refusing to argue appeal as they had no instructions.

Where the counsel engaged by an appellant refused to argue the appeal as they had not received their fees and the Court dismisses the appeal, it is not a dismissal for default of appearance but one on the merits. AIR (Vol 36) 1949 A 754: 1949 ALJ 243: 1949 AWR 354.

——O. 41, R. 17 — Party present but unable to conduct proceedings as his Pleader was absent.

Mere physical presence of a party does not mean his presence for the purpose of conducting the proceedings. Where the Vakil of the appellant was absent and the appellant who was personally present in the Court could not conduct the proceedings and the Appellate Court, therefore, summarily dismissed the appeal:

Held, that the Appellate Court's order was correct. AIR (Vol 32) 1945 Mad 300: (1945) 1 MLJ 331: 1945 MWN 328: 58 MLW 297.

——Order 41, R. 17 — Appearance in the legal sense does not mean a mere physical presence within a local area or a room or anything of that kind. It means that a party or somebody on his behalf either expressly in words or by his conduct demands an adjudication from the Court. It is possible that a party to a suit or other proceeding might physically be present in a Court and might not make his presence known to it. In these circumstances there is no appearance in the legal sense of the term.

The Court adjourned the matter for a short while and was then told that Counsel's brief of the case had been lost. It was also stated that Counsel for the appellant was busy elsewhere and could not appear in Court. The Judge directed the party to engage other Counsel and offered to allow him to use the record of the Court to prepare his arguments. Some time was allowed and after that when the case was called, Counsel who by that time had put in his vakalatnama on behalf of the appellant said that he was unfortunately unable to prepare the case and could not therefore argue on behalf of the appellant. The Court in its order explained the circumstances and finally said: "Nobody appears to argue this appeal. I therefore dismiss it with costs".

Held, that this was clearly an order dismissing the appeal for default. Neither the appellant nor his Counsel asked the Court to decide the appeal on its merits even in the absence of arguments and therefore they did not, in the legal sense put in an appearance. AIR (Vol 26) 1939 All 451: (1939) ALJ 355: 1939 AWR (HC) 366: 183 Ind Cas 453.

——O. 41, R. 17 — Appellant present but Counsel absent.

Where on the date of hearing of the appeal before the lower Appellate Court, the appellant is present but his Counsel is absent, the Court should pass orders on merits after examining judgment under appeal and the grounds of the appeal. It should not merely dismiss the appeal on the

ground that the appellant does not say anything against the order of the lower Court. AIR (Vol 24) 1937 Lah 691: 39 PLR 34: 171 Ind Cas 812.

——O. 41, R. 17 — Duty of Court — Pleaders or counsel should be sent for.

No doubt peon's calling out at the door of the Court very often proves sufficient, but when there are pleaders, the ordinary practice of sending for them should not be discontinued. In appeals especially, it is not absolutely necessary that parties should be present in person when there are constituted agents in the shape of counsels in Court and so it is conducive to good work that they should be sent for. AIR (Vol 17) 1930 All 217: 1930 ALJ 632 (DB).

——O. 41, R. 17 — Improper dismissal.

The mere unpreparedness of the appellant's counsel to argue the appeal is no ground for the Court to dismiss the appeal for default. AIR (Vol 16) 1929 Nag 89: 11 NLJ 238: 115 Ind Cas 173.

——O. 41, R. 17 — Scope.

Order 41, R. 17, is intended to give the Court power to adjourn a case, if it thinks fit. It seems distinctly unfair that for default, the appellate Court may pass an order without hearing the appellant's advocate or without hearing the appellant, which would entirely preclude him from even afterwards questioning the finding of fact. AIR (Vol 16) 1929 Rang 11: 6 Rang 612: 114 Ind Cas 302.

——O. 41, R. 17 — Remand for enquiry.

Remand for further enquiry and report on a fixed date — Appellant absenting on date fixed for enquiry — Appeal cannot be dismissed for default before date fixed for report. AIR (Vol 13) 1926 Lah 574: 96 Ind Cas 308.

——O. 41, R. 17 — Dismissal for default — Appellant present — Pleader absent.

If an appellant is appearing through a pleader and the pleader is absent but the appellant, is present in court and states that his pleader is engaged elsewhere, the mere presence of the appellant is not an appearance within O. 41, R. 17, C. P. C. 3 Pat LJ 355: 30 M 274, 45 Ind Cas 189, Foll. It is desirable to accommodate litigants to some extent if their pleaders happen to be absent in another court and have a chance of attending within a short time so as not to disturb the business of the Court. AIR (Vol 7) 1920 Pat 373: 5 Pat LJ 17: 1 Pat LT 156: 54 Ind Cas 715 (DB).

——O. 41, Rr. 17 and 19 — Dismissal for default — Pleader — 'No, instructions' — Procedure.

If appellant's pleader intimates to the Court that he has no instructions to argue the appeal, the judge must dismiss the appeal under O. 41, R. 17, C. P. C., so that the appellant may have the opportunity of applying readmission of his appeal under O. 41, R. 19. AIR (Vol 6) 1919 Pat 521: 51 Ind Cas 46.

——O. 41, R. 17 — Default — Translation or copying charges not paid.

A Court has power to dismiss a suit or appeal. Where the material essential for the progress of the case such as translation of vernacular documents, preparation of copies, etc., are wanting owing to the plaintiff's or appellant's default. AIR (Vol 6) 1919 Low Bur 139 : 9 LBR 266 : 47 Ind Cas 691 (DB).

——O. 41, Rr. 17 and 19 — One vakil refusing to appear in absence of another — Negligence.

Where two vakils appeared for an appellant and adjournment of an appeal, sought on the ground that the better of the 2 vakils was absent from the station was refused and the appeal was dismissed for default: Held, (1) that the vakil's conduct amounted to a very gross neglect of the client's interests. (2) that there was no sufficient ground for setting aside the order of dismissal for default as condonement of such negligence can result only in its continuance. AIR (Vol 3) 1916 Pat 388 : 1 Pat LJ 65 : 35 Ind Cas 429 (DB).

——O. 41, R. 17 — Dismissal for default — Pleader unable to argue.

Where the pleader is present but is prevented by physical disability from arguing the case, there is no default. (1911) 9 Ind Cas 857 (All).

——O. 41, R. 17 — Pleader present.

Where a pleader for the applicant requested the Court to postpone the case as he was not prepared, the Court is right in refusing to postpone it, but it should not dismiss the appeal for default. (1902) 2 Ind Cas 621 (All).

4. Dismissal on merits

——O. 41, R. 17 — Interpretation.

By the words "the Court may make an order that the appeal be dismissed" it is meant that the Court may dismiss the appeal or may adjourn it to some other date or pass other order, but the Court is not authorised to consider an appeal in the absence of the appellant and decide it on merits. The law contemplates that the appellate Court must hear both parties to the appeal and then decide it according to its judgment. AIR (Vol 16) 1929 Cal 475 : 56 Cal 412 : 119 Ind Cas 129 (DB).

——O. 41, R. 17 — Discretion.

The power under R. 17 is discretionary. Therefore where that is not exercised in a case where the appellant is absent, the only alternative is to adjourn the case to give an appellant an opportunity of being heard. If the appeal is to be decided on merits it must be decided under R. 30 only after hearing the parties or their pleaders. AIR (Vol 12) 1925 Rang 96 : 4 UBR 164 : 76 Ind Cas 166.

——O.41, R. 17 — Under O. 41, R. 17 Court should not dismiss the appeal on the merits. AIR (Vol 11) 1924 All 144 : 45 All 669 : 21 ALJ 667 : 5 LRA Civ 26 : 74 Ind Cas 905 (DB).

——O. 41, R. 17 — Pleader only instructed to apply for adjournment — Party must be deemed to be unrepresented — Order on merits is ultra vires.

Where a pleader is only instructed to apply for an adjournment and is in no position to argue the merits of the appeal, and has not studied the appeal and has been given no papers, the party must be deemed to be unrepresented. Under the old Code, the Court apparently had no power to adjourn the appeal in order to give the absent appellant a further opportunity to put in an appearance. Under the present Code that course is ordinarily open to it. This seems to be the object of the change. Where an order under O. 41, R. 17 ought to have been passed, and the Judge decided the case on merits, held the order was ultra vires. AIR (Vol 10) 1923 Mad 13 : 45 Mad 882 : 16 MLW 434 : 1922 MWN 604 : 43 MLJ 317 : 69 Ind Cas 513 (DB).

——O. 41, R. 17 — Powers of Court.

Where the plaintiff does not appear and the defendant appears, there is no discretion left in the trial Court as is given to the Appellate Court under O. 41, R. 17. While the first Court is bound to dismiss the suit for default under O. 9, R. 8, the Appellate Court is not bound to make an order that the appeal be dismissed, if appellant is absent and respondent appears, but it has jurisdiction to decide the appeal on merits. AIR (Vol 8) 1921 Pat 325 : 2 PLT 36.

——O. 41, R. 17 — Appellant present — Pleader absent — Appeal dismissed without going into merits.

An appeal cannot be dismissed without going into the merits where the appellant was present but his pleader was absent and the appellant on being asked to argue his case said that he had nothing to say as he was a layman. The Court should have considered the grounds of appeal and decided the case on the merits. (1913) 35 All 105 : 11 ALJ 18 : 18 Ind Cas 364 (DB).

5. Dismissal for default of appeal from ex parte decree — Application to set aside ex parte decree.

——O. 41, R. 17 — Effect of.

An order dismissing an appeal for default, is not a decree and therefore the decree of the Court of 1st instance is not superseded by it nor does it merge into it. Therefore if an appeal from an ex parte decree is dismissed for default, the first Court can allow application to set aside that ex parte decree. AIR (Vol 4) 1917 All 392 : 39 All 393 : 15 ALJ 286 : 39 Ind Cas 519.

6. Effect of dismissal.

——O. 41, R. 17 — Applicability — Appeal — Party and counsel present at hearing — Counsel requesting adjournment on ground of having been unable to study record and being unable to argue case — Party also not arguing — "Dismissal in default" — Effect of — Application for restoration under O. 41, R. 19 — Competency.

On the day fixed for the hearing of an appeal, the appellant applied for an adjournment on the ground that she had not been able to engage a counsel. The Court adjourned the appeal to the next day, intimating that the appellant might, if she liked, engage and instruct a counsel in the meanwhile. On the next day the appeal was called, and the appellant and her Counsel were present. Counsel for appellant stated that as the record was very bulky he had not been able to study it and therefore could not argue the appeal. The appellant also was unable to advance any arguments in support of the appeal. The Court dismissed the appeal "in default", on the ground that there was no reason for adjournment and that no one was prepared to argue the appeal on behalf of the appellant.

Held, that the words "in default" in the order of dismissal did not imply default, in appearance and the default lay in the refusal to argue the appeal and to show that the decree under appeal was not sustainable. Order 41, R. 17 C. P. Code, did not therefore apply to the case and hence an application for restoration under R. 19 of O. 41, was misconceived and incompetent. AIR (Vol 36) 1949 EP 86 (DB).

——O. 41, R. 17 — Order under, whether a final order.

An order under O. 41, R. 17, is a judicial order. It may not be a judicial order dealing with the merits of the appeal, but it is certainly a judicial order dealing with the matter before the Appellate Court and such an order dismissing an application in default is a final order within the meaning of Art. 182, Col. 3, Cl. (2), Lim. Act. AIR (Vol 22) 1935 Lah 771 : 16 Lah 564 : 37 PLR 727 : 161 Ind Cas 122 (DB).

——O. 41, R. 17 — The effect of the dismissal of the appeal for default is to put the parties in the same position as if there had been no appeal or as if it had been dismissed on the merits. AIR (Vol 10) 1923 Nag 1 : 7 NLJ 163 : 68 Ind Cas 239.

7. Hearing of appeal ex parte.

——O. 41, R. 17 — Respondent absent, Court duty of — U. P. Land Revenue Act, S. 219.

Under O. 41, R. 17 (2) the Court is bound to hear the appeal and record a judgment even though the respondent is absent. Failure to do so is a material irregularity within the meaning of S. 219 of the U. P. Land Revenue Act, and the Board of Revenue can interfere. (1920) 2 UPLR (BR) 26 : 56 Ind Cas 386.

8. Notice of date for hearing.

——O. 41, Rr. 17, 19 — Adjournment.

When the plaintiff and the defendant are informed to appear on a particular date and an adjournment is made on that date in the absence of the defendant it is unfair to expedite the date of hearing without notice to the defendant. (1940) 42 PLR 271.

——O. 41, R. 17 — Where no date is fixed for the hearing of an appeal and no notice is given to the parties of any date on which the hearing of the appeal would be taken up, an order dismissing the appeal for default is without jurisdiction. AIR (Vol 11) 1924 Lah 279 : 69 Ind Cas 618.

9. Restoration of appeal.

——O. 41, Rr. 17 and 19 — Applicability — Appeal — Notice of hearing date not served on appellant — Dismissal under error — If one for default — Restoration — Inherent powers — Limitation — Limitation Act, Art. 168 — Inherent powers — C. P. Code, S. 151.

An order dismissing an appeal for default can fall under O. 41, R. 17, only if the dismissal is on a date of which the appellant has notice. When the appellant has had no notice of the date, the order of dismissal is not one falling under O. 41, R. 17, C. P. Code, and hence neither R. 19 of O. 41, nor Art. 168, Limitation Act, will apply. Where the Court takes the file on a certain date of which the appellant has no notice and dismisses the appeals under some error, it is not a legal dismissal, and the Court can rectify the error at any time in the exercise of its inherent powers. AIR (Vol 36) 1949 All 36 : 1948 AWR (HC) 310 (1).

——O. 41, R. 17 — Appellant and his pleader not prepared to address Court — Appeal dismissed for default — Meaning of such order — Restoration.

Where the appellant and his pleader are not prepared to address the Court there is no hearing and therefore nothing is shown to the Appellate Court as to why it should interfere with the decision of the Court below. The burden of proof is on an appellant to show that the decision which he appeals from was wrong and where he does not address the Court at all, there is no point raised for determination and it is not necessary, therefore, to give a decision on any point or the reasons for the decision. It is sufficient for the Court to pass an order of dismissal for default. Such an order does not necessarily mean that the appeal is dismissed for default of appearance. In such circumstances, the order means that the appeal is dismissed for default of proof and not for default of appearance. Such a case therefore does not fall under O. 41, R. 17, Civil P. C., and an application for restoration does not lie. AIR (Vol 27) 1940 All 248 : (1940) ALJ 126 : ILR (1940) All 220 : 1940 AWR (HC) 157 : 189 Ind Cas 163 (DB).

——O. 41, Rr. 17, 19 — Restoration.

When a Counsel remained in Court to argue his appeal from 10 A.M. to 3-20 P.M. when he goes to attend his case in another Court, the Court did not exercise a sound judicial discretion in dismissing the appeal at 3-50 P.M. or in refusing to set aside his order on the following day. (1933) 40 PLR 76.

——O. 41, R. 17 — Notice to Counsel but not to party.

When a Judge takes it upon himself to give notice of the hearing not only to the Counsel but also to the party, he ought to in ordinary fairness, wait until the notice was duly served upon the party, especially in view of the fact that the

Counsel had noted on the notice issued to him that he was enaged only to argue the appeal at a particular place. Under the circumstances, the Judge ought not to take the drastic step of dismissing the appeal for default and should restore the appeal. AIR (Vol 23) 1936 Lah 209 : 37 PLR 779 : 161 Ind Cas 218.

——O. 41, R. 17 — Restoration — Counsel appearing immediately after dismissal.

Where the Counsel engaged on behalf of the appellant who was a pardanashin lady, came to the Court almost immediately after the order of dismissal of the appeal in default and represented that as there was a lengthy appeal above his case in the cause list, he did not expect his case to be called so soon as that, he was busy in another part of the Court:

Held, that the default should be excused and appeal restored, particularly in view of the fact that the interests of a pardanashin lady were involved. AIR (Vol 19) 1932 Lah 65 (1) : 33 PLR 85 : 134 Ind Cas 120.

——O. 41, R. 17 — Restoration.

It is not open to an appellate Court to dismiss an application to restore an appeal dismissed under R. 17 for default without giving the appellant an opportunity as required by R. 19, O. 41. AIR (Vol 14) 1927 Cal 888 : 104 Ind Cas 347 (DB).

——O. 41, R. 17 — Inherent powers.

Suits or appeals dismissed for default under O. 9, R. 8, or O. 41, R. 17, can only be restored if sufficient cause is shown and the Courts, in the absence of such sufficient cause being shown are precluded from invoking in aid their inherent powers under S. 151. AIR (Vol 14) 1927 Lah 622 : 28 PLR 554 : 103 Ind Cas 425.

——O. 41, R. 17 — O. 41, Rr. 17 and 19 are exhaustive in respect of cases where an appellant has made default in appearance in an appeal, and the Court has no inherent power under S. 151, C. P. Code, or otherwise, to restore an appeal dismissed for default. AIR (Vol 11) 1924 Mad 114 : 45 MLJ 813 : 47 Mad 171 : 33 MLT 207 : 18 MLW 870 : 76 Ind Cas 836 (DB).

——O. 41, Rr. 17 and 19 — Dismissal for default — Restoration — Sufficient cause.

Where an appeal was transferred by the District Judge from one Subordinate Court to another without notice to any party and the appellants were thereby unable to be present in the latter Court at the time the case was called on, held, that sufficient cause has been shown to restore the appeal dismissed for default. AIR (Vol 6) 1919 Cal 1058 : 46 Ind Cas 881 (DB).

——O. 41, Rr. 17 and 19 — Restoration of appeal — Dismissed for default.

A Court has the discretionary power to restore an appeal dismissed owing to the negligence of the applicant's pleader, where the applicant himself has shown all possible diligence towards causing appearance to be made. (1912) MWN 332 : 11 MLT 280 : 22 MLJ 284 : 14 Ind Cas 823 (DB).

——O. 41, R. 17 — Dismissal for default — Sufficient cause for absence of a party.

In the case of appeals dismissed for default at an early part of the day under R. 17, the Court should give further opportunity to the defaulting party before its rising to show whether he was present or not. If the appellant can give a reasonable excuse for his own absence the pleader's absence in a case need not be satisfactorily explained. 34 PLR 1910 : 8 Ind Cas 226.

——O. 41, R. 17 (S. 558 old Code) — Suit decided on grounds affecting all defendants equally — Appeal dismissed for default — Death of one defendant-appellant pending appeal — Application by surviving appellants for restoration.

A suit was decreed against several defendants on the grounds common to all. The defendants appealed and after the filing of the appeal one of them died. Ultimately the appeal was dismissed for default of appearance, no steps having meanwhile been taken to bring on to the record the representatives of the deceased appellant. Held that inasmuch as it would have been competent to one only of the defendants, having regard to S. 244 of the Code of Civil Procedure, to appeal against the whole decree, there could be no objection to the surviving defendants applying for restoration of appeal. (1901) AWN 192 (193).

10. Revision.

——O. 41, Rr. 17, 30, 31 — Absence of appellant on date of hearing — Order dismissing appeal for non-appearance — Revision.

Where on the day fixed for the hearing of an appeal, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court is entitled to make an order that the appeal be dismissed. It is not the duty of the Judge to proceed in the manner laid down in O. 41, Rr. 30 and 31, Civil P. C.

No revision lies from an order passed by the Court that the appeal be dismissed as the appellant did not appear on that day which was the day fixed for the hearing of the appeal. AIR (Vol 27) 1940 All 310: (1940) ALJ 121: 1940 AWR (H C) 156: 190 Ind Cas 656 (DB).

——O. 41, R. 18.

——O. 41, R. 18 — The provisions of R. 18 read with Art. 168, Lim Act are exhaustive. There is no inherent power remaining to the High Court ex debito justitae to allow appeals which are time-barred or to set aside an order dismissing an appeal under S. 41, R. 18, Civil P. C. AIR (Vol 30) 1943 Sind 132: ILR (1943) Kar 409 : 209 Ind Cas 326 (DB).

——O. 41, R. 18 — Grounds for dismissal.

Appeal dismissed against respondent who is necessary party and order not appealed against — Whole appeal abates — Appeal being imperfectly constituted Court cannot make contradictory decrees. AIR (Vol 17) 1930 Cal 346.

——O. 41, R. 18 — There is no distinction in principle or substance between an appeal dismissed on the day fixed for the hearing for default in payment of process fee under O. 41, R. 18 and an appeal dismissed before the hearing for default in payment of process fee or of the costs of preparing the paper book. They stand upon the same footing and cannot be differentiated and an application to restore an appeal in the one case is ejusdem generis with similar applications in the other cases. In each instance the appeal is dismissed for want of prosecution and to an application to restore any such appeals Art. 168, Lim. Act, applies. (Case-law referred.) AIR (Vol 17) 1930 Rang 228 (FB).

——O. 41, R. 18 — Notice to respondent not served —Failure of appellant to supply identifier is no ground for dismissal of appeal. AIR (Vol 10) 1923 Pat 114: 65 Ind Cas 49: 3 PLT 498 (DB).

——O. 41, R. 18 — An appeal lies under Cl. 10 of the Letters Patent from the order of a Judge in chambers rejecting an application under O. 41, R. 19, C. P. Code, for the re-admission of an appeal dismissed in default. AIR (Vol 13) 1926 Lah 617: 89 Ind Cas 795 (DB).

——O. 41, R. 18 — Order not appealable.

No appeal lies against an order passed under O. 41, R. 18, and to avail itself of the provisions of O. 41, R. 18, it is the duty of the Appellate Court to

fix a date by which the process fees are to be paid. AIR (Vol 6) 1919 Lah 203: 169 PR 1919: 52 Ind Cas 179.

——**O. 41, R. 18 — Talabnama deposited — Notice to respondent not filed — Dismissal of appeal, if valid.**

A dismissal of appeal is wrong if it is made under O. 41, R. 18 when the Talabnama has been deposited but the notice to the respdt. for the issue of process has not been filed. (1912) 16 CWN 498 : 15 CLJ 683 : 13 Ind Cas 694 (DB).

——**O. 41, R. 18 (S. 557 old Code) — Dismissal of appeal on failure to deposit costs of effecting service.**

A Judge has no jurisdiction to dismiss an appeal before the date fixed for hearing on the ground that the talabana had been paid late and that, without ascertaining that service could not be effected before the hearing day. (1908) 35 C 535 (536) (DB).

——**O. 41, R. 19.**

1. **Scope.**
2. **Sufficient cause.**
3. **Who can apply.**
4. **Limitation.**
5. **Inherent powers.**
6. **Non-payment of printing costs.**
7. **Default in depositing process fees.**
8. **Deficiency in court-fee.**
9. **Other remedy.**
10. **Right of fresh appeal.**
11. **Notices.**

1. Scope.

——**O. 41, R. 19 — Applicability — Counsel asking for adjournment and on its refusal reporting no instructions — Dismissal — Restoration — Interference in revision.**

Where on the day of the hearing of an appeal, the appellant is absent but his counsel asks for an adjournment and on its refusal reports no instructions and the appeal is dismissed for default and it is later on restored on the application of the appellant, the case falls under R. 19 of O. 41, C. P. Code. The order of restoration is not open to revision. (1947) 1947 OA (CC) 363: 1947 AWR (CC) 363: 1947 OWN 541.

——O. 41, R. 19 — Order 41, R. 19 is not applicable in a case where the date on which the appeal was rejected under O. 41, R. 10 (2) was not fixed for the hearing of the appeal. An order therefore refusing to restore the appeal so rejected is not appealable. No power is vested in the Court to allow the appellant to proceed with his appeal even if he is put to great hardship in not allowing him to proceed with it. AIR (Vol 26) 1939 All 733: ILR (1940) All 19 : (1939) ALJ 998: 1939 AWR (HC) 739: 187 Ind Cas 31.

2. Sufficient Cause.

(a) **Counsel's negligence.**
(b) **Default of counsel.**
(c) **Default of party.**
(d) **Counsel's pre-occupation before another court.**
(e) **Counsel's duty.**
(f) **Absence of knowledge of the date fixed.**
(g) **Practice of court.**
(h) **Guiding principle.**
(i) **Counsel's error.**

(a) Counsel's Negligence.

——**O. 41, R. 19 — Sufficient cause — Counsel's negligence.**

If the counsel to whom an appeal is entrusted does not perform his duty by his client, the latter has a remedy against him but the negligence of counsel in not appearing to argue the appeal will not constitute a sufficient cause for readmitting the appeal nor will it absolve the client of his responsibility to prosecute the appeal with due diligence. AIR (Vol 35) 1948 Oudh 116: 23 Luck 22: 1947 OWN 579: 1947 OA (C C) 383: 1947 AWR (C C) 383 (DB).

——**O. 41, R. 19 — Failure of Counsel to ascertain before what Bench the case was to be heard.**

It is the duty of Counsel to ascertain what cases he has on a particular day and his failure to carry out the duty is due to negligence and is not sufficient excuse for seeking to get the dismissal for default set aside. AIR (Vol 20) 1933 Lah 1043 (1): 35 PLR 313: 147 Ind Cas 698 (2) (DB).

——O. 41, R. 19 — Laches of an advocate is not sufficient ground for restoration of appeal either under R. 19 or under S. 151. AIR (Vol 13) 1926 Rang 50: 3 Rang 488: 92 Ind Cas 208.

——**O. 41, R. 19 — Restoration — Neglect of pleader.**

Neglect of the advocates for which no adequate excuse is put forward is no ground for restoring an appeal dismissed for default of appearance. (1909) 5 LBR 44: 2 Ind Cas 538.

(b) Default of Counsel.

——**O. 41, R. 19 — Case last on list called earlier — Very short time given for calling Pleader.**

Where a case which was last in the list was called earlier in order and in time and the Court allowed only five minutes' time to call Counsel and the case was dismissed in default:

Held, that an application to set aside the dismissal should be granted, regard being had to the distance between that Court and the other Courts. AIR (Vol 19) 1932 Lah 387: 33 PLR 420: 138 Ind Cas 702.

——O. 41, R. 19 — Late appearance of appellants' pleader owing to rain is not sufficient reason for restoration. AIR (Vol 13) 1926 Cal 1152: 96 Ind Cas 377 (DB).

(c) Default of party.

——**O. 41, R. 19 — Illness of party.**

Where an appeal is dismissed or the cross-appeal is decreed ex parte, and the appellant or the respondent have engaged counsel, mere illness of the party is not sufficient reason. He must account for the absence of the counsel at the hearing. (1929) 117 Ind Cas 382 (Lah) (DB).

(d) Counsel's pre-occupation before another Court.

——**O. 41, R. 19 — Sufficient cause — Counsel's pre-occupation before another Court.**

The counsel's pre-occupation before another Court when the appeal was called on for hearing is not a sufficient cause within O. 41, R. 19, C. P. Code, for restoration of the appeal dismissed for default. AIR (Vol 35) 1948 Oudh 116: 23 Luck 22: 1947 OWN 579: 1947 OA (C C) 383: 1947 AWR (C C) 383 (DB).

——O. 41, R. 19 — Absence of appellant's pleader on account of his being busy in another Court when the appeal is called on for hearing is sufficient cause for restoration of the appeal and High Court will set aside an order rejecting an application for restoration in such case. AIR (Vol 13) 1926 Cal 1231: 44 CLJ 165: 97 Ind Cas 573 (DB).

——O. 41, R. 19 — When a pleader is engaged in another Court some one should be left behind to inform the Court of the fact, so that, if it likes it can take up some other business. The disappearance of every person connected with the party, in

the hope that the Court will be compelled to wait for the pleader, is certainly a wrong method and if the appeal is dismissed, the appellant will not be granted a re-hearing. AIR (Vol 12) 1925 Oudh 234: 79 Ind Cas 550.

——O. 41, R. 19 — **Restoration — Non-appearance of pleader — Whether a sufficient cause.**

The non-appearance of the pleader due to his engagement in another court is not a sufficient cause for the restoration of an appeal dismissed for default. AIR (Vol 1) 1914 Cal 763: 24 Ind Cas 826 (DB).

(e) Counsel's duty.

——O. 41, R. 19 — Where a Judge for any reason orders a case which is before him for hearing, to be put down lower in the list, he need not give notice to the pleader of the parties. Counsel are expected to be present within the compound of the Court if they have got any case in the list. If an appeal is dismissed for default in such case it cannot be reinstated. AIR (Vol 11) 1924 Lah 189: 71 Ind Cas 813.

——O. 41, R. 19 — **Counsel arguing another case in another Court.**

Where the legal practitioner knew that he was not likely to be able to argue the appeal when called and made no arrangement for another counsel, Held, this was not sufficient cause for restoration. AIR (Vol 10) 1923 Lah 97: 68 Ind Cas 785 (DB).

——O. 41, R. 19 — **Restoration — Sufficient cause— Pleader's duty.**

Pleaders must attend the case, or appeal when it is called on for hearing; it is not the court's duty to send for a pleader or to look to their convenience. (1910) 5 Ind Cas 120 (All) (DB).

(f) Absence of knowledge of the date fixed.

——O. 41, R. 19 — Absence of knowledge of the date fixed for the hearing of the appeal is a sufficient cause for failure to appear when the appeal is called on for hearing within R. 19. AIR (Vol 14) 1927 Lah 365: 101 Ind Cas 203.

——O. 41, R. 19 — Where the appellant did not know the date of the hearing of the appeal and the vakil with whom he had entrusted the case had died and in these circumstances the Subordinate Judge held there were sufficient reasons to excuse appellant's absence.

Held, that the restoration of the appeal after default was justified. AIR (Vol 13) 1926 Mad 1210: 97 Ind Cas 687 (DB).

(g) Practice of Court.

——O. 41, R. 19 — **Application to set aside dismissal of appeal for default — Previous negligence on the part of appellant in prosecution of appeal — If can be made a ground for refusing restoration.**

Where an application is made under O. 41, R. 19 of the Civil Procedure Code, to set aside the order of dismissal for default of an appeal and restore the same to file, if there were valid excuses for the petitioner's absence on the date when the appeal was dismissed for default, the previous negligence or want of diligence on th part of the appellant to prosecute the appeal should not be made a ground disentitling him for restoration. AIR (Vol 37) 1950 Mad 573: 63 LW 441: 1950 MWN 420 (1): (1950) 1 MLJ 719.

——O. 41, R. 19 — **Restoration — Appeal fixed as last on cause list taken up first — Appellant and his Pleader being absent appeal dismissed.**

No general rule of universal application can be laid down in matter of application for restoration of appeals. Each case has to be decided on its own facts.

An appeal was fixed for hearing on a certain date as the last on the cause list. It was however called out at 11-30 on that date and as neither the appellant nor his Pleader were present the appeal was dismissed in default. Within a few minutes of the dismissal, an application for restoration was made, supported by an affidavit, in which it was stated, that the appellant could not be present as he was attending another case in another Court at the time, and that the Pleader seeing that the case was last on the list, had gone away to the Bar room expecting that the case would not be taken up for some time :

Held, that as the absence of the appellant or his Counsel was not intentional, in the peculiar circumstances of the case, there was sufficient ground for restoration of the appeal on payment of costs. AIR (Vol 26) 1939 Lah 267: 41 PLR 97.

——O. 41, R. 19 — **Appeal summarily dismissed — Restoration application dismissed on ground of "Court discipline" — No investigation on merits.**

Courts exist not for the purpose of imposing discipline on practitioners or parties but for the purpose of administering justice.

Therefore, an order rejecting an application for restoration of an appeal which has been summarily dismissed, should state reasons for its rejection and the application for retoration should be investigated on merits. The mere reason that the application is dismissed on the ground of "Court discipline" is not sufficient and such an order will be set aside. AIR (Vol 24) 1937 Pat 624: 172 Ind Cas 155: 4 BR 111 (DB).

——O. 41, R. 19 — An application for restoration under O. 41, R. 19 should not be dismissed in default without giving the appellant any opportunity of being heard. AIR (Vol 17) 1930 Lah 112: 120 Ind Cas 791.

——O. 41, R. 19 — **Dismissal at unexpected time.**

Where the appeal which was the 17th on the list of appeals was called on unexpectedly at 12-30 p.m. and dismissed for default.

Held, that the case should be restored on payment of costs. AIR (Vol 13) 1926 Rang 109: 4 Rang 18: 5 Bur LJ 8: 95 Ind Cas 521.

——O. 41, R. 19 — **Transfer of appeal.**

Transfer of appeal from Dt. Judge to Addl. Dt. Judge — Appellant ignorant of transfer and hence absent — Appeal dismissed for default — Dismissal should be set aside. AIR (Vol 12) 1925 Cal 500: 79 Ind Cas 319 (DB).

——O. 41, R. 19 — Where soon after the appeal was dismissed for non-appearance of the appellant or his pleader, but soon after the appellant's pleader appeared and satisfied the Court that failure to appear was wholly unintentional, the appeal was restored. (1924) 79 Ind Cas 504: 5 LLJ 89.

——O. 41, R. 19 — Appeal dismissed for default — Both parties asking for restoration and praying compromise to be filed — Court should restore appeal. AIR (Vol 10) 1923 Cal 319: 68 Ind Cas 448 (DB).

——O. 41, R. 19 — **Restoration — Sufficient cause — Transfer of cause — Notice to parties affected — Omission to give — Disposal of appeal in absence of parties.**

Where on a transfer of an appeal from the Dt. Judge's to the Subordinate Judge's Court, there was nothing to show that the information was communicated to the parties or their pleaders, the appellant had a very good cause for not appearing when the case was called on. AIR (Vol 5) 1918 Pat 341: 3 Pat LJ 218: (1918) Pat HCC 17: 4 Pat LW 75: 43 Ind Cas 925 (FB).

——O. 41, R. 19 — **Restoration — Sufficient cause — Date of hearing postponed but not communicated.**

Where an order of postponement of a case was not communicated to any of the parties concerned and the appeal was dismissed for default of appearance on the part of appellant. Held, that there was sufficient cause for restoration of the appeal. AIR (Vol 3) 1916 All 326: 32 Ind Cas 936 (DB).

(h) Guiding principle.

——O. 41, R. 19 — **"Sufficient cause" — Default of counsel not intentional nor due to negligence.**

No general rule can be laid down for dealing with application for restoration of appeals. Each case has to be decided on its own facts. Where the default of the counsel is not intentional and cannot be attributed to negligence on his part, there is sufficient ground for restoration of the appeal on payment of costs. AIR (Vol 36) 1949 Ajmer 18 : 1949 AMLJ 101.

——O. 41, R. 19 — **Sufficient cause — Judicial decisions — Value of.**

The question whether sufficient cause for readmission of an appeal dismissed for default has been made out or not is not one which can be decided with the aid of judicial decisions, except in so far as the decisions lay down any principle of universal application. Each case must depend upon its special facts and must be determined upon its own circumstances. There can be no hard and fast rule in determining a simple question of fact as this. AIR (Vol 35) 1948 Oudh 116 : 1947 AWR (CC) 383 : 23 Luck 22 : 1947 OWN 579 : 1947 OA (CC) 383 (DB).

——O. 41, R. 19 — **Restoration of appeal — Considerations.**

It cannot be held that an appeal should be restored unless something equivalent to misconduct or gross negligence is shown on the part of the defaulting appellant. The sound view to take would be to consider whether tht applicant has made out a sufficient cause and where the applicant has failed to show due diligence in the prosecution of his case, he is not entitled to restoration of the appeal. AIR (Vol 35) 1948 Oudh 116 : 1947 AWR (CC) 383 : 23 Luck 22 : 1947 OWN 579 : 1947 OA (CC) 383 (DB).

——O. 41, R. 19 — **Application to set aside order of dismissal for default — Considerations — Non-appearance due to default of Counsel.**

In dealing with application to set aside an order of dismissal for default, the Court has to consider the position of the party concerned rather than the conduct of the members of the bar though it may sometimes be difficult to dissociate the one from the other. As regards the position of the party, a litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot bt set right by his being ordered to pay costs; where the non-appearance is due to the default of the Counsel engaged in the case, a similar consideration will mutatis mutandis be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his Counsel. This consideration is all the more weighty when dealing with cases of default in appearance before the High Court, because it may sometime happen that the party is not present here at all, having entrusted his case to Counsel. It will be unmerited hardship if the party's interests should be irreparably prejudiced by reason of every default on the part of the Counsel.

Dictum.—Every endeavour is expected to be made to maintain, and if possible, improve upon the traditions of cordiality between the Bench and the bar and that no endeavour will be lacking on the part of the members of the bar to facilitate the disposal of work before the Court as far as possible. AIR (Vol 24) 1937 Mad 503 : (1937) MWN 195 : (1937) 1 MLJ 632 : 45 MLW 717 : ILR (1937) Mad 607 : 171 Ind Cas 533.

——O. 41, R. 19 — **Re-admission of appeal — Opportunity to produce proof that appellant was prevented from appearing.**

Order 41, R. 19, indicates that an appellant is entitled to produce proof that he was prevented from appearing upon the day fixed for hearing and that if he can prove that he was prevented by sufficient cause, his appeal shall be re-admitted.

Where the appellant was not allowed any opportunity to produce proof, and there was nothing before the Court to indicate whether he had been prevented from appearing by sufficient cause or not :

Held, that the case must be decided upon its merits after an opportunity is given for the production of proof. AIR (Vol 22) 1935 Pesh 110 (1) : 157 Ind Cas 171.

——O. 41, R. 19 — **Adjourned date correctly entered in cause list — Summary dismissal of — Opportunity to be given to appellant.**

Where although the adjourned date of hearing of an appeal was correctly entered in the cause list, the appellant did not enter appearance and the appeal was, therefore, dismissed and subsequently his application for restoration was dismissed by the Court relying on the entry in the cause list :

Held, that the lower Court overlooked the fact that a bona fide mistake might have been made about the date and that an opportunity should have been given to the appellant to prove his case and the appeal should not have been dismissed summarily. AIR (Vol 20) 1933 Pat 128 : 142 Ind Cas 576 (DB).

——O. 41, R. 19 — **Duty of Court to allow applicant to substantiate his plea.**

Where an appeal is dismissed for default of appearance and the appellant applies for restoration of the appeal he must be given an opportunity to substantiate his plea. (1931) 132 Ind Cas 5 : 31 PLR 969.

——O. 41, R. 19 — Where an application is made for restoring an appeal dismissed for default of appearance the Court should give the party an opportunity to substantiate his plea. (1930) 31 PLR 969.

——O. 41, R. 19 — **Proof of.**

When an application for re-admitting an appeal dismissed for default, is made, it should be treated as a miscellaneous matter and the applicant should be given an opportunity to show that he was prevented by any sufficient cause from being present when the appeal was called on for hearing. AIR (Vol 12) 1925 Cal 269 : 82 Ind Cas 330 (DB).

——O. 41, R. 19 — **Restoration - Procedure.**

When an appeal is dismissed for default the applicant should be given an opportunity of proving sufficient cause before rejecting his application for restoration of appeal. AIR (Vol 7) 1920 Cal 663 : 57 Ind Cas 762 (DB).

——O. 41, R. 19 — **Dismissal for default — Application to restore — Summary rejection.**

An application to restore an appeal dismissed for default, an appellant cannot be rejected summarily without giving appellant the opportunity to establish the grounds set forth therein. Whether there is or is not any reason why the appellant's counsel should not have been present is

immaterial, if the applicant himself was quite in and unable to attend. AIR (Vol 6) 1919 Lah 276 : 38 PWR 1919 : 69 PLR 1919 : 52 Ind Cas 926.

——O. 41, R. 19 — Restoration — Sufficient cause — Pleader's mistake.

Though error of a pleader in noting a wrong date in his diary as the date of the appeal was not a sufficient cause for restoring the appeal dismissed for default, the Court could have passed an order of restoration if it considered that a case for such an order had been made. As the default was not intentional and was due to a bona fide error of appellant's pleader, the Court should in the case have passed such an order. AIR (Vol 6) 1919 Lah 105 : 53 PR 1919 : 51 Ind Cas 607.

(i) Counsel's error.

——O. 41, R. 19 — Mistake of pleader.

Obiter—Judicial decision of high authority favour the view that even where suits have been dismissed for mistake or laches of the legal advisers of parties the Court will not hesitate, if proper grounds are made out, to restore the suit upon payment of costs. AIR (Vol 12) 1925 Lah 617 : 89 Ind Cas 795 (DB).

3. Who can apply.

——O. 41, R. 19, S. 146 — Applicability — Transfer of interest in dispute by appellant and allowing of appeal to be dismissed for default — Application for restoration by transferee.

The provisions of O. 41, R. 19, contemplate that the applicant who wants his appeal to be restored has to prove, first, that the appeal was his, and secondly, that he was prevented by sufficient cause from appearing when his appeal was called on for hearing.

Where after preferring an appeal from the decree, the appellant transfers his interest in the property in dispute and allows the appeal to be dismissed for default and the transferee then applies for the restoration of the appeal, he cannot rely upon the provisions of O. 41, R. 19 and S. 146, as the transferee had neither filed the appeal, nor can it be said that his interest is identical with that of the original appellant. AIR (Vol 25) 1938 Pat 574 : 4 BR 798 : 177 Ind Cas 152 (DB).

4. Limitation.

——O. 41, R. 19 — There is nothing in terms of Art. 168, Lim. Act to exclude an application made under S. 151, Civil P. C., for re-admission of an appeal dismissed for want of prosecution from operation of the article.

In the case of the appellant, limitation is reckoned from the date of the dismissal, in the case of the respondent it is reckoned from the date of his knowledge of the decree if the notice of the appeal was not duly served on him. Appellant cannot escape the operation of Art. 168, even if the application for re-admission is made under S. 151, Civil P. C. AIR (Vol 24) 1937 Oudh 426 : 1937 OWN (CC) 743 : 13 Luck 425 : 170 Ind Cas 155.

——O. 41, R. 19 — Limitation — Restoration — Limitation Act (1877), Sch. II, Art. 168.

An appeal against dismissal of suit for default being itself dismissed for default, an application to restore the appeal made after 30 days, could be treated as one for review and the Court commits no irregularity in issuing notice to the defendants to show cause against granting of the application. 7 PLR 1910 : 24 PWR 1910 : 6 Ind Cas 482.

5. Inherent powers.

——O. 41, R. 19 — Restoration of appeal dismissed for default — Inherent power of Court.

Apart from O. 41, R. 19, C. P. Code, the Court has got no inherent power to restore an appeal dismissed for default. AIR (Vol 35) 1948 Oudh 116 : 1947 AWR (CC) 383 : 23 Luck 22 : 1947 OWN 579 : 1947 OA (CC) 383 (DB).

——O. 41, R. 19 — The rule does not exhaust the powers of the Court in a proper case to re-admit an appeal or an application dismissed for default and it is open to the Court to deal with these matters under S. 151, Civil P. C. AIR (Vol 29) 1942 Bom 198 : 44 Bom LR 367 : 201 Ind Cas 653.

——O. 41, R. 19 — It is open to the High Court to make an order re-admitting an appeal dismissed for default in the exercise of its inherent powers for the ends of the justice in a proper case. AIR (Vol 8) 1921 Bom 20 : 45 Bom 648 : 23 Bom LR 110 : 60 Ind Cas 910 (DB).

6. Non-payment of printing costs.

——O. 41, R. 19 — Applicability — Appeal — Dismissal for non-payment of printing charges — Application for restoration — Limitation. AIR (Vol 36) 1949 Pat 112 : 27 Pat 745.

——O. 41, R. 19 — Appeal dismissed for non-payment of printing costs — Application for restoration — Court-fees Act (VII of 1870), Sch. I, Arts. 4, 5.

An application for restoration of an appeal which is dismissed for non-payment of printing costs should be treated as an application for review and not as one under O. 41, R. 19, and should require to be stamped under Arts. 4 and 5 of Sch. I, Court-fees Act. AIR (Vol 25) 1938 Pat 111 : 4 BR 306: 17 Pat 252: 19 PLT 17: 173 Ind Cas 633.

——O. 41, R. 19 — The words "for any other sufficient reason" in R. 1 of O. 47 will cover the case where there is a good ground for not filing the deficit printing costs, and therefore an application to set aside a dismissal of appeal for failure to file printing costs is one for review and not an application under O. 41, R. 19. AIR (Vol 13) 1926 Pat 27 : 4 Pat 704 : 7 PLT 291 : 91 Ind Cas 483 (DB).

7. Default in depositing process fees.

——O. 41, R. 19 — Dismissal of appeal for default in depositing process fess — Restoration.

The laches of an Advocate or the careless mistake of his clerk is not sufficient cause for the restoration of an appeal dismissed for not depositing process fees. AIR (Vol 20) 1933 Lah 642 (1) : 34 PLR 831 : 145 Ind Cas 528.

8. Deficiency in court-fee.

——O. 41, R. 19 — Rejection for deficiency in Court-fee.

When the appeliant fails to put in the deficit court-fee on the memorandum of appeal, the order dismissing an appeal for default is an order rejecting the memorandum of appeal. It is therefore a 'decree' under S. 2(2) and does not fall under O. 41, R. 19 applicable to cases under O. 41, Rr. 11 (2), 17 or 18. AIR (Vol 9) 1922 Pat 281 : 3 PLT 117 : 1921 PHCC 337 : 6 PLJ 625 : 63 Ind Cas 99 (DB).

9. Other remedy.

——O. 41, R. 19 — Where an appeal is decided, on merits and the appeal is dismissed in the absence of the appellant or his pleader the remedy of the appellant is an application for restoration and not by way of appeal. AIR (Vol 12) 1925 Rang 96 : 4 UBR 164 : 76 Ind Cas 166.

10. Right of fresh appeal.

——O. 41, R. 19 — Maintainability.

There is nothing in law to prevent entertainment of a fresh appeal on the dismissal for default, of a previously filed appeal, provided the latter appeal was otherwise in order and was filed within the period of limitation. The only ground

upon which a fresh appeal can be held to be barred is that the order of dismissal of the previous appeal would operate as res judicata to the hearing of the fresh appeal. But the order of the dismissal for default does not amount to a decree within the definition of the term as given in the C. P. Code as the appeal was not heard and decided on the merits. The omission of a provision for fresh appeal in O. 41, R. 19, cannot have the effect of taking away such right, if it is not otherwise barred. AIR (Vol 10) 1923 Pat 514 : 4 PLT 405 : 1923 PHCC 213 : 2 Pat 739 : 75 Ind Cas 284 (DB).

11. Notices.

——**O. 41, R. 19 — Restoration of appeal — Names of all persons to be served with notice should be mentioned in application — But, if it does not mention them, it will not be dismissed if Court with help of record has actually served notices.**

Under O. 41, R. 19, it is open to an appellant, whose appeal has been dismissed for default, "to apply to the Appellate Court for the re-admission of the appeal." There is nothing in the Code which provides that the application should expressly implead a particular party. Ordinarily it is advisable to mention the names of all persons on whom notices of the application should be served; but if no names are mentioned and the record enables the Court to ascertain the names of persons to whom notice should be given and notice is in fact given, the application cannot be dismissed merely on the ground that names of some of the respondents were not mentioned in the heading of it and that, therefore, no application can be considered to have been made against such respondents within the period of limitation. AIR (Vol 24) 1937 All 362 : (1937) ALJ 407 : 1937 AWR (HC) 338 : 169 Ind Cas 246.

——**O. 41, R. 19 — Notices to co-appellants.**

Where the memo. of appeal filed by several persons purports to be signed by all of them they are entitled to have notice of the hearing of the appeal individually. AIR (Vol 14) 1927 Lah 365 : 101 Ind Cas 203.

——**O. 41, Rr. 19 and 21 — Minor — Notice — Not given to the minor appellants.**

Where a next friend of the minor defendants had not been served with a notice of the date fixed, the order of dismissal of the appeal for default could not be sustained. AIR (Vol 6) 1919 Lah 32 : 53 Ind Cas 333.

——**O. 41, R. 19 — Absence of service — Appearance by pleader.**

An appeal cannot be dismissed in default if the appellant not being properly served does not appear but the pleader appears though without instructions. (1915) 2 OLJ 198 : 30 Ind Cas 199.

——**O. 41, R. 19 — Notice — Both parties absent.**

Notice is not necessary for the restoration of an appeal dismissed for default owing to the absence of both parties. (1912) 10 ALJ 399 : 17 Ind Cas 292.

——**O. 41, R. 20.**

See also Civil P. C. S. 151 and O. 41, R. 33.

1. Adding parties.
2. Applicability and scope.
2A. Discretion.
3. Effect of non-joinder.
3A. Inherent power.
4. "Interested".
   See also Note 1.
5. Limitation
   See also Note 2A.
6. Misjoinder.

1. Adding parties.

——**O. 41, R. 20 — Party not impleaded in appeal but added in Letters Patent Appeal.**

Where a Bank not a party in the first appeal is added as a party in the Letters Patent Appeal the Letters Patent Appeal so far as it relates to the Bank, is incompetent, as the Bank is no longer a party interested in that appeal. AIR (Vol 26) 1939 Lah 102: 41 PLR 30: 182 Ind Cas 959 (DB).

——O. 41, R. 20 — The power of Appellate Court to add new party is subject to limitation prescribed by Code. Order 41, R. 20 deals with such power and Appellate Court when it appears to it that any person who was a party to suit but has not been made party to appeal and is interested in the result of appeal may direct that such person be made respondent. AIR (Vol 24) 1937 All 243 : (1937) ALJ 436: 1937 AWR (HC) 27: 169 Ind Cas 186.

——**O. 41, R. 20 — Effect of addition.**

Very wide powers are given to the Court to add a party to a suit or an appeal and the addition, if permitted, will not be taken to decide any question of title to the properties as between him and the trustee or the creditors. AIR (Vol 23) 1936 Cal 593: 64 CLJ 212: 167 Ind Cas 615 (DB).

——**O. 41, R. 20 — No name of necessary party in attested copy of judgment — Omission through oversight — Decree giving the same.**

In spite of the provisions of O. 41, Rr. 4 and 33, an appeal cannot be heard on merits without making a party whose name is omitted from the list of appellants through oversight, a party to the appeal. He should be made a respondent under O. 41, R. 20.

The attested copy of the judgment given to the appellants did not show the name of the omitted party as one of the plaintiffs,though the copy of the decree-sheet, however, gave the names of all the plaintiffs. The Appellate Court was requested to make the omitted party an appellant, or a respondent and the omitted party had paid his share of the expenses of the appeal to a Pleader who had been asked to file an appeal on his behalf:

Held, that litigants, and members of the legal profession have the right to expect that the headings of attested copies of the judgments would show the names of the parties correctly. The omission being through oversight, he should be made a respondent. AIR (V 21) 1934 Lah 402 (2) : 154 Ind Cas 914.

——**O. 41, Rr. 20, 33 — Suit for alternative reliefs against A and B — Decree against A — Appeal by A — Power of Court to implead B in appeal.**

A claimed a decree for sale of certain properties on the basis of a mortgage and in the alternative, this relief was denied to her for a decree against B in the alternative. The suit was decreed against the properties and dismissed against B. The owner of the properties appealed impleading A alone:

Held, that this was pre-eminently a fit case for exercising the powers under O. 41, R. 33, and B could be added as a respondent under O. 41, R. 20, and even under O. 1, R. 10, read with S. 107. AIR (Vol 20) 1933 Mad 806 : 38 MLW 539: 65 MLJ 548: 147 Ind Cas 83.

——O. 41, R. 20 — Withdrawal of suit against one of two defendants — Appeal against decree by plaintiff — Appellant cannot implead defendant who has been struck off as respondent. AIR (Vol 20) 1933 Nag 66: 143 Ind Cas 88.

——O. 41, R. 20 — Under O. 41, R. 20, an Appellate Court cannot add as party to an appeal a person who was not a party to the suit. AIR (Vol 18) 1931 Bom 408: 33 Bom LR 608: 134 Ind Cas 365.

——**O. 41 R. 20 — Condition precedent.**

A person, who was not a party to the original suit, not only cannot be added as a respondent by the appellate Court under O. 41, R. 20, but he cannot be so added even under S. 107, as that section

being expressly subject to such conditions and limitations as may be prescribed, is subject to the conditions of R. 20, O. 41. 3 PLJ 409; 8 CWN 404 not Foll. AIR (Vol 16) 1929 Bom 353: 119 Ind Cas 654: 31 Bom LR 672: 53 Bom 598.

——O. 41, R. 20 — Where appellant, owing to his mistake, due to similarity of names, left out a person in the memorandum of appeal, Court has power to make such person a party to the appeal. AIR (Vol 16) 1929 Mad 343: 56 MLJ 315: 117 Ind Cas 796: 29 MLW 546: 1929 MWN 374 (DB).

——O. 41, R. 20 — Procedure.

Under O. 41, R. 20, the appellate Court has no power to implead a person who was no party to the original suit at all.

If the appellate Court is of opinion that a certain person was a necessary party, and ought to have been impleaded, the proper procedure is to remand the case to the Court of first instance with a direction that the Court should implead that person and then proceed to dispose of the case. AIR (Vol 12) 1925 All 768: 88 Ind Cas 493: 47 All 853: 23 ALJ 757: 6 LRA Civ. 386 (DB).

——O. 41, R. 20 — The Court has power to act under the rule only when the particular person it is desired to add, was a party to the suit in the Court from whose decree the appeal is preferred. AIR (Vol 10) 1923 Rang 114: 72 Ind Cas 205: 1 Bur LJ 272: 4 UBR 150.

——O. 41, Rr. 20 and 33 — Addition of parties — Powers of Court.

The appellate Court refused under the circumstances of the case, add the representatives of the deceased respt. under O. 41, Rr. 20 and 33 of the C. P. C. as the appellant could well have impleaded them in time and thus prevented an abatement. AIR (Vol 7) 1920 Cal 264: 24 CWN 44: 30 CLJ 217: 54 Ind Cas 822 (DB).

——O. 41, R. 20 — Second appeal — Court can add respondents.

An appellate Court can in Second Appeal add as respondents persons impleaded in the original Court but not in first appeal, even though an appeal against them is time-barred. AIR (Vol 7) 1920 Low Bur 64: 59 Ind Cas 798: 10 LBR 191.

——O. 41, R. 20 — Non-joinder of parties in appeal — Practice.

In a mortgage suit, the sole question was whether the contesting deft. had priority over the plff. Deft. appealed and impleaded the plff. only as respdt. The court dismissed the appeal on the ground of non-joinder of other defts. Held, that the Lower Appellate Court ought to have made them respondents to the appeal under O. 41, R. 20. (1912) 15 Ind Cas 295 (All) (DB).

——O. 41, R. 20 — Adding of parties — Not necessary for appeal — If can be allowed.

Though a Court can add parties, apart from the provisions of O. 41, R. 20, yet it cannot allow a respdt. to add an unnecessary party to an appeal and raise cross objection against him. (1912) 11 MLT 157: (1912) MWN 198: 13 Ind Cas 906.

——O. 41, R. 20 — Parties — Addition in appeal.

Held on a review of the authorities, that the court is competent to add a respondent at the hearing of an appeal if the presence of such respondent is necessary for the purpose of properly deciding the appeal and cross objection provided such respondent is interested in the result of the appeal as brought and the cross-objection so far as the original appellants concerned. (1910) 12 CLJ 137: 5 Ind Cas 654 (658) (DB).

——O. 41, R. 20 — — Parties — Addition of.

An Appellate Court can add a person as party respdt. who was not a party to the suit below. Persons who ought to have intervened in the lower Court but have not done so, should not be allowed to do so in appeal unless the appellate Court finds that they must be brought in for the determination of the appeal. (1910) 12 CLJ 91: 6 Ind Cas 912 (DB).

——O. 41, R. 20 — Parties, addition of — C. P. C., (O. C. S. 561) — Legality.

An order of remand of an appellate court directing the lower court to add parties is an order upon a point necessarily preliminary to the proper decision and trial of the suit and is perfectly legal. (1910) 5 Ind Cas 998 (999): 37 C. 171 (DB).

——O. 41, R. 20 — Second Appeal — Powers of High Court.

It is competent to the High Court to direct the addition of a fresh party for the trial and determination of a question arising in the suit when it comes on before it in Second Appeal. (1909) 5 MLT 225: 4 Ind Cas 1132 (DB).

——O. 41, R. 20 — (Ss. 559, 577 and 574 old Code) — Defendants liable in the alternative — Decree — Appeal — Decree against different defendants — Joinder of parties.

In a suit against two sets of defendants claiming relief against the one or the other in the alternative if a decree is passed against one of them, he or they may appeal against the decree on the ground that the other set of defendants is liable and the Court may pass a decree in favour of the plaintiff, shifting the obligation from one set of defendants to the other. And if the other defendants were not parties to the appeal the appellate Court may join them as respondents in order to determine who should be liable to the plaintiff. (1901) 3 Bom LR 172 (173, 177) (DB).

2. Applicability and scope.

——O. 41, R. 20 and O. 22 — Abatement of suit or appeal against deceased party — His legal representative — If can be made party.

Order 41, R. 20 does not override the provisions of O. 22, C. P. Code, and the legal representative of a deceased party cannot be made a party to the suit or appeal after it has abated as against the party deceased. AIR (Vol 39) 1952 Nag 181: ILR (1949) Nag 437: 1949 NLJ 487.

——O. 41, R. 20 — Scope — Applicability to case of substitution.

Order 41, R. 20 C. P. Code, is intended to enable the Court to exercise its inherent powers for the purpose of adding a respondent who might have been left out by the parties but is considered necessary by the Court. So it cannot apply to a case which is not one of addition of respondent but only of substitution. (1948) 1948 RD 433.

——O. 41, R. 20 — The language of the rule does not show that it is exclusive or exhaustive so as to deprive a Court of any inherent power which it may possess and can exercise in special circumstances. AIR (Vol 30) 1943 Lah 252: 45 PLR 248: 16 PLR 306: 212 Ind Cas 575.

——O. 41, Rr. 20, 33 — Suit for contribution — Suit dismissed against one of defendants — Appeal — Name of such defendant not mentioned in memorandum of appeal — Claim against such defendant, if can be allowed.

Where in a suit for contribution, the plaintiff's claim against one of the defendants is disallowed and suit against him dismissed and in appeal by the plaintiff, the name of this defendant is not mentioned in the memorandum, the provisions of O. 41, Rr. 20, 33 and S. 151, are not applicable to

the case and the Appellate Court cannot grant a decree against such defendant. AIR (Vol 23) 1936 Pat 49: 16 PLT 813: 2 BR 264: 15 Pat 219: 160 Ind Cas 976 (DB).

——**O. 41, R. 20 — Heirs of deceased respondent not parties in Court from whose decree appeal is filed.**

Order 41, R. 20, applies to a case where a person who was a party to the suit in the Court from whose decree the appeal is preferred has not been made a party to the appeal but not where the deceased respondent's heirs were not parties in the Court from whose decree the appeal has been filed. It was not the intention of the Legislature that a party against whom an order of abatement has been made should get over that order under cover of O. 41, R. 20. AIR (Vol 22) 1935 Oudh 329 : 1935 OWN (CC) 401 : 11 Luck 5 : 154 Ind Cas 897 (DB).

——O. 41, R. 20 — An appeal cannot be allowed to proceed in the absence of a party who ought to have been impleaded as a respondent if the result of allowing the appeal would, if the appeal proved successful bring into existence two inconsistent decrees one of the trial Court and one of the Appellate Court with respect to the subject-matter of the suit. AIR (Vol 19) 1932 Rang 16: 9 Rang 624: 135 Ind Cas 645.

——O. 41, R. 20 — No relief can be given under O. 41, R. 20 if it would have the effect of depriving a party of a valuable right which accrues to him in consequence of the failure of the appellant to bring on record the legal representative of a deceased person within the time allowed by O. 22. AIR (Vol 19) 1932 Sind 220: 26 SLR 362: 141 Ind Cas 711 (DB).

——O. 41, R. 20 — Order 41, R. 20 has no application to the addition of fresh parties by the Court of first instance after the case is remanded to it by the Appellate Court for retrial. AIR (Vol 18) 1931 Bom 408: 33 Bom LR 608: 134 Ind Cas 365.

——O. 41, R. 20 — Order 41, R. 20, is not intended to override the provisions of O. 22. The right obtained by a respondent when the appeal abates as against him is a valuable right and should not be lightly treated. Order 41, R. 20, will only apply where there is an appeal pending in the Court on which decision may be given by the Court. Therefore, when the appellant impleads only some of the persons holding a joint decree, there is no proper appeal before the Court and the Court has no jurisdiction to implead other persons who have been omitted beyond limitation under O. 41, R. 20. AIR (Vol 14) 1927 Pat 23: 98 Ind Cas 1003: 5 Pat 755: 8 PLT 373 (DB).

——O. 41, R. 20 — The Code does not contemplate that a person should be made a party to an appeal simply in order to enable one of the respndents to prefer a cross-objection against him. A defendant against whom a suit is dismissed and who is not made a party to the appeal filed by the other defendants against the decree passed against them, is not interested in the result of the appeal within R. 20, and cannot be impleaded under that rule. AIR (Vol 13) 1926 Cal 533: 91 Ind Cas 649: 53 Cal 270 (DB).

——O. 41, R. 20 — O. 41, R. 20, is ordinarily intended to apply to cases where the Court finds that it cannot proceed with the suits without the presence of a party who was not made a party to the appeal. It is not intended to override the provisions of O. 22. AIR (Vol 13) 1926 Cal 335: 90 Ind Cas 986: 30 CWN 45 (DB).

——O. 41, R. 20 — Rule 20 does not apply to cases where there is any doubt as to party being a necessary party, but also applies to persons who are admittedly necessary parties; so also it not only applies to cases where the Court itself discovers the defect as to the non-joinder of the parties, but also to cases where the appellant applies for the addition of a party. AIR (Vol 13) 1926 Lah 689: 97 Ind Cas 223: 8 LLJ 473: 27 PLR 731.

——**O. 41, R. 20 — Parties — Representatives — Addition of.**

The words "any person who was a party to the suit" in O. 41, R. 20 C. P. C., on a reasonable construction include the representative of that party. The power given to the Court to add parties is a power which is to be exercised at the hearing, for, it is necessary that the Court should have before it all the circumstances of the case. AIR (Vol 3) 1916 Cal 690: 29 Ind Cas 470 (DB).

——**O. 41, R. 20 — Parties — Addition of party appellant — Test.**

When a person applies to be added as a party appellant, the test is whether he can urge any of the grounds upon which the validity of the original Court's order is called in question. If he cannot, he ought not to be added as an appellant. (1907) 5 CLJ 434 (437) (DB).

2A. Discretion.

——**O. 41, R. 20 — Discretion — When can be exercised.**

The Court cannot exercise the discretion under O. 41, R. 20, when the respondent has obtained a valuable right of which he would be deprived by exercise of the discretion. AIR (Vol 22) 1935 Pesh 106: 157 Ind Cas 502 (DB).

——**O. 41, R. 20 — Discretion of Court.**

Order 41, R. 20, Civil P. C., gives discretion to the Court to join parties interested in the result of the appeal. AIR (Vol 21) 1934 Nag 33: 15 NLJ 173: 144 Ind Cas 267.

——O. 41, R. 20 — R. 20 of O. 41 is permissive and it is in no way binding on a Court to act on that rule in order to bring in a necessary party against whom an appeal is already time-barred. (1930) 14 RD 88.

——O. 41, R. 20 — Order 41, Rr. 20 and 33 should be sparingly used in cases where the appellant omits to implead the necessary respondents through oversight. It is only in cases where full justice cannot be done or where the appeal anyhow reopens the whole of the question decided that the powers under O. 41, R. 33 should be exercised. AIR (Vol 15) 1928 Lah 947: 111 Ind Cas 692.

——**O. 41, R. 20 — Adding or refusing to add parties to appeal is discretionary.**

Whether in any particular case the Court will add or refuse to add a party to an appeal under O. 41, R. 22, is a matter which is left to the discretion of the Court. AIR (Vol 13) 1926 Cal 893: 95 Ind Cas 649: 53 Cal 752: 43 CLJ 401 (DB).

——O. 41, R. 20 — Power is discretionary — Limitation does not apply. AIR (Vol 11) 1924 Lah 629: 76 Ind Cas 285.

——O. 41, R. 20 — The Law of Limitation does not apply to action taken by a Court under O. 41, R. 20 but the power to take this action is discretionary and should not be exercised in a case of extreme neglect. AIR (Vol 10) 1923 Lah 503: 75 Ind Cas 90.

——**O. 41, R. 20 — Second appeal — Necessary parties — Addition of.**

If the plff. in second appeal to the High Court failed to implead necessary respt., the power to add him could not be exercised. The case being on a joint footing against all respts., the appeal abated in toto. AIR (Vol 7) 1920 Lah 72: 2 Lah LJ 5: 57 Ind Cas 259.

——O. 41, R. 20 — Limitation — Negligence — Court's powers discretionary.

The law of limitation has application to an action by the Court under O. 41, R. 20. The power to take action is discretionary and will not be exercised in cases of extreme negligence. AIR (Vol 1) 1914 Lah 276: 79 PR 1914: 268 PLR 1914: 169 PWR 1914: 25 Ind Cas 549 (DB).

——O. 41, R. 20 — Power of appellate Court — Discretion.

An appellate Court has discretionary powers to add a party as respondent to an appeal, even when the time for appealing has expired. But an application to enforce a judgment within the meaning of Article 183 of the Limitation Act against a new party can be allowed only if it is in time. (1911) 38 Cal 913: 16 CWN 49: 11 Ind Cas 943 (DB).

3. Effect of non-joinder.

——O. 41, R. 20 — Addition of necessary party after appeal has become barred by limitation — If may be allowed.

The absence of a necessary party makes an appeal incompetent and the Court cannot allow the addition of such party as respondent to the appeal after it has become barred by limitation. AIR (Vol 37) 1950 EP 355 (DB).

——O. 41, R. 20, O. 4, R. 9 — Minor defendants not impleaded in appeal — Appeal when abates.

Where a suit against certain persons some of whom are minors is decreed against the plaintiff and the plaintiff appeals without impleading the minor defendants the appeal does not abate if the plaintiff is satisfied with a decree against the major defendants. AIR (Vol 27) 1940 Pat 671: 7 BR 235: 191 Ind Cas 597.

——O. 41, R. 20 — Only one of parties to partition decree filing objection — Decree-holder if can in appeal implead only objector as respondent.

Where in application for the execution of a partition decree, the decree-holder impleads all the parties to the partition decree and only one of them files an objection impleading the decree-holder alone and the objection is treated as a separate miscellaneous suit and decided against the decree-holder, the decree-holder is fully entitled in appeal to implead only the objector as respondent without impleading other parties to the partition decree. The objector by his objection having invited the Court to decide the matter between him and the decree-holder only, cannot subsequently raise an objection that the decree-holder should have impleaded other parties in appeal. AIR (Vol 27) 1940 Pat 147: 6 BR 94: 185 Ind Cas 59 (DB).

——O. 41, Rr. 20 and 33 — Suit by worshipper against shebait, idol and transferees for declaration that suit property is debutter property of idol — Suit decreed — Appeal by transferees — Neither shebait nor idol made party.

Where the worshipper's suit against the shebait, idol and transferees of debutter property for a declaration that certain immovable property was debuttar property of the idol having been decreed, the defendant transferees went up in appeal but failed to make the shebait and the idol parties to the appeal:

Held, that the shebait and not the idol had the right to sue and be sued: as the idol was in fact represented in appeal by the plaintiff respondent, omission to make either the shebait or the idol herself a party to the appeal was at most an error in form and not in substance. AIR (Vol 28) 1941 Cal 248: ILR (1941) 1 Cal 309: 54 CWN 699: 196 Ind Cas 241 (DB).

——O. 41, Rr. 20, 23, O. 40, Rr. 1, 4 — Receiver in possession of defendant's property alleged to be in possession of third parties — Court refusing release of property — Appeal — Plaintiff alone made respondent.

The Receiver appointed in a rent suit took over the possession of the defendant's property alleged to be in possession of a third party. The third party applied to the Court which appointed the Receiver to direct him to return the property. The application was refused and the party filed an appeal making the plaintiff alone the respondent:

Held, that the failure to implead the defendant as a party rendered the appeal incompetent. AIR (Vol 28) 1941 Rang 236: 1941 Rang LR 300: 196 Ind Cas 768.

——O. 41, R. 20 — Joint-decree for possession in favour of two plaintiffs against defendant — Appeal — Dismissal of appeal as against one plaintiff — Appeal, if can be proceeded against the other.

A joint decree was passed in favour of two plaintiffs declaring their title to a share of a certain jama and giving them possession against D who appealed against the decree. The appeal was dismissed as against one of the plaintiffs for non-compliance with a certain order of the Court.

Held, that the appeal failed as a whole and that it could not be proceeded against the other plaintiff alone. AIR (Vol 20) 1933 Cal 464: 37 CWN 84: 144 Ind Cas 814.

——O. 41, R. 20 — Omission to implead a necessary party.

Where of three appeals against an order, two were rejected on the ground that a necessary party was not made a respondent and the third was accepted on merits but the Court refused to condone the omission to implead in the other two appeals:

Held, that under the circumstances the Court might well have exercised the discretion vested in it by O. 41, R. 20 and condoned the omission and it would be unjust if all the matters dealt with by the same order could not be re-opened owing to a pure technicality. AIR (Vol 20) 1933 Lah 304: 146 Ind Cas 148.

——O. 41, R. 20 — Omission through mistake.

Appellant failing through oversight to implead in appeal person who was original party to suit, his appeal should not be dismissed — Court should exercise its power under O. 41, R. 20, and implead party so omitted. AIR (Vol 17) 1930 Lah 295: 11 LLJ 523.

——O. 41, R. 20 — Omission, deliberate.

Appellant omitting to implead necessary respondents to avoid Court-fee — Appeal is incompetent and parties should not be added under R. 20. AIR (Vol 16) 1929 Sind 120: 115 Ind Cas 305 (DB).

——O. 41, R. 20 — Party not joined by mistake of pleader may be impleaded.

Where the pleader for plaintiff-appellant did not implead co-plaintiffs in the appeal under mistaken view of O. 41, R. 4, the Court allowed them to be joined as respondents at the hearing. AIR (Vol 15) 1928 Lah 43: 106 Ind Cas 313 (DB).

——O. 41, R. 20 — One of two plaintiffs not appealing against dismissal of suit — Suit decreed in appeal — Defendant appealing but joining only the appealing plaintiff — Appeal is not infructuous. AIR (Vol 14) 1927 Cal 733: 104 Ind Cas 151: 46 CLJ 51 (DB).

——O. 41, R. 20 — Formal party.

A defendant, in a suit need not be made a respondent when he is only a formal defendant and his non-impleadment cannot possibly have any

effect on the decision of the case. AIR (Vol 12) 1925 Lah 87: 79 Ind Cas 107.

——O. 41, R. 20 — Necessary parties — Not before the Court — Procedure.

Where a plaintiff obtained a decree for redemption against defendants 1 to 4, against which defendants 1 and 3 alone appealed, and defendants 2 and 4 were not parties to the appeal. Held, that the Appellate Court should have either dismissed the appeal, or made defendants 2 and 4 also parties to the appeal. (1909) 6 MLT 346: 4 Ind Cas 1076 (DB).

3-a. Inherent power.

——O. 41, R. 20 — Where no good reason is shown why the parties whose names were omitted were not impleaded although they were necessary parties the Court will not exercise its inherent power under O. 41, R. 20 to impleaded them as parties. (1938) 40 PLR 6.

——O. 41, R. 20 — An appellate Court has power to implead only such persons as parties to the appeal as were parties in the trial Court and were not made parties to the appeal but not those who were complete strangers to the suit.

Powers of a Court to implead parties under S. 151, C. P. Code, are circumscribed by O. 41, R. 20 and it is only in exceptional circumstances that the inherent powers under S. 151 could be invoked. AIR (V 10) 1923 Lah 490 : 73 Ind Cas 136.

——O. 41, R. 20 — Apart from all questions as to the scope of O. 41, R. 20, and O. 41, R. 33, the Court has inherent power to add a respondent to the appeal. AIR (V 8) 1921 Cal 722 : 67 Ind Cas 19 : 34 CLJ 405 (DB).

4. "Interested."

See also Note 1.

——O. 41, R. 20 — Where unsuccessful claimants prefer an appeal under S. 45, U. P. Encum. Estates Act, all creditors must be impleaded as respondents if they be affected adversely by the result. If some of the creditors are not impleaded, the case cannot be remanded for re-trial as without the creditors the appeal itself is competent. AIR (V 29) 1942 Oudh 339 : 1942 OWN (CC) 248 : 1942 AWR (CC) 173 : 199 Ind Cas 801 (DB).

——O. 41, R. 20 — Official Receiver against whom suit is dismissed and limitation for appeal against whom has expired.

Quaere. — Whether the Official Receiver, against whom the suit of the plaintiffs has been dismissed by the lower Appellate Court and the limitation for preferring an appeal against whom has long since expired can be said to be a person "interested in the result of the appeal" within the meaning of O. 41, R. 20. AIR (V 28) 1941 Lah 402 : 43 PLR 471 : ILR (1942) Lah 603 : 198 Ind Cas 726 (DB).

——O. 41, R. 20 — Pro forma defendant.

Where persons who did not join as plaintiffs are joined as pro forma defendants to a suit and such persons are not interested in the result of the litigation and no issues are framed in the suit with respect to their interest, such persons are not necessary parties to the appeal in such a suit. AIR (V 25) 1938 Cal 639 : 43 CWN 41 : 179 Ind Cas 95 (DB).

——O. 41, R. 20 — Party to original proceedings proposed to be added party in appeal — Time expiring — His interest in appeal, when survives.

Where it is intended to make a party to the original proceedings, a party to the appeal and the appeal against him is barred by time the question whether the interest of the party proposed to be added still survives in the appeal, must depend on the nature of the litigation, the decree passed, the subject-matter of the appeal, and the effect of the decision in appeal in their absence. AIR (V 24) 1937 Bom 401 : 39 Bom LR 444 : ILR (1937) Bom 602 : 171 Ind Cas 536 (DB).

——O. 41, R. 20 — Auction-purchaser, if necessary party to appeal.

When an objection to attachment under S. 47, by the legal representative of the judgment-debtor has been dismissed and the property sold, the auction-purchaser is not a necessary party to the appeal from the order dismissing the objection, as his right came into existence after the matter had been decided by the trial Court. AIR (V 24) 1937 Lah 263 : 174 Ind Cas 320.

——O. 41, R. 20 — Declaration in favour of many — Appeal against declaratory decree against some decree-holders.

The power conferred on the Court of Appeal by R. 20 of O. 41, can be used in favour of that person alone who is interested in the result of the appeal and the defendant against whom a suit has been dismissed and as against whom the right of appeal has become barred is not a person interested in the result of the appeal filed by a plaintiff against the other defendants.

Where, therefore, a declaration has been made jointly in favour of all the petitioners who had claimed the right, title and interest in dispute and one of them had been omitted from the appeal, the appeal cannot proceed against the other respondents inasmuch as the declaratory decree had become final in favour of the person omitted. AIR (V 24) 1937 Lah 180 : 39 PLR 301 : ILR (1937) Lah 136 : 172 Ind Cas 266 (DB).

——O. 41, R. 20 — Suit for partition — Sons likely to be prejudiced by modification of their father's share in appeal — Son, if "interested in result of the appeal."

In a suit for partition, though certain defendants represented their branches, their sons were formally brought on record. The lower Court throughout referred to the entities known as defendant No. 3's branch and defendant No. 4's branch, nowhere did it in its long judgment refer to their sons as possessing any individual or distinct interest. Indeed, they had been so treated as if their individuality had become merged in that of their fathers and their separate existence had not been recognized or even noticed. What is more, when the various points bearing on the question of the apportionment were being considered in the lower Court, all the parties concerned assumed without hesitation that the Official Receiver in each case represented adequately and properly the interest of the sub-family as a whole, not a single point was put forward as affecting the interests of the sons as distinct from those of their fathers. In fact, if the sub-group gained, each member of it gained also, if it lost, it was equally patent that every member likewise lost. Though therefore in the lower Court the sons were formally on the record, they had no separate entity and the decree passed did not recognize their existence. On appeal against the decree, the sons were not impleaded:

Held, that though the sons were proper parties, they were not necessary parties:

Held, also that the sons would not be directly affected by the appellate decree, they not being parties to it. But yet the result of any diminution of their father's assets would ipso facto be to diminish the extent of their own assets, in other words, they would be prejudiced by modifications made behind their backs in the decree under appeal. Granting, therefore, that the parties sought to be added are necessary, as distinguished from

proper parties, O. 41, R. 20, applied and that they could be added as parties to the appeal, they being interested in the result of the appeal. AIR (Vol 24) 1937 Mad 741: (1937) MWN 506 : (1937) 2 MLJ 100: 46 MLW 916: ILR (1938) Mad 52: 172 Ind Cas 776 (DB).

——O. 41, R. 20 — Suit by reversioner for declaration that defendant is not adopted son — Appeal by defendant — Other reversioners.

A person instituted a suit claiming that he was the nearest reversioner of the last male-holder of an estate for a declaration that the defendant is not the adopted son of the last male-holder. The suit was decreed and the defendant went in appeal

Held, that the persons claiming to be more distanct reversioners than the plaintiff were entitled to be added as respondents as their position and interests will be adversely affected if the lower Court's decision were to be reversed. AIR (Vol 24) 1937 Pat 11: 15 Pat 379: 3 BR 161: 3 CLT 7: 166 Ind Cas 342 (DB).

——O. 41, R. 20 — Where a claim against a co-defendant has been dismissed and an appeal against him is barred, such person is not a person interested in the result of the appeal filed by the other defendant, within the meaning of O. 41, R. 20. AIR (Vol 24) 1937 Sind 312: 173 Ind Cas 862 (DB).

——O. 41, Rr. 20 and 30 — Plaintiff's claim dismissed against A but decreed against B — Appeal by B — A not joined — Appeal allowed against plaintiff — Plaintiff appealing joining A and B — Time for appeal against A expired.

Under O. 41, R. 20, the addition of a respondent whom the appellant has not or cannot make a party to the appeal, is not permissible, where the Court finds that he is not interested with the result of the appeal. Where therefore, before any relief is claimed in appeal against such respondent, the time for filing an appeal against him is time-barred, he is not a party interested in the appeal and decree cannot be passed against him.

Where a suit was dismissed against A but decreed against B who alone appealed in District Court and got a decree against the plaintiff who thereupon filed an appeal in the High Court impleading A and B:

Held, that time for appeal against A having expired he could not be held to be a party interested in the appeal, to be added to B under O. 41, R. 20;

Held, further, that as the first appeal was available in the District Court, appeal against A could not directly lie in the High Court. AIR (Vol 21) 1934 Pat 589 : 15 PLT 813: 1 BR 278:154 Ind Cas 171 (DB).

——O. 41, Rr. 20, 33 — Suit dismissed against one defendant — Appeal by the other — Former defendant, whether "interested in the appeal" — Power of Appellate Court to pass decree against such absent defendant.

The powers under O. 41, Rr. 20 and 33, however ample they be, cannot be used to the detriment or prejudice of a person against whom the suit has been dismissed by the trial Court and against whom no appeal has been preferred in the lower Appellate Court.

Where a suit is dismissed against one defendant and decree against another and the latter appeals without making the former a party, the former defendant cannot be deemed to be "a party interested in the result of the appeal" within the meaning of O. 41, R. 20. AIR (Vol 18) 1931 Cal 738: 58 Cal 923: 133 Ind Cas 177 (DB).

——O. 41, R. 20 — Necessary party.

Where neither the appellant nor the respondents derive their claim in respect of the dispute in appeal from a party to suit but not joined in appeal and from the nature of the appeal itself it is evident that either the success or the failure of the appeal will in no way injure the interest acquired by the party under a decree appealed against such a party is not a necessary party to the appeal. 120 Ind Cas 666: 7 Rang 398: AIR (Vol 16) 1929 Rang 265 (DB).

——O. 41, R. 20 — 'Interested party'.

The addition of a respondent whom the appellant has not made a party to the appeal is expressly dealt with in R. 20. The rule empowers the Court to make such party a respondent when it appears to the Court that he is interested in the result of the appeal. A defendant against whom a suit has been dismissed and as against whom the right of appeal has become barred, cannot be deemed to be interested in the result of the appeal filed by the plaintiff against the other defendants. It is for the plaintiff-appellant who applies to the Court to exercise its powers under this Rule to show what is the nature of the interest of such defendant. 107 Ind Cas 237: 6 Rang 29: 27 MLW 1: 1928 MWN 20: 4 OWN 1231: 47 CLJ 136: 32 CWN 281: 30 Bom LR 220: 26 ALJ 371: AIR (Vol 14) 1927 PC 252: 54 MLJ 88.

——O. 41, R. 20 — Interested parties not joined in appeal originally — Appellate Court can allow them to be joined later on. 104 Ind Cas 400: AIR (Vol 14) 1927 Lah 738 (DB).

——O. 41, Rr. 20 and 22 — Parties — Addition of.

A respondent to an appeal can proceed against his co-respondent by way of cross-objections; for this purpose he may join him as party to the appeal though previously he was not interested. AIR (Vol 7) 1920 Mad 120: 27 MLT 266: 11 LW 602: 56 Ind Cas 612 (DB).

——O. 41, R. 20 — Parties — Assignee of decree.

The assignee of the decree is not a necessary party to an appeal by the judgment-debtor. But he is in the absence of fraud bound by the order of the Appellate Court. AIR (Vol 3) 1916 Mad 745: 38 Mad 36: 23 MLJ 513: (1912) MWN 1152: 17 Ind Cas 420 (DB).

——O. 41, R. 20 — Power of appellate Court to implead parties struck off.

Order 41, R. 20 applies to persons who were parties to a suit and persons are none the less parties because they were struck off before the passing of the decree. An appellate Court is therefore authorised to consider whether they are interested in the result of the appeal and to implead them if it thinks they are interested. AIR (Vol 3) 1916 Mad 499: 27 Ind Cas 423 (DB).

——O. 41, R. 20 (S. 559 old code) — "Interested in the result of appeal" — Where defendants exonerated and no appeal, against that portion of decree, they cannot be brought on record under S. 559.

A party, who is not made a respondent in an appeal, is not "interested in the reasult of the appeal" within the meaning of S. 559 of the Code of Civil Procedure, unless the decree sought to be obtained against the respondents in the appeal would have the effect of prejudicing him in some way of other. The party sought to be made a respondent in the appeal under S. 559 must be shown to be interest in the result of the appeal before he is brought on the record, and the interest he may acquire as a result of being added as a respondent, will not suffice.

Where a defendant has been exonerated, and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party as he is not a party to the appeal and cannot be said to be interested in the result of such appeal. 31 Mad 442 (444, 445) : 18 MLJ 452 : 4 MLT 104 (DB).

5. Limitation.

See also Note 2A.

(a) General.
(b) Addition after limitation not allowed.
(c) Addition after limitation allowed.

(a) General.

——O. 41, R. 20 — A person as an agent of another executed a promissory note in favour of C. C instituted a suit on the note claiming relief alternatively against the agent and the principal. The suit was decreed against the principal and dismissed against the agent. No appeal was filed against the dismissal and consequently it became barred. The principal, however, appealed against him and contended that the agent and not he, was liable on the promissory note. The agent, however, was not impleaded as necessary party to the appeal:

Held, (1) that when the right of appeal against the dismissal of the suit against the agent was barred, the agent was no longer an interested party. He was entitled to hold the decree in his favour: it was a substantive right of a very valuable kind of which he could not be lightly deprived:

(2) that the appeal by the principal was incompetent unless the agent was added by him as necessary party:

(3) that it was not necessary for C to have appealed against the agent's dismissal from the suit. It was incumbent on the principal, if he desired to appeal against the judgment in favour of the agent, to do so:

(4) that the order of the Court would be that the decree of the trial Court against the principal would be restored. AIR (Vol 28) 1941 Rang 63 : 1940 Rang LR 693 : 194 Ind Cas 306 (DB).

——O. 41, R. 20 — The Law of Limitation has no application when action is taken under O 41, R. 20. 97 Ind Cas 174: AIR (Vol 13) 1926 Lah 679.

(See AIR 1944 Lah 76 (FB) Ed.)

——O. 41, R. 20 — Power to add party in appeal is discretionary and is not fettered by law of limitation. A necessary party can be added as a party to appeal, even though, at the time the appeal against him was barred. 76 Ind Cas 285 : AIR (Vol 11) 1924 Lah 629.

(See AIR 1944 Lah 76 (FB) — Ed.)

——O. 41, R. 20 — There is no period of limitation provided for bringing parties to the suit upon the record in an appeal from a decision in that suit. Ordinary rules of limitation relating to appeals ought not to apply where in the course of an appeal the Court finds that in order to do justice between the parties it is necessary to bring one of them who was a party to the suit upon the record in the appeal. 82 Ind Cas 600 : 5 PLT 509: 1924 PHCC 249: AIR (Vol 11) 1924 Pat 773 (DB).

——O. 41, R. 20 — Addition of party — Party impleaded in Appellate Court — Higher Court will not interfere.

When an Appellate Court impleads a person, a Higher Court will not upset the order on the score of limitation. AIR (Vol 1) 1914 Lah 187: 110 PWR 1914: 215 PLR 1914: 3 PR 1915: 25 Ind Cas 480 (DB).

(b) Addition after limitation not allowed.

——O. 41, R. 20 — Addition of party — When not justified.

The Court cannot add a respondent in the appeal under O. 41, R. 20, C. P. Code, merely to suit the convenience of a party or to enable it to get round limitation. 1948 AWR (Rev) 267: 1948 RD 424.

——O. 41, R. 20 and S. 151 — Inherent power to add a party to appeal even after expiry of period of limitation.

Apart from O. 41, R. 20 the Court has ample power under S. 151, Civil P. C., to add a party to the appeal even after the expiry of the period of the limitation prescribed for appeals, if in the circumstances of the particular case before it, it thinks fit to do so:

Where the name of the official receiver was omitted from the array of parties to the appeal by the mistake caused by an error in the certified copy of the judgment of the lower appellate Court which had been supplied to the appellant and which did not contain his name:

Held that the prayer for adding the Official Receiver as a respondent should be granted and that even though period of limitation for appeal against him had expired, the delay should be condoned under S. 5, Limitation Act: (Overruled in AIR 1944 Lah 76 (FB)). AIR (Vol 28) 1941 Lah 402: ILR (1942) Lah 603: 43 PLR 471: 198 Ind Cas 726.

——O. 41, R. 20 — When once time for an appeal has run out, it is not possible for an appellant subsequently to implead those defendants who were not originally impleaded as respondents in the appeal. In a case in which a necessary party to an appeal has been omitted, the Court cannot exercise any power vested in it under O. 41, R. 20, to cover the omission. An Appellate Court could not exercise its power under O. 41, R. 20, if limitation had already expired. It being a special provision, general provisions of O. 1, R. 10 or S. 151 cannot be invoked. No question of S. 5, Limitation Act, arises in such cases. No right vests in any appellant to make an application under O. 41, R. 20. The discretion to add a party who is interested in the result of the appeal is vested in the Court alone and it is the Court that can make that order suo motu. It cannot, therefore, be urged that if the Court is moved to exercise that power in favour of a certain appellant, the appellant in doing so prefers an appeal against the order of the trial Court or seeks to amend his original memorandum in any manner. AIR (Vol 28) 1941 Lah 402, Overruled. AIR (Vol 31) 1944 Lah 76: 46 PLR 148: ILR (1945) Lah 18: 213 Ind Cas 278 (FB).

——O. 41, R. 20 — One of decree-holders not joined as respondent within limitation.

Where one of the holders of a decree had not been joined as a respondent to an appeal against the decree and time limited for appealing has expired, he is not "interested in the result of the appeal" within the meaning of R. 20, O. 41, Civil P. C., and cannot, therefore, be subsequently impleaded under that rule. AIR (Vol 31) 1944 Oudh 9: 1943 OWN (CC) 385: 1943 AWR (CC) 108: 19 Luck 428 : 211 Ind Cas 103 (2) (DB).

——O. 41, Rr. 20 and 22 — Cross-objections against party not impleaded in appeal — Procedure.

When a respondent in an appeal proposes to file a memorandum of cross-objections against a person who is not a party to that appeal, two distinct operations are necessary. He must first implead the person as a party under O. 41, R. 20

of the Code and then having done so, he must put in his memorandum of cross-objections under R. 22. In order that he may succeed under R. 20, he must bring his application within the time allowed for filing an appeal against the person sought to be impleaded. Having succeeded in getting him impleaded, he must file his memorandum of cross-objections within the period of limitation contemplated by R. 22. Where the period contemplated by R. 20 has expired and the person sought to be impleaded is not already a party, it is no longer open to the respondent to file a memorandum of cross-objections against him. AIR (Vol 30) 1943 Mad 609: (1943) 1 MLJ 429: 56 MLW 277: 1943 MWN 423: 210 Ind Cas 500.

——O. 41, R. 20 — When the applicant under S. 4, U. P. Encum. Estates Act 1934 appeals, the success of his appeal is in the interest of all the creditors and therefore, it is unnecessary to implead them, but when the applicants under S. 11 file an appeal under S. 12 (2), Oudh Courts Act, the success of the appeal involves the revocation of a valuable right acquired by the creditors under the judgment and decree of the Single Judge. Therefore it is necessary for the appellants to implead all the creditors. If they fail to do so within time, they cannot be added under O. 41, R. 20. An application under S. 5, Limitation Act cannot succeed in these circumstances. AIR (Vol 30) 1943 Oudh 78: 1942 OWN (CC) 465: 1942 AWR (CC) 305: 205 Ind Cas 628 (DB).

——O. 41, R. 20 : — Defendants against whom a suit has been dismissed and right of appeal has become barred are not interested in the result of the appeal filed by plaintiff against other defendants and cannot therefore be impleaded as parties to appeal. (1941) 53 MLW 392: 1941 MWN 311 : (1941) 1 MLJ 471.

——O. 41, R. 20 — Defendant exonerated in lower Court — In appeal such defendant not made respondent within limitation.

The defendant who has been exonerated in the lower Court and no appeal has been filed against him within the period of limitation, is not interested in the result of the appeal against other defendants within the meaning of O. 41, R. 20.

Where a person had not been impleaded in an appeal and the right of appeal against him had become barred by limitation in an appeal against other persons in which the person omitted is also a necessary party, the Court cannot make such other person a respondent in the appeal under O. 41, R. 20, of the Civil P. C. AIR (Vol 28) 1941 Oudh 580: 1941 AWR (CC) 694: 1941 OWN (CC) 893: 1941 RD 752: 17 Luck 175: 195 Ind Cas 761 (DB).

——O. 41, R. 20 — Court is not competent to allow the appellant to implead a person for the first time after the limitation for the appeal has expired AIR (Vol 27) 1940 Lah 314 : 42 PLR 355: 190 Ind Cas 332.

——O. 41, R. 20 — Suit against X and Y dismissed against X — Appeal by Y—X is not interested in result of appeal after expiry of period for appeal against him.

Where a suit filed against X and Y is dismissed against X only and Y prefers an appeal, X Cannot be deemed to be interested in the result of the appeal after the period of limitation for an appeal against him has expired. His joining as a respondent to the appeal at such time by the Appellant Court is illegal. AIR (Vol 27) 1940 Rang 97: 188 Ind Cas 120.

——O. 41, R. 2 — Adding party to appeal when it is time-barred against him.

G sued H and S for the cancellation of a deed, whereby H had purported to mortgage to S a certain piece of land, on the ground that the land belonged jointly to G and H. The Court granted the plaintiff a decree cancelling the mortgage of G's one-half interest in the land. H appealed making G alone respondent and not joining S and the Appellate Court dismissed the suit. G appealed from the appellate decree and joined only H as respondent and subsequently sought to join S also as respondent but only after the appeal against S was time-barred :

Held, that the appeal was incompetent because the prayer of G in the second appeal being the restoration of the trial Court's decree, he could not succeed in the appeal unless S was made a party to it and since the appeal against S was barred by time he could not afterwards be made a party to the appeal. AIR (Vol 26) 1939 Rang 213 : 182 Ind Cas 1005.

——O. 41, R. 20 — Where an appeal against a respondent has become time-barred, he is not interested in the result of the appeal and therefore O. 41, R. 20 is inapplicable, and his name cannot subsequently be added as respondent. AIR (Vol 25) 1938 Lah 325 : ILR (1938) Lah 398 : 40 PLR 1060 : 180 Ind Cas 698 (DB).

——O. 41, R. 20 — Persons who cannot be deemed to be persons interested in the result of the appeal, cannot be joined under O. 41, R. 20 as respondents. Even if some of the appeallants be minors, S. 5 of Limitation Act has no application to such a case. AIR (Vol 25) 1938 Lah 35: 40 PLR 273: ILR (1937) Lah 746: 175 Ind Cas 819 (DB).

——O. 41, R. 20 — Joint decree in favour of plaintiff and defendant — Appeal against plaintiff — Defendant not made party — Remedy of appellant.

If owing to some bona fide mistake or other sufficient cause one of the defendants has been omitted from the memorandum of appeal against a joint decree, there is nothing to prevent the appellant from filing a fresh appeal against him even though limitation has expired, and the appeal can be admitted if he satisfies the Appellate Court that there was sufficient cause for not appealing against him within the prescribed time. If in such a case, the appeal is ultimately admitted against the new defendant, then even if the previous appeal has been dismissed on account of non-joinder, the Court may in a proper case, review its previous order and restore the appeal to its original number, and dispose of both the appeals simultaneously.

Where a decree is a joint decree in favour of the plaintiffs and defendant No. 2, the position of defendant No. 2 is identical with that of the co-plaintiffs and it is just as incumbent on the appellant to implead defendant No. 2 as any of the other plaintiffs. The omission to implead him would be fatal, and an Appellate Court has no power to implead him after the period of limitation has expired: but where the decree is in fact not a joint one, such a defendant may be impleaded. AIR (Vol 24) 1937 All 243: 1937 AWR (HC) 27 : (1937) ALJ 436: 169 Ind Cas 186.

——O. 41, R. 20 — Receiver's application under S. 53, Provincial Insolvency Act (V of 1920), dismissed — Appeal — Transferee not impleaded as respondent — Application to implead him after expiry of limitation for appeal.

Where in an appeal by the Receiver of the insolvent, against the dismissal of his application under S. 53, Provincial Insolvency Act, application is made to implead the transferee, who is a neces-

sary party to the appeal, long after the expiry of the limitation for the appeal, he cannot be impleaded as a respondent under O. 41, R. 20, and where he is not impleaded, the appeal cannot proceed against the other respondents. (1937) 171 Ind Cas 896: 1937 OWN (CC) 1179: 13 Luck 659: 171 Ind Cas 896 (DB).

—— **O. 41, R. 20 — Appeal — Wrong person impleaded as respondent — Court giving time — Party not brought on record within time — Case, if falls under O. 41, R. 20 — Sufficient cause, if made out under S. 5, Limitation Act (IX of 1908).**

Where the appellant is informed that a wrong person has been impleaded as respondent and is given a stated time to bring the right person on the record and he was not brought on record within such time and there was a special order of the trial Court to make him a party:

Held, that this was not a case for the application of O. 41, R. 20 and there was no sufficient cause within the meaning of S. 5, Lim. Act and the appeal was time-barred. AIR (V 23) 1936 Lah 793 : 165 Ind Cas 154 (1) (DB).

——**O. 41, R. 20 — Application to set aside sale dismissed — Appeal — Auction-purchaser not impleaded within time.**

Held, that the Court cannot take action under O. 41, R. 20. Before the Court can take action, it must be shown that the omission of the auction-purchaser from the list of respondents was due to a bona fide mistake which crept in in spite of the exercise of due care and caution. AIR (V 22) 1935 Lah 802 : 159 Ind Cas 870.

——**O. 41, R. 20 — Corporation, if has special privileges.**

The mere fact that the appellant is a Corporation does not entitle it to any special privileges in respect of extension of time for impleading legal representatives. AIR (V 22) 1935 Lah 632 : 37 PLR 289 : 162 Ind Cas 59 (DB).

——**O. 41, R. 20 — Limitation Act (IX of 1908), S. 5 — Joint decree-holders — Appeal against some alone — Power of Court to implead others after limitation.**

A judgment-debtor against whom an order in execution was passed preferred an appeal against it in time but omitted to implead one of the joint decree-holders as a respondent. Subsequently, after the expiry of the period of limitation, he applied for impleading him as a party and for excusing delay under S. 5, Lim. Act, and both the petitions were allowed:

Held, that as the appeal had abated as against the decree-holder who had not been impleaded, he was not a party 'interested in the appeal' within the meaning of O. 41, R. 20, and the Court had no power to implead him as a party. Order 41, R. 20, is not intended to override the provisions of O. 22. The right obtained by the respondent when the appeal abates as against him is a valuable right and should not be lightly treated.

Held, further that the order excusing delay made under S. 5, Lim. Act, had not been appealed from and had become final and it did not make any difference as this order could logically be passed only after the order to implead as party. AIR (V 22) 1935 Mad 175 : 41 MLW 111 : (1935) MWN 398 : 156 Ind Cas 110.

——**O. 41, R. 20 — Appeal — Party in lower Court, whether and when can be made party in appeal — Limitation.**

A person who is a party to a suit in the lower Court can be made a party to the appeal at any time before the appeal against him is time-barred, under O. 41, R. 20, but where that is not done, he cannot be added by the Court under O. 41, R. 33, after the period for limitation had expired. AIR (V 22) 1935 Rang 364: 159 Ind Cas 186.

——O. 41, R. 20 — Order 41, R. 20, gives power to to the Appellate Court to adjourn the hearing of an appeal, and to direct that such persons as may appear to it to be interested in the decision of the appeal be made respondents in the appeal. While it is open to an Appellate Court to vary the decree of the lower Court in favour of the plaintiffs who have not joined in the appeal filed by the co-plaintiff, it is not open to any Appellate Court to pass or modify any decree to the detriment of a person who is not a party to the appeal before it.

Where a person has not been impleaded in an appeal barred by limitation, in an appeal against other persons in which the person omitted was also a necessary party, the Court cannot make such other person a respondent in the appeal under O. 41, R. 20. AIR (V 21) 1934 Oudh 496 : 11 OWN (CC) 1263 : 10 Luck 240 : 152 Ind Cas 304 (DB).

——**O. 41, Rr. 20, 33 — Appeal by plaintiff — Failure to implead one of defendants as respondent — Application to appeal after limitation, granting of — "Interested", meaning of.**

Where a suit is dismissed and the plaintiff appeals but fails to implead one of the defendants as respondent, an application by him to amend the appeal for adding such person as respondent after the expiry of limitation should not be allowed as a valuable right has accrued to him and the decree in his favour having become final he is not "interested in the result of the appeal" within the meaning of O. 41, R. 20. AIR (V 19) 1932 All 120 : (1931) ALJ 1004 : 15 RD 810 : 135 Ind Cas 553 (DB).

——**O. 41, R. 20 — Power to implead person against whom appeal has become time-barred.**

Where the appellant omitted to implead a certain person in an appeal, and the right of appeal became barred by time against him, and he is a necessary party to the appeal, he cannot be deprived of the right he had acquired, by the Court, by impleading him under O. 41, R. 20. AIR (V 19) 1932 Oudh 288 : 9 OWN (CC) 687 : 8 Luck 115 : 16 RD 490 : 140 Ind Cas 483.

——**O. 41, R. 20 — Appeal — Adding respondent after limitation — Legality.**

A party as against whom an appeal has become barred by limitation and who has consequently acquired a valuable right under the decree of the trial Court should not be impleaded as a party respondent to the appeal at the instance of the appellant. AIR (V 19) 1932 Rang 16 : 9 Rang 624 : 135 Ind Cas 645.

——**O. 41, R. 20 — Limitation.**

Where a party has not filed an appeal against another party not himself an appellant, and the time for so doing has expired, he cannot have him added for the purpose of filing a memorandum of objections although appellate Court has, upon very unusual grounds, jurisdiction to do so. AIR (V 16) 1929 Mad 479 : 120 Ind Cas 369 : 1929 MWN 381.

——**O. 41, R. 20 — Person party to suit but not a party to decree is not "interested in result of appeal".**

It is not competent to an appellate Court to implead under O. 41, R. 20, a person who had not been made a party to the decree though he had been a party to the suit, as the person is not "interested in the result of the appeal". To hold that an appellate Court can implead a person who has acquired an absolute right by the lapse of time or by the omission of his name from the decree would amount to denying all finality to litigation. AIR 1924 Lah 629 and 3 Pat LJ 409, Diss.

from. AIR (V 13) 1926 Lah 499 : 97 Ind Cas 338 : 8 Lah 161 : 8 LLJ 333 : 27 PLR 576 (DB).

——O. 41, R. 20 — Addition of respondents.

Court will not add new respondents after limitation for appeal against them. AIR (V 12) 1925 Rang 108 : 84 Ind Cas 522 : 3 Bur LJ 259 : 2 Rang 541 (DB).

(c) Addition after limitation allowed.

——O. 41, R. 20 — Where unsuccessful claimants prefer an appeal under S. 45, U. P. Encum. Estates Act, all creditors must be impleaded as respondents if they be affected adversely as the result. If some of the creditors are not impleaded, the case cannot be remanded for re-trial as is without the creditors the appeal itself is competent. The creditors left out cannot be made respondents under O. 41, R. 20, after the right of appeal against them has become time-barred and they have acquired a valuable right. AIR (V 29) 1942 Oudh 339 : 1942 OWN (CC) 248 : 1942 AWR (CC) 173 : 199 Ind Cas 801 (DB).

——O. 41, R. 20 — To add as respondent party to suit who was not impleaded as respondent in lower Appellate Court.

Under O. 41, R. 20 the High Court has power in second appeal to add as respondents to the appeal persons who were parties to the suit in the original Court, but were not impleaded as respondents in the lower Appellate Court, although the time in which the appeal might have been preferred as against them has expired. AIR (V 27) 1940 Pat 137 : 18 Pat 768 : 6 BR 407 : 21 PLT 420 : 186 Ind Cas 865 (DB).

——O. 41, R. 20 — Party interested in result of appeal, if can be added after limitation.

Where the real contesting respondent is duly impleaded, another person who is supporting the case of the appellant and is interested in the result of the appeal, can be impleaded as a proper party under O. 41, R. 20, Civil P. C., even after the period of limitation has expired. AIR (V 26) 1939 Lah 346 : 41 PLR 816 : ILR (1940) Lah 40 : 187 Ind Cas 839.

——O. 41, Rr. 20, 33 — Suit for declaration that plaintiffs and pro forma defendants were owners and entitled to profits as against A—Suit decreed — Appeal by A not impleading pro forma defendants — Appellate Court impleading them after period of limitation for appeal — Legality of.

If a joint decree were passed in favour of a number of parties and an appeal were preferred against only some of the joint decree-holders leaving out the rest and the period of limitation were to expire, then it would be too late for the lower Appellate Court to implead such joint decree-holders as respondents in the appeal, in order to consider the appeal against them and pass a decree against them. The cases where a decree is to be passed in favour of persons who have not appealed or who are to be impleaded for some other purpose stand on a different footing, for there is an express power conferred on Appellate Court by O. 41, R. 33, to pass a decree in their favour.

The plaintiffs claimed a declaration that they and defendants Nos. 2 to 7 are the owners of certain groves in proprietary right, and, therefore, of the cattle market which was held on those plots, and that defendant No. 1 had no right to any part of the profits accruing from that market. The suit was contested by defendant No. 1 only. The others who were co-owners were impleaded as pro forma defendants. The suit being decreed by the trial Court, defendant No. 1 filed an appeal against the plaintiffs only. The Appellate Court impleaded defendants Nos. 2 to 7 finding them to be necessary parties but at that time the period for filing appeal had expired. The decree was reversed. On second appeal by plaintiffs and defendants Nos. 2 to 7, it was contended that the lower Appellate Court was not justified in impleading defendants Nos. 2 to 7 after period of limitation for the appeal had expired:

Held, (Per Sulaiman, C. J., agreeing with Niamat Ullah, J. Smith, J., contra), that as the plaintiffs prayed for a relief only as being entitled to profits, there could be no doubt that the defendants must have been misled by the frame of the relief, and considered that the decree passed by the trial Court in terms of the relief was in favour of the plaintiffs only and really not in favour of defendants Nos. 2 to 7. In any case, defendants who have not been impleaded in an appeal can be impleaded by filing an appeal against them, accompanied by an application under S. 5, Lim. Act, for extension of time. In view of the ambiguous language used in the relief and the decree, there was ample justification for the contesting defendant not to implead defendants Nos. 2 to 7 and regard them as not persons in whose favour any decree had been passed. This was accordingly a fit case under which time could have been extended under S. 5, Lim Act. Consequently, in the special circumstances of this particular case, there being in strictness no decree in favour of defendants Nos. 2 to 7, the Appellate Court had jurisdiction to implead them as respondents, so that they may be bound by the final order. If the decree were in fovour of plaintiffs as well as defendants Nos. 2 to 7, the contrary conclusion would be arrived at. AIR (V 24) 1937 All 82 : 1936 AWR (HC) 1099 : (1937) ALJ 424 : 167 Ind Cas 405 (DB).

——O. 41, R. 20 — Persons against whom right of appeal is barred — Added as respondent.

Even a person against whom the right of appeal has become barred can be added as respondent under O. 41, R. 20. AIR (V 24) 1937 Mad 741 : (1937) MWN 506 : (1937) 2 MLJ 100 : 46 MLW 916 : ILR (1938) Mad 52 : 172 Ind Cas 776 (DB).

——O. 41, R. 20 — Under O. 41, R. 20, C. P. Code, a person who was a party to the proceedings in the Court below may be added as a respondent though the time to appeal against him has expired. The law of limitation does not affect the powers of the Court to implead such persons. AIR (V 15) 1928 Lah 202 : 105 Ind Cas 569 : 9 LLJ 550 : 28 PLR 468.

——O. 41, R. 20 — Under O. 41, R. 20, a person who was a party to the proceedings in the Court below may be added as a respondent to the appeal although the time to appeal may have expired. AIR (V 15) 1928 Lah 120 : 103 Ind Cas 223.

——O. 41, R. 20 — Section 22 of the Limitation Act does not prescribe any period of limitation for the joinder of a party to a suit under S. 32, C. P. C. (1882). O. 1, R. 10 or to an appeal under S. 559 of the old Code (O. 41, R. 20) and there is nothing to prevent such a joinder in either a suit or appeal even after it is barred by time. Section 22 of the Limitation Act applies to appeals as much as to suits in principle. But a suit in which a defendant is joined, after the period of limitation has expired, must necessarily be dismissed as against him. In an appeal, however, there may be possibly reasons justifying its admission after time under S. 5 of the Limitation Act. AIR (V 9) 1922 Nag 213 : 66 Ind Cas 217 : 5 NLJ 192.

——O. 41, R. 20 — Respondents can be added though time for filing appeal as against them has expired. AIR (V 8) 1921 UB 13 : 66 Ind Cos 365 : 4 UBR 87.

——O. 41, R. 20 — Limitation — Power of Court to add partics — Limitation.

Under O. 41, R. 20, C. P. C. the Court has full authority to direct the joinder of additional parties in an appeal where the appellant has inadvertently omitted to implead them and when it takes action under this rule, no question of limitation can arise. AIR (V 2) 1915 Oudh 159 : 2 OLJ 20 : 18 OC 90 : 27 Ind Cas 609.

——O. 41, R. 20 — Limitation — Lim. Act, S. 22.

Order 41, R. 20, C. P. C. is not subject to S. 22 of the Lim. Act.. Persons who were parties to the original suit can be added as parties in the appeal even after the period for presenting the appeal has expired. (1912) 6 SLR 74 (Note) : 16 Ind Cas 771.

——O. 41, Rr. 20 and 22 — Limitation — Addition of parties.

The Appellate Court can add a respondent if his presence is necessary, provided the respondent is interested in the result of the appeal and cross-objections. He can be added even after the period of appealing against him has expired. (1910) 12 CLJ 137 : 5 Ind Cas 654 (DB).

——O. 41, R. 20 — Limitation.

A party to a suit who has not been made a respondent in the appeal may be made. So, even after the period of limitation as against that party has expired. (1909) 1 Ind Cas 518 (All).

6. Mis-joinder.

——O. 41, R. 20 — Mis-joinder — Appeal — Different defences — Different grounds of appeal.

It is irregular for persons with different defences to a suit and with different reasons for appeal to join in a single appeal. (1901) 5 CWN 1 : 10 MLJ 279 : 2 Bom LR 967 : 23 A 137 (142) : 27 IA 168 (PC).

——O. 41, R. 21.

——O. 41, R. 21 — Application to re-hear appeal — Summary rejection without hearing applicant — Legality.

Where an aplication to re-hear an appeal decreed ex parte is rejected summarily without hearing the applicant, it cannot be said to be in accordance with law and so can be set aside in revision. 1949 RD 151 (DB).

——O. 41, R. 21 — Additional evidence — Admission of — Grounds for — Grounds supporting review — If sufficient for admission of additional evidence in appeal.

The grounds which may be available on an application for review are not the grounds which may be relied on while invoking the Court's jurisdiction under O. 41, R. 27, C. P. Code. It is the requirement of the Court and not the requirement of a litigant that has to be considered in deciding the question whether or not additional evidence will be allowed to be produced. It is only when the appellate Court "requires it" (i.e., finds it needful) that additional evidence can be admitted. The words "for any substantial cause" in sub-r. (1) (b) of O. 41, R. 27, C. P. Code, do not give the Court jurisdiction to entertain an application for recording further evidence on the grounds which would enable an application to be entertained under O. 47, R. 1. AIR (V 35) 1948 Bom 337 : ILR (1948) Bom 521 : 50 Bom LR 221 (DB).

——O. 41, R. 21 — Appeal — Application to set aside ex parte decree — Extension of limitation.

There is no law extending the provisions of S. 5, Lim. Act to an application for setting aside ex parte decree passed in appeal. AIR (V 31) 1944 Mad 571 : (1944) 2 MLJ 121 : 1944 MWN 522 : 218 Ind Cas 451 (DB).

—— O. 41, R. 21 — Some observation in nature of obiter dicta against respondent, if a ground.

The difference of language between O. 9, R. 13 and O. 41, R. 21 does not necessarily mean that the conditions in the latter rule are fulfilled merely by the presence of some observations of the nature of obiter dicta. Rule 21, O. 41, is not wide enough to cover the case of an appeal which has been wholly dismissed, ex parte against the respondent merely by reason of some remarks which may be in the nature of the obiter dicta and thus incapable of constituting a final decision of the matter discussed so as to be res judicata.

The fact that the respondents did not receive notice of the appeal in time is a sufficient cause to restore the appeal under O. 41, R. 21 to the file for re-hearing, if such an application be otherwise maintainable. AIR (V 28) 1941 Pat 141 : 21 PLT 1082 : 7 BR 329 : 192 Ind Cas 211.

——O. 41, R. 21 — "Prevented by sufficient cause from appearing" — Onus is on applicant.

An applicant under O. 41, R. 21, who admits receipt of notice is obliged like an applicant under O. 9, R. 13, to show that he was "prevented by sufficient cause from appearing":

Held, on facts that it could not be said that the appellant was prevented by sufficient cause from appearing. AIR (V 27) 1940 Mad 53 : (1939) 2 MLJ 568 : (1939) MWN 947 : 50 MLW 515 (1) : 189 Ind Cas 704.

——O. 41, R. 21 — Appellant entrusting money and papers to a friend — Friend not taking steps in matter.

The fact that the appellant entrusted a friend with money and necessary papers in a case but he took no steps in the matter and the appellant could not contest the appeal on account of the friend's laches and he lost his cause for no fault of his own is not a ground for re-hearing the appeal under the provisions of O. 41, R. 21. AIR (V 23) 1936 Pat 128 : 2 BR 71 : 17 PLT 261 : 159 Ind Cas 260.

——O. 41, R. 21, O. 5, R. 15 (Allahabad) — Pardanashin lady — Lady present in house — Summons handed over to relation — Whether due service.

Summons can be delivered or tendered to a pardanashin lady even though it may not be possible for the process-server to have access to her: nor can a purdanashin lady be considered to be a person who cannot be personally served. It is the duty of the process-server to make an attempt to find ways and means of delivering or tendering the summons to the pardanashin lady for whom it is intended.

Where, although the lady on whom summons had to be served was not absent from the house, the process-server, without trying for means whereby personal service could be effected, handed over the summons to her husband's brother who did not inform her of it and the appeal against her was consequently dismissed ex parte:

Held, that as the process-server did not comply with the requirements of law provided in O. 5, R. 15, as amended by the Allahabad High Court, she could not be considered to have been duly served and consequently under O. 41, R. 21, the Court was bound to set aside the ex parte decree passed against her. AIR (V 22) 1935 All 660 : (1935) ALJ 632 : 1935 AWR (H C) 637 : 155 Ind Cas 676.

——O. 41, R. 21 — "Notice of appeal" — Meaning of.

Quaere. — Whether the expression "notice of the appeal" as used in Art. 169 of the Lim. Act, merely refers to the first notice as regards the appeal having been filed or to the subsequent notices (if any) as to the dates fixed for hearing. AIR

(V 20) 1933 Lah 882 : 35 PLR 146 : 147 Ind Cas 288.

——O. 41, R. 21 — Sufficient cause.

Respondent a lady — Her agent failing to attend Court due to illness of daughters — Sufficient cause was held to exist. AIR (V 8) 1921 All 264 : 63 Ind Cas 737 : 19 ALJ 547 (DB).

——O. 41, R. 21 — Scope of.

A principal cannot be relieved for the neglect of his agent in not appearing as respondent in an appeal in the High Court. Consequently if the appeal is decreed, there is no right in the principal to ask the Court to grant a re-hearing of the appeal. AIR (V 4) 1917 All 216 : 39 All 388 : 15 ALJ 413: 39 Ind Cas 636 (DB).

——O. 41, R. 21 — Ex parte decree — Aplication to set aside — Pendency of appeal — Decree set aside — Effect of.

Where the lower Appellate Court passed an ex parte decree against the defendant who preferred an appeal and also applied under O. 41, R. 21 to the lower Appellate Court,

Held, that the pendency of the appeal was no bar to the application under O. 41, R. 21 and that when the lower appellate Court set aside the ex parte decree and passed a judgment in favour of the defendant the "cause of appeal" to the Judicial Commissioner's Court disappeared and that the second appeal should be dismissed. AIR (V 4) 1917 Nag 26 : 14 NLR 30 : 43 Ind Cas 902.

——O. 41, Rr. 21 and 11 — Jurisdiction of first Appellate Court.

A Court has jurisdiction to entertain an application and re-hear an appeal under R. 21, O. 41, at the instance of a respondent in whose absence the appeal was first decided. A second appeal by a co-respondent dismissed under R. 11, O. 41 does not take away the absent respondent's consent to the jurisdiction of the first Appellate Court. (1911) 15 CWN 798 : 14 CLJ 42 : 10 Ind Cas 275 (DB).

——O. 41, R. 21 — (S. 560, old Code) — Sufficient cause.

The fact that the party's pleader refused to receive notice of the appeal when served on him is no sufficient cause. (1905) 1905 AWN 44 (44).

——O. 41, R. 21 (S. 560, old Code) — Application presented in time, but returned for amendment, and returned after time.

An application for re-hearing of an appeal presented originally within the period of limitation, but returned for amendment and re-presented after amendment after the period of limitation, cannot be rejected as being out of time. (1901) 5 CWN 816 (817) (DB).

——O. 41, R. 22.

1. **Against whom allowed.**
2. **Applicability and scope.**
3. **Attacks on decree.**
4. **Cessation of appeal.**
5. **Court-fee.**
6. **Cross-appeals and cross-objections.**
7. **Cross-objections against co-respondents.**
8. **Effect of non-filing.**
9. **Limitation.**
10. **Nature of.**

See N. 6.

11. **Powers and duties of Court.**
12. **Res judicata.**
13. **Revision.**
14. **Right in second appeal.**

See also N. 16.

15. **Right to support decree.**
16. **Second appeal.**

See also N. 14.

17. **When disallowed.**

See also N. 18.

18. **Who may file.**

See also Notes 15 and 18.

1. Against whom allowed.

——O. 41, R. 22 — Where the person against whom cross-objections are filed is not interested in the appeal and is a mere pro forma respondent, no cross-objections can be validly filed against him. AIR (Vol 16) 1929 All 195: 107 Ind Cas 569 (DB).

——O. 41, R. 22 — The Code does not contemplate filing of cross-objection against a person who is not a party to the appeal. AIR (Vol 13) 1926 Cal 533 : 53 Cal 270 : 91 Ind Cas 649 (DB).

——O. 41, R. 22 — In an appeal by some of the defendants, the plaintiff respondent cannot be allowed to prefer cross-objection against the defendant respondent, when the time for appeal by the plaintiff had become barred. AIR (Vol 11) 1924 Pat 200 : 4 PLT 652 : 72 Ind Cas 643 (DB).

——O. 41, R. 22 — Ordinarily cross-objections should be allowed to be urged only against the appellant.

Where one of several defendants against whom a decree is passed has allowed the period for appealing to elapse, the rule does not revive his right simply because a co-defendant had instituted an appeal against the plaintiff on entirely different grounds. The same principle would apply with equal force where the interest of the objector is identical with that of the appellant and he might have joined in the appeal. Order 41, R. 22, should ordinarily be confined to cases of cross-objections urged against the appellant but rule 33 of the same Order gives the Court a very wide discretion, and cases may occasionally arise where justice requires that cross-objections against a co-respondent should be heard. AIR (Vol 8) 1921 Oudh 176 : 8 OLJ 358 : 66 Ind Cas 642.

——O. 41, Rr. 22 and 23 — Scope of — Persons not parties to appeal.

No cross-objection under O. 41, R. 22, C. P. C., could be entertained against a person not a party to the appeal and the lower appellate Court was not justified in passing a decree against him. AIR (Vol 7) 1920 Lah 438 : 54 Ind Cas 971.

——O. 41, R. 22 — Co-respondents.

In an appeal by one of several defendants plaintiffs can raise cross-objections even though they may relate to defendant who is not an appellant. Quaere:—Whether a plaintiff respondent can raise cross-objections against a defendant who is not an appellant? AIR (Vol 4) 1917 Pat 463 : 38 Ind Cas 641.

——O. 41, R. 22 — Scope of — Parties to appeal — Defendant not party to appeal.

Where one of two defendants appeals the respondent is not entitled to raise a cross-objection which is directed against the defendant who is not a party to the appeal. AIR (Vol 3) 1916 Pat 43 : 2 Pat LJ 162 : 39 Ind Cas 662 (DB).

——O. 41, R. 22 — Co-respondents.

A respondent in an appeal is not ordinarily entitled to urge cross-objections except against the appellant. AIR (Vol 2) 1915 Upp Bur 9 : (1915) 11 UBR 58 : 29 Ind Cas 610.

——O. 41, R. 22 (S. 561 old Code) — Objection against persons who did not appeal — Not admissible.

A memoranddum of objections under S. 561, C. P. C., will not lie against a person who did not appeal. (1900) 23 A 93 (93) : 1900 AWN 212 (DB).

2. Applicability and scope.

——O. 41, R. 22 — Scope — Powers of Court — Decision against party not before the Court.

The ordinary rules of hearing apply to a cross-objection in the same way as to an appeal, and the Court in pursuance of a cross-objection, cannot decide a point against a party behind his back. 12 Cut LT 85: AIR (Vol 34) 1947 Pat 255 (DB).

——O. 41, R. 22 — Proceedings in revision — Cross-objection, if can be allowed.

The provisions of O. 41, R. 22 do not apply to cases in which only revision proceedings can be taken by either side; and there is nothing else in the Civil P. C., to entitle a respondent to present cross-objections to a petition for revision made by his opponent. AIR (Vol 32) 1945 Pesh 34: 1945 Pesh LJ 34: 222 Ind Cas 561 (DB).

——O. 41, R. 22 — In Letters Patent appeal.

Order 41, Civil P. C., would apply to Letters Patent Appeal and in general there is no difference between the procedure in Letters Patent Appeals and ordinary appeals so far as the Civil P. C., is concerned. Cross-objections can be taken in Letters Patent Appeal from a first appeal. AIR (Vol 27) 1940 Lah 438: 42 PLR 499: 191 Ind Cas 417 (DB).

——O. 41, R. 22 — Whether applies to appeals under Provincial Insolvency Act — Provincial Insolvency Act (V of 1920), S. 5 (2).

It is clear from the provisions of S. 5 (2), Provincial Insol. Act that the procedure relating to cross-objections contained in O. 41, R. 22, would apply to appeals under the Provincial Insol. Act.

Quaere. — Whether law contained in AIR 1943 Nag 150: 143 Ind Cas 769 is good law in view of the decision of the Privy Council in AIR 1936 PC 277: 164 Ind Cas 6.

Remand by the lower Appellate Court held was justified. AIR (Vol 27) 1940 Nag 292: 1940 NLJ 385: ILR (1942) Nag 156: 201 Ind Cas 439.

——O. 41, R. 22 — Report of Assistant Referee neither order nor decree — No appeal lies — Order 41, R. 22 is not applicable to application to discharge or vary such report under Chap. XXVI, R. 89 of Calcutta High Court Rules. (1935) 62 Cal 1007.

——O. 41, R. 22 — Where a compromise is effected between the parties to a suit in which some defendants are minors and it is obtained by fraud or under some other circumstances as to render it invalid, the remedy of the minors is not by filing cross-objections in an appeal by one of the defendants. 114 Ind Cas 101: AIR (Vol 16) 1929 Sind 32 (DB).

——O. 41, R. 22 — In a suit for a declaration that one of the 'jotes' is not permanent, the finding that this 'jote' formed part of a bigger 'jote' would not affect the point at issue, the suit being limited to the declaration sought in respect of a particular 'jote' and for the correction of the record of rights in that respect. Such a finding is therefore not a ground which is covered by O. 41, R. 22 and it should be expunged from the lower Court's decree. 36 Ind Cas 6: 41 CLJ 31: AIR (Vol 12) 1925 Cal 518 (DB).

——O. 41, R. 22 — R. 33 is not controlled by R. 22. AIR (Vol 7) 1920 Cal 990: 62 Ind Cas 623.

——O. 41, R. 22 — Scope — Cross-objection.

The object of R. 22 of O. 41, Civil Procedure Code is to allow a respdt. content with a decree in his favour an opportunity of contesting findings against him in case his opponent appeals. (1920) Pat HCC 161: 5 Pat LJ 328: 1 Pat LT 434: 56 Ind Cas 262: AIR (Vol 7) 1920 Pat 77 (DB).

——O. 41, Rr. 22 and 33 — Scope of — Memo. of objections as to parts of the decree not affected — Appeal by Dy. Collector with regard to the valuation of some of the plots acquired — Memo. as to some of the plots acquired — Memo. of objections regarding other plots.

When an appeal is preferred by the Government to the High Court as regards the valuation of some of the plots in a land acquisition case, it is open to the respondent to prefer a memorandum of objections relating not merely to the plots covered by the appeal but also to the other plots, the subject of the same petition though not covered by the appeal. A memorandum of objections may be filed against the decree as a whole or against any part of it though it may not be the subject matter of the appeal. AIR (Vol 6) 1919 Mad 827: 35 MLJ 83: 24 MLT 83: (1918) MWN 458: 8 LW 271: 48 Ind Cas 1003 (DB).

——O. 41, R. 22 — Scope of — Common right — Memo. of objection — Damages — Claimed by only one given to all.

Where in a memo. of objections put in by respts. (Plffs.) in an appeal only one plff. claimed damages for an infringement by the defts. of a right common to all the plffs., damages could be awarded to all the plffs. as the basis of the claim was common to them all. (1912) 15 Ind Cas 409 (Mad) (DB).

——O. 41, R. 22 — Leave to file memo. in forma pauperis.

An application for leave to file cross-objections in 'forma pauperis' may be received by the Court. (1911) 15 CWN 205: 12 CLJ 173: 7 Ind Cas 118 (DB).

3. Attacks on decree.

——O. 41, R. 22 — Right to file cross-objection — Respondent challenging whole decree.

If an appeal is filed, the respondent to the appeal without filing any appeal can take cross-objection to the decree on any ground on which he could have filed an appeal. It is not necessary that before a respondent can file cross-objection he must accept some part of the decree as good. He has a right to file a cross-objection even if he challenges the whole of the decree. AIR (Vol 37) 1950 Cal 372 (DB).

——O. 41, R. 22 — Right of respondent to challenge decree.

In a suit for ejectment and damages for use and occupation, the Court did not give the plaintiff a decree for ejectment as there was defect of parties, and gave him merely a decree for damages. The plaintiff appealed. The defendant who did not file a cross-appeal sought to re-open the question of title.

Held, that although the amount awarded as damages was the same as the rent would have been, the nature of the payment was entirely different and in speaking to challenge the decision as to title the defendant-respondent was also in effect challenging the decree against him which was a decree for damages based on an adjudication that he had no title and was a mere trespasser, and that he could not do so as O. 41, R. 22, C. P. Code, enabled the respondent only to support the decree upon grounds decided against him and not to challenge it. 29 PLT 499: AIR (Vol 36) 1949 Pat 79 (DB).

——O. 41, R. 22 — Objections attacking decree.

Order 41, R. 22 while it allows a respondent to support the decree on any of the grounds decid-

ed against him will not permit him to take objections which instead of supporting the decree, attack it. Such objections can be raised only by way of cross-objection. AIR (Vol 20) 1933 Mad 465: 38 MLW 263: 144 Ind Cas 16.

——O. 41, R. 22 — Where the respondents instead of supporting the decree of the Court below attacks it without filing cross-objections, they are not permitted to do so under the provisions of O. 41, R. 22. AIR (Vol 16) 1929 Lah 684 (DB).

——O. 41, R. 22 — The Court of first instance dismissed a suit on the ground of limitation. The lower appellate Court set aside this finding holding that the suit was in time but the suit was dismissed on another ground. From this the plaintiff appealed. The respondent contended that the lower appellate Court was wrong in not dismissing the suit on the ground of limitation.

Held, that the question of limitation could not be entered into as there was no appeal by the defendants. 9 LRA Rev. 232: 116 Ind Cas 283: AIR (Vol 15) 1928 All 624.

——O. 41, R. 22 gives a right to a respondent to attack any decree which is passed against him by the lower Court by filing a cross-objection. 106 Ind Cas 817: AIR (Vol 15) 1928 Lah 221.

——O. 41, R. 22 — Objection not put as cross-objection, cannot be taken if it is not in support of the decree.

Where the question as to the frame of the suit under O. 34, R. 1 of the C. P. Code was raised in and decided by the lower Court and no cross-objection was filed in appellate Court under O. 41, R. 22 of the Code, and where the ground was not one in support of the decree made but which, if sustained, would render the decree invalid.

Held , that such objection cannot be taken in the appellate Court. AIR (V 12) 1925 Cal 94 : 84 Ind Cas 124 : 40 CLJ 67 (DB).

——O. 41, R. 22 — When the objection to jurisdiction of execution Court was not taken in first Court it is doubtful whether the order of the Court attaching the property could be properly attacked by means of cross-objections in connection with an entirely different order, viz., in the appeal of the decree-holder from the order of the executing Court refusing to set aside a prohibitory order. 75 Ind Cas 419: AIR (Vol 10) 1923 Lah 514.

——O. 41, R. 22 — Suit for possession of ancestral property alienated without necessity — Trial Court finding necessity but decreeing possession on payment of certain amount — Appeal by defendant but no cross-objection by plaintiff — Plaintiff can raise point about necessity for sale but Appellate Court cannot decree possession without payment of any amount. AIR (Vol 8) 1921 Lah 318.

4. Cessation of appeal.

(a) General.
(a-1) Abatement.
(b). Appeal barred by limitation.
(c). Dismissal for default.
(d). Non-payment of Court-fee.
(e). No right of appeal.
(f). Withdrawal of appeal.

(a) General.

——O. 41, R. 22 — "Duly served" — Appeal — Cause list not mentioning name of respondent's advocate — Appeal heard ex parte — Right of respondent to apply to set aside on the ground of want of due service of notice.

The cause list published by the High Court is a notice of the date of the hearing of the appeal. If an appeal is heard without mentioning it in the daily cause list, it must be held that the notice of the appeal has not been duly served. Similarly, if, in the cause list, the name of the Advocate for the respondent is not mentioned, it must amount to having issued a notice without designating the person to whom the notice is issued. It must be held in such a case, when the appeal is heard without any appearance for the respondent, that the appeal is heard ex parte as the notice of appeal was not "duly served" on the respondent. The respondent would therefore be entitled to have the ex parte decree set aside on that ground. AIR (Vol 36) 1949 Pat 502.

——O. 41, R. 22 — Right to file cross-objections — Respondent whose appeal has been dismissed summarily.

When a respondent had already filed an appeal and it has been dismissed summarily it is not open to him to raise the same grounds as in that appeal, by way of cross-objections in an appeal by the other party. 1947 AWR (Rev.) 12: 1947 RD 11.

——Order 41, R. 22 — When the appeal preferred by the appellant does not lie, the Court has no jurisdiction to entertain the cross-objections of the respondent. (1939) 41 PLR 153.

——O. 41, R. 22 — Cross-objections filed after dismissal of appeal should also be dismissed.

The very word "cross-objections" used in O. 41, R. 22 implies that the objections are taken in answer to a pending appeal, Clause (4) cannot be invoked against this view. It lays down that where after the respondent has filed a memorandum of objection under the rule the appeal is subsequently withdrawn or dismissed for default such withdrawal or dismissal shall not prevent the objections being heard and decided. The rule clearly implies that the objections have been filed prior to the appeal being dismissed or withdrawn. AIR (Vol 11) 1924 All 867: 78 Ind Cas 677: 22 ALJ 365: 5 LRA Civ 298.

——O. 41, R. 22 — Withdrawal of appeal — Right to file cross-objections.

If an appeal is no longer pending having already been dismissed cross-objections cannot be filed as the pendency of an appeal is a condition precedent to the filing of cross objections. AIR (Vol 4) 1917 All 299: 39 Ind Cas 947.

——O. 41, R. 22 — Dismissal of appeal — Appeal unsustainable — Cross-objections, if valid.

A respdt. can file cross-objections even in cases where the appeal filed is not maintainable. (1912) 34 All 140: 8 ALJ 1297: 13 Ind Cas 19 (DB).

(a-1) Abatement.

——O. 41, R. 22 (4) — Scope — Abatement of appeal — Cross-objections — If survive and can be heard.

Where an appeal abates on the death of the appellant, the legal representatives of the appellant not being brought on record within the time limited, the respondent who has preferred cross-objections has no right to have the same heard. On the abatement of the appeal the cross-objections must stand dismissed. AIR (Vol 36) 1949 Bom 276 : ILR (1949) Bom 263 : 51 Bom LR 241 (DB).

——O. 41, R. 22 (4) — Appeal abating.

A cross-objection is part of an appeal and if an appeal goes out for any extraneous reasons, the cross-objection must ordinarily go out with it: the only exceptions are those mentioned in sub-r. (4) of O. 41, R. 22. Consequently a respondent has no right to be heard on his cross-objection when the appeal in which he took the cross-objection has abated. AIR (V 26) 1939 Nag 39 : 1938 NLJ 399 : ILR (1940) Nag 324 : 181 Ind Cas 411 (DB).

——O. 41, R. 22 — Death of appellant — Legal representatives not brought on record — Whether cross-objections can be heard after bringing legal representatives on record (Quaere).

Where after an appeal is filed, the appellant dies but notices have been issued to the respondents, the appeal abates and if no application to bring the legal representatives on record is made within time, the cross-objections cannot be heard.

Quaere.— Whether on the abatement of the appeal by the death of the appellant the cross-objections can be heard after bringing on the record the legal representatives of the deceased appellant in the respondents' application. AIR (Vol 21) 1934 Lah 136 (2): 151 Ind Cas 387 (DB).

——Order 41 R. 22 — When the appeal has abated, the cross-objection cannot be heard. AIR (Vol 15) 1928 Lah 596: 110 Ind Cas 910: 10 Lah 208 (DB).

——O. 41, R. 22 — Where an appeal has abated, the respondent is not entitled to have his cross-objections heard and determined. AIR (Vol 8) 1921 Mad 405 : 41 MLJ 304 : 62 Ind Cas 757 : 44 Mad 828: 13 MLW 705: 1921 MWN 438 (DB).

(b). Appeal barred by limitation.

——O. 41, R. 22 — Cross-objection by one creditor to enhance his amount — Appeal against other creditors barred by time.

Where creditors have acquired a vested interest which cannot be interfered with in a case solely between the creditor and the debtor, the cross-objections of such creditor to enhance the amount decreed in his favour under the Encum. Estates Act cannot be allowed if the appeal against other creditors is then time-barred. AIR (Vol 31) 1944 Oudh 230: 1944 OWN (CC) 69: 1944 AWR (CC) 75: 1944 RD 170 (DB).

(c). Dismissal for default.

——O. 41, R. 22 (4) — "Default".

The word 'default' occurring in the rule includes any default made by the appellant which would amount to non-prosecution of the appeal. AIR (Vol 18) 1931 Mad 133: 1930 MWN 1236.

——Order 41, R. 22 — Though the main appeal from the Original Side of a High Court has been dismissed for default, a memorandum of objection filed by the respondent in the appeal can be treated as a substantive appeal. AIR (Vol 12) 1925 Mad 725 : 21 MLW 672 : 1925 MWN 190 : 88 Ind Cas 443 : 48 Mad 631 : 48 MLJ 384 (DB).

——Order 41, R. 22 — The rejection of a memorandum of appeal as insufficiently stamped is not a dismissal for default and no cross-objections can be entertained or heard where the appeal is rejected. AIR (Vol 7) 1920 Lah 24: 59 Ind Cas 795: 46 PWR 1921.

——O. 41, R. 22 (4) and O. 41, R. 10 — Dismissal of appeal — Failure to furnish security — Cross-objections.

Rejection of appeal for failure to furnish security for costs is equivalent to dismissal for default and the respondent can have his cross-objections heard. AIR (Vol 6) 1919 Pat 219: 4 Pat LJ 164: 50 Ind Cas 729 (DB).

——O. 41, R. 22 — Dismissal of appeal for default — Memo. of objection.

The appellate Court can deal with the memo. of objections even though the appeal itself is dismissed for default. (1911) 9 MLT 217: 9 Ind Cas 572 (DB).

——O. 41, R. 22 — Dismissal if appeal — Default — Memo if can be heard.

A memo of objections cannot be argued if the appeal is dismissed for default, nor are the courts bound to allow costs to respdt. in such case, or even when memo. is dismissed because the appeal is withdrawn. The case was decided under S. 526 of the C. P. C., 1882. (1910) MWN 144 : 8 MLT 53 : 20 MLJ 878 : 6 Ind Cas 309 (DB).

(d). Non-payment of Court-fee.

——O. 41, R. 22 Appeal rejected for failure to deposit court-fee — Cross-objection cannot be heard.

A respondent has no right to be heard on his cross-objection when the appeal in which he took the cross-objection has become incompetent and the only exceptions are those mentioned in O. 41, R. 22 (4). The provisions of R. 22 (4) must be interpreted strictly and not extended beyond their obvious meaning. The words "dismissed for default" in Sub-R. (4) cannot cover the case of the rejection of an appeal for failure to pay the court-fee. It makes no difference that at the time of the filing of the appeal, the court-fee was sufficient but that the necessity for more court-fee arose due to subsequent developments, because in order that a cross-objector should be entitled to maintain his cross-objections, it is imperative that the appeal should not only be competent and valid on the day when it is filed but it must continue to be so till the time when the cross-objections are heard:

Difference between effect of dismissal of appeal on cross-appeal and effect on cross-objection pointed out incidentally. AIR (Vol 31) 1944 Oudh 57: 1943 OWN (CC) 470: 1943 AWR (CC) 159: 215 Ind Cas 37 (DB).

——O. 41, R. 22 (4) — Memorandum of appeal rejected for non-payment of court-fee.

Where the memorandum of appeal is rejected for non-payment of court-fees, the appeal cannot be said to be withdrawn or dismissed for default within the meaning of O. 41, R. 22 (4) and hence the cross-objections must fail with the appeal. AIR (Vol 28) 1941 Bom 242: 43 Bom LR 475: ILR (1941) Bom 477: 195 Ind Cas 894 (DB).

——O. 41, R. 22 (4) — Appeal rejected for deficiency of court-fee.

Where the memorandum of appeal is rejected on the ground that it is insufficiently stamped, cross-objections filed by the respondent cannot be heard.

Order 41, R. 22 (4), must be interpreted strictly and cannot be extended beyond its obvious scope. AIR (Vol 19) 1932 Nag 41: 28 NLR 25: 137 Ind Cas 156.

——O. 41, R. 22 (4) — Rejection of appeal for non-payment of deficiet court-fee — 'Default', meaning of — Second appeal against dismissal of cross-objections — Cross-objection against dismissal of appeal, competency of.

The word 'default' in O. 41, R. 22 (4), is wide enough to cover non-payment of deficit court-fee which the appellant was directed to pay by an order of the Court and, therefore, the respondent is entitled to have his cross-objections heard under that clause where the appeal is rejected for non-payment of such court-fee.

Where an appeal preferred by A against B was dismissed for non-payment of court-fee and the cross-objections of B were also dismissed and B filed a second appeal challenging the correctness of the dismissal of the cross-objections:

Held, that it was not open to A to object to the rejection of his appeal by the lower Court, by way of a cross-objection to B's second appeal. AIR (Vol 18) 1931 Mad 133: (1930) MWN 1236: 130 Ind Cas 657.

——O. 41, R. 22 (4) — Rejection of appeal for non-payment of court-fee.

Where an appeal is rejected for failure to pay deficit court-fees the cross-objections must also be rejected. The provisions of R. 22 (4) of O. 41, must be interpreted strictly and not extended beyond their obvious meaning. AIR (Vol 18) 1931 Rang 38: 8 Rang 533: 129 Ind Cas 500 (DB).

——O. 41, R. 22 (4) — Dismissal of appeal — Court-fee — Cross-objections.

There are only two exceptions as provided by R. 22 (4) of O. 41 which allow the hearing of cross-objections even when the original appeal is not heard. If the original appeal is dismissed without hearing for failure to pay proper Court-fee, the Court has no jurisdiction to hear and determine the cross-objections. 131 PLR 1911: 180 PWR 1911 : 11 PR 1912 : 10 Ind Cas 207.

(e). No right of appeal.

——O. 41, R. 22 — Dismissal of appeal — Appeal incompetent and not pressed.

A memorandum of objections can be heard even though appellant admits that the appeal is incompetent and it is consequently dismissed. AIR (Vol 7) 1920 Mad 169: 10 LW 605: 54 Ind Cas 506 (DB).

——O. 41, R. 22 — Dismissal of appeal — Not maintainable — Memo. if can be heard.

Though an appeal fails on the ground of absence of right of appeal, the respdt. can have his cross-objections heard and determined on the merits. 67 PWR 1909: 4 Ind Cas 625.

(f). Withdrawal of appeal.

——O. 41, R. 22 — Withdrawal of appeal — Memo. of objections.

If an appeal is withdrawn without any hearing, the memo of objections must be dismissed without costs as the respdt., are not entitled to take any objection to the decree under S. 561. (1909) 6 M LT 346: 4 Ind Cas 1076 (DB).

5. Court-fee.

——O. 41, R. 22 — Court-fee — Ad valorem fee.

Cross-objection in appeals arising out of redemption suits must be stamped ad valorem on the amount by which the decretal amount is sought to be reduced. Where the object of the cross-objections is to wipe off the claim of the respondent in respect of a deed of further charge, court-fee should be paid ad valorem on that amount. AIR (Vol 21) 1934 Oudh 246: 11 OWN (C C) 559: 9 Luck 657: 149 Ind Cas 543 (DB).

——O. 41, R. 22 — Cross-objection regarding costs — Court fee.

Plaintiff's suit in the Court below was dismissed without giving any costs to the defendants. The plaintiff filed an appeal and the defendants filed a cross-objection stating that the Court below was wrong in not allowing costs to them.

Held, that the cross-objection, which related to costs, should bear Court-fee upon the amount claimed: AIR 1921 Cal 55. not Foll. AIR (Vol 16) 1929 Pat 286: 117 Ind Cas 166: 8 Pat 543: 10 PLT 224.

——O. 41, R. 22 — Court-fee — Valuation.

Where the object of a cross objection is to have a declaration in respect to a mortgage set aside the proper value of the cross objection for Court fees is the value of the mortgage. AIR (Vol 6) 1919 Pat 494: 52 Ind Cas 1002.

6. Cross-appeals and cross-objections.

——O. 41, R. 22 — Appeals by plaintiff and defendant — Defendant's appeal barred — Whether it can be treated as cross-objection.

Where the plaintiff and the defendant both file separate appeals and the defendant's appeal is time-barred, it is not open to the Court instead of dismissing it as required by S. 3, Lim. Act, to treat it as cross-objection to the plaintiff's appeal. AIR (Vol 31) 1944 Pesh 7: 211 Ind Cas 343.

——O. 41, R. 22 — There is nothing in the provisions of U. P. Encum. Estates Act or rules framed thereunder which conflicts with the provisions of O. 41, R. 22, Civil P. C. which provides for cross-objections by a respondent. Consequently filing of cross-objections in an appeal is competent. AIR (Vol 30) 1943 Oudh 38: 1942 OWN (CC) 585: 1942 RD 753: 1942 AWR (C C) 309 (2): 18 Luck 273: 203 Ind Cas 449 (DB).

——O. 41, R. 22 — Decree of dismissal — Cross-objections cannot be preferred against mere findings.

A memorandum of cross-objections cannot be preferred against mere findings when the decree appealed against is one of dismissal. But it is open to the respondent in such circumstances to sustain the decree of the Court below even on any ground which has been decided against him by that Court. AIR (Vol 29) 1942 Mad 334: (1942) 1 MLJ 92: 55 MLW 82: 1942 MWN 97: 208 Ind Cas 81.

——O. 41, R. 22 — Suit dismissed in entirety — Appeal by plaintiff — Objection by pro forma defendant who did not contest suit that decision appealed from was wrong.

Where a suit has been dismissed in its entirety and, on the plaintiff appealing, the pro forma defendant who did not contest the suit at all, files an objection that the decision appealed from is wrong in its entirety, the objection petition is not a petition of cross-objections within the meaning of O. 41, R. 22, Civil P. C. AIR (Vol 27) 1940 Cal 377: 190 Ind Cas 580.

——O. 41, R. 22 — Under O. 41, R. 22 (1), it is open to a respondent to support the decree under appeal on any of the grounds decided against him in the Court below. Order 42, R. 1, provides that the rules in O. 41, shall apply, so far as may be, to appeals from appellate decrees. If the statement that a Court of second appeal is bound by the findings of fact of the first Appellate Court holds good, both as against an appellant and as against a respondent, it is inconceivable that the Legislature permits a respondent to support the decree of the lower Appellate Court on any of the grounds decided against him in the Court below in a case in which there are both issues of fact as well as issues of law or issues of mixed fact and law. Where a respondent takes any cross-objection to the decree, such cross-objection would be governed by the rules of procedure governing an appeal, because under O. 41, R. 22 (1), cross-objection must be such as the respondent could have taken by way of appeal. It is to be noted that a cross objection is a cross-objection to the decree, and where the decree is entirely in favour of the respondent, there is nothing to which it is necessary for the respondent to take cross-objection. AIR (Vol 26) 1939 Rang 59: 179 Ind Cas 946 (DB).

——O. 41, R. 22 — Cross-appeals by defendant and plaintiff against same decree — Subject-matter different — Plaintiff-respondent dying during pendency.

Held, that the appeal by the defendant could not be treated as cross-objection as none of the conditions required by the Civil P. C., were satisfied. (1936) 164 Ind Cas 935: 62 CLJ 139.

——O. 41, R. 22 — Cross-appeal — No cross-appeal when there is no decree.

Where a suit is decreed against some of the defendants and dismissed against the minor defendants as they were not represented, it is not at all open to the plaintiff to prefer a cross-appeal against such dismissal as it does not amount to a decree AIR (Vol 16) 1929 Cal 669: 124 Ind Cas 75: 33 CWN 742 (DB).

——O. 41, R. 22 — Appellant if can file cross-objections.

A person, who has filed an appeal from a decree which is still pending and especially when it has not been admitted to hearing, is not precluded from filing cross-objections on the same grounds when the other party appeals from the decree. AIR (Vol 16) 1929 Lah 161: 112 Ind Cas 689.

——O. 41, R. 22 — Scope of.

The memorandum of objections can be treated as a separate cross-appeal only if the appeal and the memorandum of objections are such as must be treated as forming two independent proceedings relating to distinct sets of facts. AIR (Vol 16) 1929 Mad 429: 121 Ind Cas 16: 52 Mad 521: 29 MLW 623: 1929 MWN 304: 56 MLJ 476 (DB).

——O. 41, R. 22 — Account suit — First appeals filed by both parties — That of one party dismissed — Second appeal not filed by that party from dismissal of his first appeal — His claim cannot be taken by way of cross-objections to second appeal filed by opposite party. AIR (Vol 16) 1929 Oudh 41: 111 Ind Cas 843 (DB).

——O. 41, R. 22 — Where appeals relating to the matter in cross-objections are dismissed under O. 41, R. 11, cross-objections cannot be heard in the cross-appeal. AIR (Vol 15) 1928 Cal 882: 117 Ind Cas 693: 32 CWN 863 (DB).

——O. 41, R. 22 — Decree against two defendants — One appealing on grounds open not to him but to other — Other filing cross-objections being adverse to appellant's interest though consistent with his contentions, as well as to plaintiff-respondent are maintainable. AIR (Vol 12) 1925 Cal 973: 88 Ind Cas 866: 29 CWN 784 (DB).

——O. 41, R. 22 — The law does not permit a respondent, who has preferred an appeal, to file cross-objections. AIR (Vol 12) 1925 Lah 2: 17 PWR 1923: 79 Ind Cas 670 (DB).

——O. 41, R. 22 — Respondent cannot take cross-objection which he has already taken by way of appeal and which had been decided against him. AIR (Vol 11) 1924 All 867: 78 Ind Cas 677: 22 ALJ 365: 5 LRA Civ 298.

——O. 41, R. 22 — Cross-appeal as to a part and objections as to rest.

There is nothing in O. 41, R. 22 to prevent a party from filing an appeal from one part of the decree and contening himself with filing a cross-objection about another part of the decree in a cross-appeal filed by the other side before the former appeal has been decided. AIR (Vol 11) 1924 All 840: 73 Ind Cas 877.

——O. 41, R. 22 — Right to cross-objections is unconditional — Party can file cross-objections though his right to appeal from the decree against him is lost where appeal by the other side is filed against decree on appeal by the other side. AIR (Vol 11) 1924 Pat 775: 76 Ind Cas 257: 5 PLT 411 (DB).

——O. 41, R. 22 — Petition to support judgment.

If for the purpose of supporting the decree dismissing plaintiff's claim on any ground, even on a ground other than that taken by the Court of first instance, respondents filed a petition stating the reasons on which they supported the decree, that did not amount to cross-objections for which an ad valorem Court-fee was payable. AIR (Vol 9) 1923 All 280: 68 Ind Cas 861: 44 All 577 (DB).

——O. 41, R. 22 — What is not.

Mere criticism of judgment cannot be allowed to be filed as a petition of cross-objection and do not amount to cross-objection so as to require to be stamped. AIR (Vol 9) 1922 Pat 483: 1 Pat 258.

——O. 41, R. 22 — Petition by respondent criticising judgment is not a cross-objection and cannot be filed. AIR (Vol 9) 1922 Pat 483 : 1 Pat 259.

——O. 41, R. 22 — Scope of.

Where a decree is given for a petition of the amount claimed and an appeal is filed claiming more, it is not open to the respdt. who has not appealed to urge any objection with respect to the portion not appealed against. AIR (Vol 3) 1916 Mad 720: 39 Mad 365: 28 MLJ 285: 2 LW 241: 28 Ind Cas 221 (DB).

——O. 41, R. 22 — New grounds — Points not raised in objections.

The respdt. cannot raise at the hearing of the appeal grounds not set forth in objections. (1913) 15 Bom LR 130: 19 Ind Cas 98 (DB).

——O. 41, R. 22 (Ss. 561, 590, old Code) — Memorandum of objections in appeals from orders.

A memorandum of objectins will lie in appeals from orders. (1907) 18 MLJ 157 (157): 3 MLT 248: (DB).

7. Cross-objections against co-respondents.
(a) When maintainable.
(b) When not maintainable.

(a) When maintainable.

——O. 41, Rr. 22 and 33 — Cross-objection against co-respondent — Maintainability.

There is no warrant for holding that in no case can a cross-objection be filed by a respondent directed solely against a co-respondent. Under O. 41, R. 22, C. P. Code, it is open to a defendant-respondent to file a cross-objection against a co-respondent. Where the decree under appeal is an infructuous decree in as much as it is in contravention of S. 42, Specific Relief Act, the plaintiff respondent in an appeal by a defendant can file a cross-objection even against a respondent to the effect that the decree is erroneous and that it should be corrected and that a proper and legal decree should be passed, if not under O. 41, R. 22, at least certainly under R. 33 of O. 41, C. P. Code. AIR (Vol 38) 1951 Pat 539: 30 PLT 359 (DB).

——O. 41, R. 22 — Cross-objection against co-respondent — When competent.

One respondent may urge a cross-objection as against other co-respondents in those cases where the appeal opens up questions when cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. Where a suit was decreed for khas possession not only against defendant No. 1 but also against the other defendants who were his tenants, and the lower appellate Court decreed khas possession of untenanted land and not in respect of tenanted lands, in a second appeal filed by defendant No. 1 alone cross-objection filed by the plaintiff-respondent against the other defendants who are co-respondents is competent, as the decree appealed from proceeds on a ground common to all the parties against whom it is passed although the appeal is preferred by only one of such parties. (1950) 54 CWN 2 (DB) 265.

——O. 41, R. 22 — Cross-objections against co-respondent — If can be filed.

The provisions of O. 41, R. 22 of the Code of Civil Procedure do not enable one respondent to prefer objections against another respondent at any rate when the objection sought to be taken was one in which the appellants were in no way interested. 27 MLJ 740: ILR 38 Mad 705 (FB), overruled.

O. 41, R. 22 on a proper construction confers only a restricted right on a respondent to prefer objections to the decree without filing a separate appeal. Such an objection should as a general rule be primarily against the appellant. In exceptional cases, it may incidentally be also directed against other respondents. AIR (Vol 37) 1950 Mad 379: ILR (1950) Mad 874: 63 LW 32: 1950 MWN 125: (1950) 1 MLJ 54 (FB)

——O. 41, R 22 — Cross-objections against co-respondent — Maintainability.

The right of the respondent to urge a cross-objection should be limited to his urging it against

the appellant and it is only by way of an exception to the general rule that one respondent may urge cross-objections as against other respondents, the exception holding good, among other cases, in those in which the appeal by some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents; in other words, only such questions can be raised by way of cross-objections as are common both to the appellant and the co-respondents. AIR (Vol 35) 1948 Nag 377: ILR (1948) Nag 340: 1948 NLJ 513 (DB).

——O. 41, R. 22 — Cross appeal — Right of respondent to file against a co-respondent — Limits.

It is now well settled so far as Allahabad High Court is concerned that as a general rule a respondent can file a cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent. Where at the time the decree was passed both respondents are satisfied with the decree and do not file an appeal against it and it has become final so far as they were concerned, there is no reason why one of the respondents should be given a second chance to file an independent appeal by way of cross-objection against the other respondent. AIR (Vol 33) 1946 All 395: ILR (1946) All 317: 1946 ALJ 44: 1946 OWN (HC) 21: 1946 AWR (HC) 70: 1946 ALW 21 (DB).

——O. 41, R. 22—A respondent may not only file cross-objections against the appellant, but also against a co-respondent. AIR (Vol 32) 1945 Mad 47 : (1944) 2 MLJ 220 : 1944 MWN 539.

——O. 41, R. 22 — Respondent can file cross-objections against another co-respondent.

Under O. 41, R. 22, Civil P. C., a respondent has a right to file cross-objections against another co-respondent. It is not necessary that the party against whom he intends to file objections should have been impleaded by the appellant or should have in any case, come on the record before the period of appeal against him had expired. Since the respondent can get his grievance existing against a decree redressed by filing an appeal against party to the suit, he can do the same by way of cross-objections as well although they do not happen to be directed against an appellant or happen to be directed against a party to the suit, whether that party might or might not have been added as a party to the appeal. AIR (Vol 30) 1943 Mad 15: 55 MLW 578: (1942) 2 MLJ 431: 208 Ind Cas 38 (DB).

——O. 41, R. 22 — Cross-objections would be admissible if the points raised in them directly or indirectly concern the appellant. In case they do the fact that a co-respondent is also affected would not matter. But, on the other hand, if the cross-objections agitate questions which have nothing to do with the appellant and affect only a co-respondent or co-respondents, they should not be admitted. AIR (Vol 30) 1943 Pesh 3: 206 Ind Cas 35 (DB).

——O. 41, R. 22 — Respondent can file cross-objections against co-respondent.

In a memorandum of cross-objections, a respondent can raise a question that arises only between him and a co-respondent. AIR (Vol 28) 1941 Mad 402: (1941) 1 MLJ 106: 53 MLW 57: (1941) MWN 89.

——O. 41, R. 22, O. 14, R. 1 — Cross-objection, if can be filed by respondent against person who, though party to suit, was not impleaded as party to appeal by appellant — Parties should draw attention of Court to omission in framing issue — Person contending that he is not necessary party —No issue pressed.

The provisions contained in O. 41, R. 22, are quite general and entitle a respondent to take any cross-objection to the decree which he could have taken by way of appeal. A respondent's right to file cross-objections and ask for relief cannot be restricted to the parties only who have been impleaded in the appeal at the instance of the appellant. If the respondent could file an appeal against a respondent who although not a party to the appeal was yet a party to the suit, there is nothing in the words of O. 41, R. 22, which would prevent him from raising the contention in his cross-objections which could be raised by him in an appeal.

It is true that the duty of framing issues has been cast by the Civil P. C., on Courts. But it is essential for the parties also to draw the attention of the Court to an omission in framing issues. Where the issue in regard to a party as being an unnecessary party was not pressed on his behalf deliberately when the issues were being framed it must be held to have been waived by him. AIR (Vol 25) 1938 Mad 329: (1938) MW N 75: 47 MLW 760: 178 Ind Cas 191.

——O. 41, R. 22 — Case of co-respondent having nothing in common with that of appellant — Maintainability of cross-objection against such co-respondent.

The expression "cross-objection" is clearly indicative of the fact that it should be directed against the appellant, but it may be taken against a co-respondent also, if there is a community of interest between the latter and the appellant. When the cross objection is directed solely against a co-respondent whose case has nothing in common with that of the appellant but proceeds on the same grounds on which the appeal does, it is not maintainable. AIR (Vol 22) 1935 All 134: (1935) ALJ 845: 4 AWR (HC) 1178: 57 All 580: 155 Ind Cas 89 (DB).

——O. 41, R. 22 — Cross-objection against co-respondent — Tests.

A cross-objection by a respondent as against his co-respondent should not be entertained under O. 41, R. 22, where the question raised thereby is entirely distinct from and in no way related to the question in controversy in the appeal. The test is whether the question raised thereby is so connected that one of the parties ought not to be allowed to re-open matters so far as he is concerned without opportunity allowed, in the interest of justice, to another to protect himself by urging his objections, even though they be directed, not against the appellant but against a co-respondent. AIR (Vol 21) 1934 Cal 345: 58 CLJ 534: 150 Ind Cas 364 (DB).

——O. 41, R. 22 — Cross-objection by respondent against co-respondent — When can be entertained — Tests.

A cross-objection against the appellant stands on a different footing from an objection against a co-respondent; the former, comes from a party who is content with the decree of the lower Court provided his opponent does not appeal, while the respondent who wishes to urge an objection against a co-respondent is, as a general rule, merely availing himself of an appeal by another party relating to other matters, to urge at a late stage what he could and should have urged by way of appeal earlier. A respondent is not entitled as of right to urge cross-objections against co-respondents although such objections may be entertained under O. 41, R. 33, in exceptional cases. AIR (Vol

21) 1934 Pat 134: 15 PLT 42: 13 Pat 200: 153 Ind Cas 412 (DB).

——O. 41, R. 22 — Cross-objection against co-respondent is permissible.

The right of a respondent to urge cross-objections should not be limited to his urging them aginst the appellant and one respondent may urge cross-objections against another respondent. Rule 22 (3) of Order 41 of the Code of 1908 has materially altered the pre-existing law by the substitution of the words "party who may be affected by such objection" for the word "appellant" contained in S. 561 (3) of the Code of 1882: 16 CWN 612; 37 Bom 511, Diss. AIR (Vol 10) 1923 Lah 39: 69 Ind Cas 330: 5 LLJ 92.

——O. 41, R. 22 — Co-respondents.

As a general rule a respondent can urge cross-objections only against the appellant and it is by way of exception that he may urge a cross-objection against another respondent, the exception holding good among other cases in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened as between co-respondents. AIR (Vol 7) 1920 Lah 204: 2 UPLR (Lah) 97: 2 Lah LJ 747: 56 Ind Cas 469 (DB).

——O. 41, R. 22 — Co-respondents — Cross objections against.

Cross-objections against a co-respondent should be entertained where the appeal re-opens the whole matter in controversy between respondents inter se. Rule 22 cannot be construed to revive only a right of appeal of one of several co-defendants allowing the time of appeal to elapse. AIR (Vol 7) 1920 Pat 77: (1920) Pat HCC 161: 5 Pat LJ 328: 1 Pat LT 434: 56 Ind Cas 262.

——O. 41, Rr. 22 and 33 — Co-respondents.

Cross-objections against co-respondents are not illegal and where an appellate Court cannot do complete justice between the parties without opening the whole case, it can take into consideration the objections filed by one of the respondents not only against the appellant but against the co-respondent also, and to modify the decree, if necessary. AIR (Vol 6) 1919 Oudh 329: 6 OLJ 495: 53 Ind Cas 659.

——O. 41, R. 22 — Co-respondents — Memorandum of cross-objections.

Order 41, Rule 22, C. P. C. allows a respondent in an appeal to claim to relief against a co-respondent by way of a memorandum of cross-objections. AIR (Vol 6) 1919 Oudh 60: 6 OLJ 544: 2 UPLR (JC) 27: 54 Ind Cas 332.

——O. 41, Rr. 22 (3) and 33 — Co-respondent.

As an ordinary rule a respondent in an appeal is not entitled to urge cross-objections except as against the appellant but under special circumstances the appellate Court can under Order 41, Rules 22 (3) and 33 which have materially altered the existing law and given wide discretionary powers to the Appellate Courts to alter the decree of the Courts below, give effect to the cross-objections of one respondent against another. AIR (Vol 3) 1916 Cal 136: 43 Cal 790: 23 CLJ 26: 20 CWN 370: 35 Ind Cas 305 (DB).

——O. 41, R. 22 — Co-respondents.

A respondent can claim a relief against a co-resppndent by way of memorandum of objections. AIR (Vol 2) 1915 Mad 648: 38 Mad 705: (1915) MWN 45: 27 MLJ 740: 27 Ind Cas 323 (FB).

——O. 41, R. 22 — Co-respondents.

An appellate Court can allow a respondent to prefer cross-objections against another respondent. AIR (Vol 1) 1914 All 424: 12 ALJ 892: 36 All 505: 26 Ind Cas 83 (DB).

——O. 41, R. 22 — Co-respondents — Cross-objection against.

Under Order 41, Rule 22, one respondent can file cross-objection against another. (1912) 15 CLJ 61: 16 CWN 612: 13 Ind Cas 653 (DB).

——O. 41, R. 22 — Co-respondents — Cross-objection.

The legislature has altered the wording of law so as to provide for cases in which the person affected by the objections is not the appellant. (1910) 6 NLR 50: 6 Ind Cas 430.

——O. 41, R. 22 — Co-respondents.

Under Section 561 of the C. P. C, memorandum of objections as between co-respondents can be filed. (1909) 6 MLT 324 : 4 Ind Cas 1072 (DB).

——O. 41, R. 22; O. 41, R. 4 (Ss. 561, 544 old Code) — Appeal — Practice — Memo of objections as between co-respondents.

Where it is necessary for the proper decision of an appeal before it, it is competent to an appellate Court to take into consideration objections filed under Section 561, C. P. C., by one of the respondents, not only as against the appellant, but, it may be, as against the co-respondents with the objector and to modify the decree as against them accordingly. (1905) AWN 200: 2 ALJ 667: 28 A 95 (98) (DB).

——O. 41, R. 22 (S. 561 old Code) — Memo of objections lie between co-respondents — General rule and exceptions.

The rule is that generally no memorandum of objections can be urged by one respondent against a co-respondent. But where the appeal of the appellant opens out questions which cannot be disposed of completely without the matters decided against the plaintiff respondent in the Court below being opened as between him and the other respondents, a memo of objections can be allowed. Where in a suit brought by a plaintiff against several persons a principal debtor and another as suerty, and it was decided as against the surety but not as against the principal debtors, the claim against them being barred by limitation, the plaintiff-respondent in an appeal by the surety cannot file a memo of objections as against the principal debtors. (1903) 30 C 655 (658) (DB).

——O. 41, R. 22 (S. 561 old Code) — Memo of objections between co-respondents — Delay in filling — Excusing of.

Per Arnold White C. J. : Semble Section 561, C. P. C., only applies where a party has a right of appeal, but who until forced or invited into Court does not think fit to exercise it.

Per Subrahmanya Aiyar, J. — A memorandum of objections may be filed under Section 561, C. P. C. by one respondent against another although the question arises as between the co-respondents only. It would be a legitimate ground to excuse delay in the presentation of a memo of objections if the admission of the same is required to do complete justice. (1902) 15 MLJ 212: 28 M 229 (231, 234) (DB).

(b) When not maintainable.

——O. 41, R. 22 — Cross-objections against respondent — Respondent's right to file.

A respondent cannot file cross-objections against a co-respondent when he has not appealed from the decree and the cross-objections do not in any way affect the appellant. AIR (Vol 37) 1950 Assam 119 (DB).

——O. 41, R. 22 — Cross-objection against co-respondent but not affecting appellant.

A respondent cannot file cross-objections against a co-respondent when he has not appealed from

the decree and the cross-objections do not in any way affect the appellant. AIR (Vol 31) 1944 Lah 433: 46 PLR 281: 218 Ind Cas 183 (DB).

——O. 41, R. 22 — Cross-objection directed solely against co-respondent.

A cross-objection which is solely directed against the co-respondents and in which the appellant is not interested at all cannot be entertained. AIR (Vol 31) 1944 Oudh 130: 1944 OWN (CC) 50: 1944 AWR (CC) 22: 20 Luck 45: 215 Ind Cas 295 (DB).

——O. 41, R. 22 — Appellant not interested in cross-objection — Question between co-respondents raised.

A cross-objection which seeks to raise a question as between two respondents inter se and is a purely lateral attack in which the appellant is not concerned or interested, cannot be entertained. AIR (Vol 23) 1936 Oudh 182: 1935 OWN (CC) 1139: 158 Ind Cas 708 (DB).

——O. 41, R. 22 — Cross-objection nothing but old appeal which was dismissed as time-barred — Maintainability.

A cross-objection is not maintainable where the objector-respondent has no community of interest with the appellant and the cross-objection proceeds on the same grounds as the appeal or where it is nothing more than an old appeal which was dismissed as being time-barred. AIR (Vol 23) 1936 Pat 604 : 3 BR 100 : 165 Ind Cas 936 (DB).

——O. 41, R. 22 (1) — Where a point is taken in cross-objection which could not have been taken in appeal the cross-objection is incompetent. AIR (Vol 20) 1933 Rang 377: 150 Ind Cas 678.

——O. 41, R. 22 — Against whom allowed.

The cross-objections provided for by O. 41, R. 22 are cross-objections which are aimed against an appellant from a decree of a lower Court and are not cross-objections against a co-respondent. In any case such cross-objections will not be allowed as against a co-respondent, where the respondent could have preferred them by way of appeal. AIR (Vol 17) 1930 Bom 1: 122 Ind Cas 843: 31 Bom LR 1179 (DB).

——O. 41, R. 22 — The amendment substituting the words "the party who may be affected" for the word "appellant" does not give a respondent an absolute right of filing cross-objections against a co-respondent, even where such co-respondent is not an interested party at all and no relief has been claimed against him in the appeal. In such cases, the discretion given by O. 41, R. 33 to the appellate Court to allow cross-objection should not be exercised. AIR (Vol 16) 1929 All 195: 107 Ind Cas 569 (DB).

——O. 41, R. 22 — Cross-objections against co-respondent preferred long after dismissal of the appeal — Maintainability.

Cross-objection in this case was not pressed till long after the dismissal of the appeal. The applicant was represented on the date on which the appeal was dismissed.

Held, if the applicant wished to press her cross-objections it was her duty to intimate the fact to the Court at the time when orders were passed on the appeal. Not having done so and the appeal having been dismissed it is not open to her to come forward months afterwards and apply to revive them. The word "cross" was introduced for the first time in the Code of 1908 and indicates that the objections referred to must be directed against the appellant, and not against co-respondent. AIR (Vol 10) 1923 Oudh 108: 70 Ind Cas 79 : 25 OC 280 (DB).

——O. 41, Rr. 22 and 33 — Co-respondent.

A cross objection by a respondent as against his co-respondent should not be entertained under Order 41, Rule 22 of the C. P. C., where the question raised thereby is entirely distinct from and in no way related to the question in controversy in the appeal. AIR (Vol 5) 1918 Cal 13: 28 CLJ 123: 48 Ind Cas 78 (FB).

——O. 41, R. 22 — Co-respondents — Cross-objections.

Cross-objections cannot be urged against a co-respondent except in exceptional cases and should not be allowed to be urged where they could be raised by an appeal. (1913) 37 Bom 511: 15 Bom LR 781: 21 Ind Cas 7 (DB).

8. Effect of non-filing.

——O. 41, R. 22 — Scope — Rights or causes of action decided against respondent — Adjudication by appellate Court.

Under O. 41, R. 22, C. P. Code, it is not open to a respondent to have adjudicated by the appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections. AIR (Vol 39) 1952 Nag 60: ILR (1950) Nag 679: 1949 NLJ 550.

——O. 41, R. 22 — Decision on point not appealed from nor cross-objection filed.

Order 41, R. 22, Civil P. C., gives a respondent power only to support the decision of the lower Court; not to attack it. He has, therefore, no right to raise a point in an appeal, against a decision he has not appealed or even put in cross-objection. AIR (Vol 29) 1942 Lah 87: 44 PLR 80: 199 Ind Cas 700 (DB).

——O. 41, R. 22 — Declarations must be deemed to be conclusive under R. 22.

On the dismissal of an archaka of a temple, the trustee brought a suit against him for possession of the lands connected with the archaka service. The Court while dismissing the suit as incompetent added certain specific declarations to the dismissing decree which were not prayed for by the plaintiff in order to safeguard the interests of the temple. The plaintiff appealed and the defendant raised no cross-objections against the declarations:

Held, that the correctness of the declaration embodied in the trial Court's decree could not be allowed to be canvassed in appeal in the absence of memorandum of cross-objections by reason of O. 41, R. 22, Civil P. C., and the declarations must be deemed to have become conclusive. AIR (Vol 27) 1940 Mad 617 : (1940) MWN 71.

——O. 41, Rr. 22, 23 — Suit by co-sharer to set aside revenue sale — Appeal by defendant — Plaintiff without filing cross-objection claiming that sale should be set aside for want of jurisdiction and irregularity.

In a suit brought by the co-sharers, they alleged that in respect to the revenue sale, their co-sharer had been guilty of fraud or improper conduct to the prejudice of his co-owners in the estate, and contended that, by reason thereof, the purchase was one in which they could claim to share by recovering their former interest upon payment of a proper proportion of the purchase-money. The trial Judge accepted this contention and gave the plaintiffs decree, directing the co-sharer to convey to them their former share on receipt of a proportionate part of the purchase price. On appeal the decree-holders-respondents without filing any cross-objection to the decree of

the trial Court claimed that the revenue sale should be set aside for want of jurisdiction or irregularity:

Held, that the claim to relief was founded upon different grounds from those upon which the trial Court's decree proceeded, and upon principles different from those which underlie the relief given by the decree. The case came clearly within the condition imposed by the concluding words of Sub-Rule (1) of Rule 22 of O. 41, Civil P. C., "provided he has filed such objections in the Appellate Court", etc., and Rule 33 could not rightly be used in the case so as to abrogate the important condition which prevents an independent appeal from being in effect brought without any notice of the grounds of appeal being given to the parties who succeeded in the Court below. AIR (Vol 26) 1939 PC 86: 20 PLT 359: 43 CWN 529: 69 CLJ 505· ILR (1939) Kar (PC) 149 Sup: 5 BR 654: 181 Ind Cas 380.

——**O. 41, R. 22 — Trial Court passing decree for mesne profits for certain amount — Item reduced by Appellate Court — Respondent whether can support decree of trial Court, without memorandum of cross-objection.**

When an item in an account appearing in the decree of the lower Court is reduced by the appeal succeeding, the respondent without filing any memorandum of cross-objection can support the said decree by showing that the lower Court had wrongly decided against him on other items, but it is not open to the respondent to have adjudicated by the Appellate Court rights or causes of action which have been decided against him in the lower Court without filing an appeal or memorandum of cross-objection. As interest is an integral part of mesne profits the plaintiff-respondents are entitled on the said principle to maintain the amount of mesne profits decreed to them by the lower Court by a relative variation of the constituent elements without filing memoranda of cross-objections. They are entitled to urge that if interests be reduced by the Appellate Court, the profits may be assessed at a higher figure, if the evidence supports it, provided that the total does not exceed the amount decreed as mesne profits by the lower Court, and vice versa. AIR (V 25) 1938 Cal 563: 68 CLJ 152: 179 Ind Cas 298 (DB).

——**O. 41, R. 22 — Objector appealing on one point — Whether debarred from raising other points in appeal after expiry of limitation.**

Where the objector has not appealed, he can put in any objection which he could have made in an appeal although the period of limitation for appeal has expired. But by presenting an appeal on one point only, the appellant is debarred from raising other points in an appeal after the period of limitation has expired, and his failure to raise other points results in the decree becoming final as against him in respect of all points which he did not raise in appeal. AIR (Vol 23) 1936 Pesh 214: 166 Ind Cas 222 (DB).

——**O. 41, Rr. 22, 33 — Appeal by one party — Damages as to one item liable to be enhanced and as to another to be reduced — Set-off — Permissibility of.**

Under Order 41, Rule 22 it is not open to a respondent to have adjudicated by the Appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections. AIR (Vol 20) 1933 Cal 165: 56 CLJ 285: 143 Ind Cas 377 (DB).

——**O. 41, R. 22 — Respondent filing neither appeal nor cross-objection.**

Where the lower Courts held that the respondents had no lien over certain paddy attached and in an appeal by the appellants, this part of the decree was impeached by the respondents who, however, filed neither appeal nor cross-objctions:

Held, that the respondents could not raise the question of their lien over the paddy attached and claim that they were in possession at the time of attachment. AIR (Vol 20) 1933 Rang 120: 144 Ind Cas 1007 (DB).

——**O. 41, Rr. 22, 20 (Ss. 561, 559 old Code) — Respondent getting a decree against a co-respondent.**

A respondent cannot get a decree against a co-respondent when he has submitted to the decree of the Court of First Instance and has not filed an appeal separately. (1907) 4 ALJ 772 (773) : 30 All 48 (DB).

9. Limitation.

——**O. 41, R. 22 — Cross-objection against co-respondent — Limitation.**

It is true that Sub-Rule (3) to Order 41, Rule 22, Civil P. C., now requires that notice of the cross-objection should be given to "the party who may be affected by such objection", while Section 561 of the Code of 1882 required only notice to "the appellant". But the alteration was necessary as there was no provision in the Code of 1882 for giving notice of the cross-objection to a co-respondent in those exceptional cases where a cross-objection could be urged against him. The change in the language cannot be considered to imply that the Legislature intended that in every case a respondent should have an extended period of limitation for filing a cross-objection against a co-respondent which was in essence an appeal against him and had nothing to do with the appellant. AIR (Vol 33) 1946 All 395: 1946 OWN (HC) 21: 1946 ALJ 44 (DB).

——**O. 41, R. 22 — Cross-objections can be filed before service of notice is effected on respondent — Title of cross-objections is same as that of appeal.**

No doubt cross-objection cannot be presented after the expiry of one month from the date of the service of the notice on the respondent or his Pleader, but the right to submit his cross-objection accrues to a respondent as soon as an order is made issuing notice of the date of hearing of the appeal to him and it is not necessary for him to wait until the service is actually effected on him. It is even open to him to appear in a Court of Appeal on the date of hearing and present his objections there and then though not served at all.

The mere fact that the list of parties attached to the cross-objections does not contain the names of two of the respndents is merely a defect but it would not be fatal to the cross-objections. The cross-objections are always preferred to an appeal that is pending and the title of the cross-objections remains the same as that of the appeal. The words "within one month from the date of service on him" are meant to provide the maximum number of days during which cross-objections can be filed by a respondent as of right unless the period is extended by the Appellate Court. AIR (Vol 31) 1944 Lah 76: 46 PLR 148: ILR (1945) Lah 18: 213 Ind Cas 278 (FB).

——O. 41, R. 22 — In view of O. 41-A (Mad) R. 6, service by merely leaving the notice in the office of the Advocate as provided by O. 3, R. 5, is not service on party or his Pleader for the purpose of limi-

tation for filing memorandum of cross-objections under O. 41, R. 22. AIR (Vol 29) 1942 Mad 403: (1942) 1 MLJ 245: 55 MLW 115: 1942 MWN 182 (2): 201 Ind Cas 785 (DB).

——O. 41, R. 22 — Notice that an appeal has been preferred is not the same notice fixing the date of hearing of appeal — Cross-objection to be filed within one month from the date of receipt of later notice. (1939) 1939 OWN 530.

——O. 41, R. 22 — Cross-objections — Limitation — Starting point.

Under Order 41, Rule 22, Civil P. C., the cross-objections have to be filed by the respondent within a month of the serving of the notice of appeal and not from the date of knowledge of appeal as they do not necessarily coincide. (1937) 1937 MWN 39.

——O. 41, R. 22 — Obiter — The words "within one month" in R. 22, O. 41, would be more reasonably interpreted as meaning not beyond one month and, therefore, the respondent has a right to file cross-objections at any time up to one month after the date of service. It is hardly possible that the Code intended to prohibit an early filing of cross-objections. AIR (Vol 24) 1937 Nag 105: ILR (1937) Nag 401: 170 Ind Cas 93.

——O. 41, R. 22 — Use of word 'within', significance of.

Order 41, R. 22, lays down that a respondent may cross object provided he does so "within one month from the date when he receives notice of the hearing of the appeal." The use of the word "within" would fix two limits; an anterior limit starting from the date of receipt of the notice and a posterior limit of one month after that date. The "cross-objections" filed before that date would not be cross-objections at all in the strict legal sense of the word. AIR (Vol 23) 1936 Lah 362: 162 Ind Cas 336 (DB).

——O. 41, R. 22 — Time against respondent, when begins to run — Subsequent devolution of interest — Fresh start, whether furnished.

Under O. 41, R. 22, time begins to run against the respondent as soon as he is served in the appeal as such and no subsequent devolution of interest furnishes a fresh start for the period of limitation. What really happens in the case of such devolutions is provided for by R. 10, O. 42, Civil P. C. The Court merely grants leave to continue the appeal against the person upon whom such interests devolve and evidently this does not amount to an impleading of a fresh respondent who may on his service be deemed to be entitled to exercise his privilege under O. 41, R 22. The respondent remains the same, though his description is changed and the substitute inherits all those disabilities which have already been incurred by his predecessors. If therefore time has run out against the predecessors, it cannot revive in the case of the successor, the principle of law being well-recognized that if once time begins to run, no subsequent disability stops it. AIR (Vol 22) 1935 Lah 653 : 159 Ind Cas 257 (DB).

——O. 41, R. 22 — Where an appeal was dismissed before the cross-objections were heard, by an oversight, and the dismissal of the cross-objections was not included in the decree, it will be mere waste of time to order the District Judge to incorporate the dismissal of the cross-objections in the decree and extend time for the appellants to go in appeal. AIR (Vol 20) 1933 Lah 961: 34 PLR 1073: 146 Ind Cas 1075.

——O. 41, R. 22 — Transfer by respondent, whether extends period.

A transfer by a respondent pending the hearing of an appeal cannot in any way extend the period of 30 days from the service of notice on the respondent which is allowed for the filing of a cross-objection. AIR (Vol 19) 1932 All 45: (1931) ALJ 606: 135 Ind Cas 254 (DB).

——O. 41, R. 22 — The limitation of 30 days from the date of the decree does not apply to applications for leave to file cross-objections in forma pauperis. AIR (Vol 16) 1929 Pat 31: 119 Ind Cas 900: 7 Pat 827: 10 PLT 387 (DB).

——O. 41, R. 22 — The day of appearance of respondent mentioned in the notice issued in the form No. 6-A appended to O. 41-A (Madras High Court) cannot be regarded as the day fixed for hearing as contemplated by O. 41, R. 22. AIR (Vol 13) 1926 Mad 283: 22 MLW 792: 50 MLJ 112 (DB).

——O. 41, R. 22 — Where appellant apprehends that his appeal would be time-barred and prays that it should be treated as cross-objections in respondents' appeal.

Held, that he is entitled to do so. AIR (Vol 12) 1925 Lah 57: 79 Ind Cas 132 (DB).

——O. 41, R. 22 — An appeal must be properly before the Court in order that cross-objections may be heard. Where the appeal was admittedly barred by time,

Held, neither appeal nor the cross-objections were properly before the Court and accordingly the Court had no power to proceed with the matter. AIR (Vol 11) 1924 Lah 43: 73 Ind Cas 655: 4 Lah 140: 5 LLJ 345 (DB).

——O. 41, R. 22 — Time-barred appeals can be treated as cross-objections. AIR (Vol 9) 1922 Lah 423: 67 Ind Cas 478.

——O. 41, R. 22 — A cross-objection can be admitted after the expiry of 30 days from the service of notice of the appeal on the respondent, even though it be put in the course of the arguments in appeal. AIR (V 9) 1922 Nag 213 : 66 Ind Cas 217 : 5 NLJ 192.

——O. 41, R. 22 — Dismissal of appeal — Miscellaneous appeal — Memorandum of objections — Prov. Insol. Act, Ss. 46 and 47 — Appeal filed out of time — Respdt. if can present a memorandum of objections

A respdt. in an appeal filed under S. 46 of the Prov. Insol. Act has the right to present a memo. of objections under O. 41, R. 22 of C. P. C. A memo. of objections, presented in an appeal, which is dismissed as out of time, cannot be heard. The right of a respdt. to proceed by way of memo. of objections is strictly incidental to the filing of the original appeal in time; and it is open to a party against whom a memo of objections has been filed to set up the bar that the original appeal was filed out of time. AIR (Vol 6) 1919 Mad 784: 41 Mad 904: 35 MLJ 236: 24 MLT 137: 8 LW 240: (1918) MWN 688 : 48 Ind Cas 203 (FB).

——O. 41, R. 22 — Dismissal of appeal — Limitation — Memo. of objections.

A respdt. filing objections within time is entitled to be heard even though the appeal is dismissed as time barred. AIR (Vol 4) 1917 Mad 876: 3 LW 109: 19 MLT 86: 32 Ind Cas 579 (DB).

(This is no longer law. See AIR (Vol 6) 1919 Mad 784: 41 M 904: 48 Ind Cas 203 (FB).)

——O. 41, R. 22 — Limitation — Advancement of hearing.

An Appellate Court cannot advance the hearing of an appeal and hear it within one month of the date of issue of notice on the respdt. thereby depriving him of the right of filing cross-objections. AIR (Vol 4) 1917 Pat 408: 1 Pat LW 680: (1917) Pat HCC 103: 38 Ind Cas 522.

——O. 41, R. 22 — Limitation — Memo. of cross-objections — Within what time to be filed.

Under O. 41, R. 22 cross-objections should be filed within one month from date of service of notice of appeal or within such further time as the Appellate Court may allow. But it is not necessary that further time must be granted before his objections are actually filed. AIR (Vol 4) 1917 Low Bur 37: 39 Ind Cas 125 (FB).

——O. 41, R. 22 — Limitation — Memo. of objections — One month how to be calculated.

The time of one month under the rule is time extending up to and including the day before the corresponding date of the next month. AIR (Vol 3) 1916 Mad 734: 29 MLJ 182: 30 Ind Cas 832 (DB).

——O. 41, R. 22 — Dismissal of appeal — Time-barred — Memorandum of objection filed in time by respondent after notice.

If a respdt. who is served with a notice, though by mistake, files his cross-objection in time, he must be heard even though the appeal is time barred. AIR (Vol 3) 1916 Mad 706: (1915) MWN 792: 30 Ind Cas 832 (DB).

(This is erroneous 41 Mad 204: 35 MLJ 236: 24 MLT 137: 8 LW 240: (1918) MWN 688: 48 Ind Cas 203 : AIR (V 6) 1919 Mad 784 (FB).)

——O. 41, R. 22 — Dismissal of appeal — Filed out of time — Cross-objections.

Where an appeal is dismissed as being filed out of time the memorandum of objections also fails and cannot be heard and adjudicated upon. The rules under O. 41, R. 22 (1) (4) are not different from those of the old Code. (1910) 8 MLT 447: 8 Ind Cas 140 (DB).

——O. 41, R. 22 (S. 561 Old Code) — Memo of Objections — 'Forma pauperis' — Limitation.

An application for leave to file a petition of cross-objection under S. 561 of the Code of Civil Procedure of 1882, as also the corresponding provision of the Code of 1908 (O. 41, R. 22) may be received by the Court at anytime. (1910) 12 CLJ 173 (181) : 15 CWN 205 : 7 Ind Cas 118 (DB).

——O. 41, R. 22 (S. 561 Old Code) — Limitation — Objections filed after time — Discretion of Court.

It being within the discretion of a Court of Appeal to extend the time for filing objections under S. 561 of the Code of Civil Procedure, it was held not to be a good objection to the decree of the lower appellate Court that the Court had knowingly entertained objections which were filed by the respondent after the prescribed time. It was to be presumed that the Court had properly exercised its discretion in the matter. 1902 AWN 74 (74).

10. Nature of.

See N. 6.

11. Powers and duties of Court.

——O. 41, R. 22 — Failure to file written acknowledgment — Party affected contesting appeal — Cross-objection, if can be disallowed.

It is true that under Cl. (3), O. 41, R. 22, the respondent should file with the cross-objection, a written acknowledgment of notice from the party who may be affected by such an objection but the cross-objection should not be disallowed merely on the ground that this rule has not been observed in cases where the party affected thereby had appeared and contested the appeal. AIR (Vol 21) 1934 Cal 345: 58 CLJ 534: 150 Ind Cas 364 (DB).

——O. 41, R. 22 — Court, if bound to hear cross-objections if by his conduct the respondent has disentitled himself to hearing thereof.

The Court is not bound to hear the cross-objections if the circumstances show that the person who has filed them has by his own conduct disentitled himself to the hearing thereof. AIR (Vol 21) 1934 Lah 136 (2): 151 Ind Cas 387 (DB).

——O. 41, R. 22 — Cross-objections in appeal by some of the defendants — Appeal dismissed — Cross-objections not entertained — Procedure.

The plaintiffs had filed cross-objections in an appeal which was filed by two out of several defendants. The appeal was dismissed on merits, and on that ground the cross-objections were not entertained for the reason that the decree would remain intact as against the other defendants who were no parties to the appeal:

Held, that the procedure was not warranted by law and the cross-objections should be considered on merits. AIR (Vol 21) 1934 Oudh 131 (2): 11 OWN (CC) 258 (2) : 18 RD 160 (1) : 151 Ind Cas 530.

——O. 41, R. 22 — Powers of Court.

Appellate Court can give relief to respondent although no cross-objection is filed. 49 All 224: 97 Ind Cas 65: AIR (Vol 14) 1927 All 453 (DB).

——O. 41, R. 22 — No order can be passed damnifying the appellant in an appeal when the respondent has not filed any cross-objections. AIR (Vol 8) 1921 Sind 102 : 11 SLR 260 : 79 Ind Cas 553 (DB).

——O. 41, R. 22 — Scope of — Absence of Memo. of objections — Findings favourable to applicants — Power to disturb.

When there are no cross-objections an Appellate Court cannot disturb so much of the original decree as is favourable to the appellant so as to place him in a worse position than before. AIR (Vol 7) 1920 Oudh 145 : 23 OC 110 : 57 Ind Cas 555.

——O. 41, R. 22 — Co-respondents — Cross-objections.

A plaintiff as respondent to an appeal, is entitled to support the decree of the Court below, upon a ground that had been decided against him by the trial Court. It is within the competence and discretion of the High Court to permit the petition of cross-objections to be heard, even as against those defendants to suit who were arrayed as respondents to the appeal. AIR (Vol 6) 1919 All 420 : 40 All 536 : 16 ALJ 587 : 51 Ind Cas 646 (DB).

——O. 41, Rr. 22 and 33 — Scope of — Absence of cross-objections — Power of Appellate Court.

A trial Court's decision in the appellant's favour does not in the absence of cross-objections by the respondent justify the lower appellate Court to interfere with the trial Court's decree under O. 41, R. 33, C. P. C. AIR (Vol 5) 1918 Cal 168 : 22 CWN 526 : 46 Ind Cas 142 (DB).

——O. 41, R. 22 (3) and (4) — Scope of — Parties.

Quaere — Whether under O. 41, R. 22(3) and (4), an Appellate Court can make a defendant, exonerated by the Court of first instance a party to the memo. of objections when not made a party to the appeal itself? AIR (Vol 3) 1916 Mad 1219 : 31 Ind Cas 978.

——O. 41, R. 22 — Right to support decree — Punjab Courts Act (XVIII of 1884), S. 30(1)(a) — Finding — Finding reversed by Appellate Court and decree passed without considering defendant's objection to other findings — Revision, if lies — Material irregularity.

Where a suit is dismissed on one finding which is reversed in an appeal and decree passed without considering the defendants objections to other findings the Appellate Court acts with material irregularity and its decree is open to revision. 144 PWR 1911 : 202 PLR 1911 : 11 Ind Cas 41.

——O. 41, Rr. 22 and 33 — Scope of — Cross-objections — If relief can be given to the party who fails to object.

Under O. 41, R. 33 the Court can give relief to a respondent who has not filed cross-objections as regards that portion of the decree of the Lower Court which is against him. (1910) MWN 719 : 9 MLT 39 : 8 Ind Cas 337 (DB).

——O. 41, R. 22 — Court-fee — Memo of objections.

A memo. of objections filed under S. 561, though not stamped and moved by respondent may yet be disposed of by the Court, and the Court has in such case jurisdiction to dismiss it with or without costs. (1909) 32 Mad 170 : 2 Ind Cas 345 (DB).

——O. 41, R. 22 (S. 561 old Code) — Jurisdiction to dismiss the memorandum with costs.

Courts have jurisdiction to dismiss a memorandum of objections not stamped and therefore not moved and to dismiss it with costs also. (1907) 18 MLJ 490 : 32 M 170 (173) : 2 Ind Cas 345 (DB).

——O. 41, R. 22 (S. 561 old Code) — 'May not only support the decree on any of the grounds decided against him' — Ground not referred to by the lower Court.

Section 561, C. P. C., in no way prevents an appellate Court from upholding the decree of the lower Court on any ground which in law warrants such upholding, even though that ground may not have been referred to, or disallowed in the lower Court. (1904) 28 M 427 (435) (DB).

12. Res judicata.

——O. 41, R. 22(4) and S. 11 — Order on cross-objections operates as res judicata on matter involved in appeal.

The restoration of the appeal, which was dismissed for default would not by itself have the effect of vacating the order passed in cross-objections adversely to the plaintiff-appellant in his absence. Under O. 41, R. 22, the cross-objections filed by the respondent have to be heard, and determined even if the original appeal is withdrawn or is dismissed for default. Consequently, the decision arrived at by the Court in disposing of them must be held to be binding between the parties if it is not set aside as required by law or is allowed to become final. Unless, therefore, steps are taken to get rid of the order passed on cross-objections, that order continues to be binding on the parties and is bound to affect the decision of the appeal if, in disposing of the cross-objections, it is necessary for the Court to come to a decision on facts which would affect the merits of the appeal itself. The decision on cross-objections will operate as res judicata in appeal. AIR (Vol 31) 1944 Lah 174 : 46 PLR 80 : 213 Ind Cas 217 (DB).

——O. 41, R. 22 — Appeal withdrawn — Subsequent cross-objection to appeal filed by opponent — Res judicata.

Where by an oversight the Counsel of an appellant drafted the appeal memorandum as if he were retained by the opposite party and on discovering the fact withdrew the appeal:

Held, that the withdrawal did not in any way operate as a bar to his preferring a cross-objection to an appeal preferred by the opposite party. AIR (Vol 20) 1933 Lah 487 : 34 PLR 140 : 144 Ind Cas 22 (1).

13. Revision.

——O. 41, R. 22, S. 115 — Both parties appealing — Appeal of one time-barred — Application to treat the time-barred appeal as cross-objections — Application and appeal both dismissed by the same judgment — Revision.

Where both the parties appeal, and the appeal of one of them is time-barred and the other is still pending, it is permissible to convert the time-barred appeal into a cross-objection. The mere fact that the Counsel stated that the appeal should be withdrawn and treated as cross-objection would not amount to dismissal on merits.

An application to treat a time-barred appeal as a cross-objection and the appeal of the opposite party were both dismissed by a single judgment:

Held, that the order so far as dismissing the application was an order and not a decree and a revision was competent against such an order. AIR (Vol 21) 1934 Lah 273 : 36 PLR 67 : 15 Lah 641 : 150 Ind Cas 273.

——O. 41, R. 22 — Revision case.

Rule 22, O. 41, under which a memorandum of objections can be preferred by a respondent in an appeal does not extend to the revision petitions; 17 MLJ 62, Dissent from. But the High Court's powers of revision may be exercised even without any application by an aggrieved party, and when a case is already before the Court and the necessary parties are also before it, it has ample powers to entertain questions which may be raised by the respondent and deal with those questions also if it thinks fit. AIR (Vol 15) 1928 Mad 794 : 112 Ind Cas 231.

——O. 41, R. 22 — Revision petition.

The respondents in a revision petition have no right to file cross-objection. 150 PWR 1912 : 160 PLR 1912 : 14 Ind Cas 562.

——O. 41, R. 22 (Ss. 105, 561, 647 old Code) — Memorandum of objections against co-respondent — Small Cause revision — Powers of High Court in revision cases.

It is open to the High Court in dealing with revision petitions under S. 25 of the Provincial Small Cause Act IX of 1887 to exonerate the defendant against whom the decree has been passed by the lower Court and pass a fresh decree against another when all the parties are before the Court.

Obiter:—S. 647, C. P. C., makes applicable to revision petitions under S. 25 of the Provincial Small Cause Act, the procedure relating to appeals, and consequently a memorandum of objections will lie in such revision petitions. A memorandum of objections between co-respondents was allowed in the case. (1906) 17 MLJ 62 (63).

14. Right in second appeal.

See also N. 16.

——O. 41, R. 22 — Appeal by defendant — Cross-objection by plaintiff — Cross-objection allowed — Plaintiff appealing from decree — Defendant, if can file cross-appeal or cross-objection to plaintiff's appeal.

Where in an appeal by defendant, the cross-objection of the plaintiff is allowed and the plaintiff files a second appeal not being satisfied with the lower Appellate Court's decree, it is open to the defendant either to file a cross-appeal from the other part or to file a cross-objection to the plaintiff's appeal. In either case the Appellate Court is seized of the whole matter and has jurisdiction to dispose of the entire suit. AIR (Vol 22) 1935 All 404 : (1935) ALJ 418 : 1935 AWR (HC) 408 : 158 Ind Cas 100 (DB).

15 Right to support decree.

——O. 41, R. 22 — Partial decree — Defendant respondent can support decree on ground which would have necessitated total dismissal of suit.

Under O. 41, R. 22, Civil P. C., it is open to a defendant-respondent who has not taken any cross-objections to the partial decree passed against him, to urge in opposition to the appeal of the plaintiff a contention which, if accepted by the trial Court, would have necessitated the total dismissal of the suit. A I R (Vol 30) 1943 Mad 698 : 56 M L W 527 : (1943) 2 M L J 336 : 1943 M

W N 557 : I L R (1944) Mad 147 : 209 Ind Cas 479 (F B).

——O. 41, R. 22 — **Suit decided against defendants on grounds of limitation and title — Cross-objection not filed — Defendants, if can support decree.**

Where a suit is decided against the defendants on the grounds of limitation and title, they are at liberty to support the decree of dismissal on these grounds, even though they have filed no cross-objection. (1937) 166 Ind Cas 1007 (Cal).

——O. 41, R. 22 — **Respondent, whether can support decree appealed from on any of grounds decided against him.**

A respondent is not barred from supporting the decree appealed from not only on any of the grounds decided in his favour but also on grounds decided against him. Where, therefore, the lower Court, on a particular construction of contract against the respondent, decreed a part of the claim dismissing the rest of it and against the part dismissed, the plaintiffs went in appeal but the defendant did not file an appeal or cross-objection against part of the claim decreed.

Held, that the respondent could support the part of the decree appealed from on the question of construction decided against him. Merely because in such circumstances he did not prefer appeal or cross-objection, the Appellate Court was not precluded from construing the contract for itself. A I R (Vol 23) 1936 All 717 : 1936 A W R (H C) 1216 : 165 Ind Cas 473 (DB).

——O. 41, R. 22 — Respondents are entitled to support decree of Court below upon some of the grounds which were decided against them in that Court. (1936) 63 Cal 629 : 40 C W N 271.

——O. 41, R. 22 — **Dismissal of suit in its entirety — Cross-objection by defendant.**

Where a suit has been dismissed in its entirety by the trial Court, the defendant is not entitled to file a cross-objection against the decree although he is entitled to support the decree in his favour on any of the grounds decided against him. If a cross-objection is filed, it should be rejected on the ground of its non-maintainability, but the rejection of it is not a rejection on the merits. A I R (Vol 20) 1933 Pat 690 : 149 Ind Cas 1158 (DB).

——O. 41, R. 22 — **'Support the decree' meaning of.**

Per Macpherson, J.—The expression "support the decree" in O. 41, R. 22 (1), does not merely mean 'support the decision' but permits the respondent to show by reference to a ground decided against him in the Court below that the appellant has at least secured by the decree in controversy as much as he is, if not more than he is, entitled to. A I R (Vol 19) 1932 Pat 134 : 12 P L T 659 : 137 Ind Cas 116 (DB).

——O. 41, Rr. 22, 33 — **Respondent's right to support decree on new grounds.**

It is not open to a respondent to have adjudicated by the Appellate Court, rights or causes of action which have been decided against him in the trial Court and in respect of which he has filed no appeal or memorandum of objections.

A contention that a ground on which the lower Court has decided against the respondent should have been decided in his favour and, therefore, the lower Court should not have passed the decree under appeal is not a ground which supports the decree but is one which attacks the decree and therefore, cannot be urged by the respondent under O. 41, R. 22. A I R (Vol 18) 1931 Mad 513 : 131 Ind Cas 833.

——O. 41, R. 22 — **Support to decree.**

Where a party had raised a matter in his grounds of appeal in the lower Court, he can support the judgment of that Court in second appeal by referring to documents which that Court disregarded. A I R (Vol 15) 1928 Lah 964 : 116 Ind Cas 315.

——O. 41, R. 22 — Where an appeal is filed from decree dismissing a suit, the defendant is entitled to support the decree even on grounds decided against him, and the decree being one of dismissal of whole suit he need not file any formal cross-objection. A I R (Vol 15) 1928 Nag 181 : 108 Ind Cas 801.

——O. 41, R. 22 — Though the word "decree" has been used in R. 22 what the rule contemplates really is the decision by the court below and merely enables the decision arrived at by the lower Court to be supported on grounds other than those on which the lower Court proceeded. Under that rule it is not open to a respondent to have adjudicated by the appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objection. A I R (Vol 14) 1927 Mad 801 : 50 Mad 866 : 26 M L W 125 : 39 M L T 234 : 104 Ind Cas 472 : 53 M L J 189 (F B).

——O. 41, R. 22 — **Decree can be supported on ground other than that urged in lower Court.**

Where in a suit for redemption of certain mortgages, plaintiff urged a certain method of accounting based on an award of simple interest, and got a decree and on the appellate Court setting aside the decision as to award of simple interests in favour of a decision to award compound interest the plaintiff sought to support the lower Court's decree on a different method of calculation than that urged by him before; held per Kanhaiya Lal, J. C :—That the plaintiffs were not barred from urging this different method under the circumstances.

Per Daniels, A. J. C. :—The respondent was entitled to support the decree on any point which was decided against him but in the present case the point as to method of calculation was decided in accordance with the wishes of the respondent and therefore he cannot urge a different method in appeal.

Per Ashworth, A. J. C. — The decision of the lower Court was only in favour of the respondents so long as the decision to award simple interest was maintained. As soon as the appellate Court decided as to award compound interest, the decision as to the method of calculation became adverse to the respondents who can therefore urge the plea of a different method of calculation in appeal. It was always, however, open to the Appellate Court to reverse the method of calculation adopted by the Lower Court as soon as it upset its decision as to the nature of the interest awardable. A I R (Vol 10) 1923 Oudh 123 : 77 Ind Cas 310 : 25 O. C. 349 (FB).

——O. 41, R. 22 — **Right to support decree — Other grounds.**

Though a person who has not appealed from a decree cannot question its correctness he can support the decree on reasons not given by the lower Court under O. 41, R. 22 (2) C. P. C. A I R (Vol 7) 1920 Pat 151 : 5 Pat L J 239 : 1 Pat L T 65 : 55 Ind Cas 214 (DB).

——O. 41, R. 22 — **Right to support judgment — Rival suits — Appeal.**

If an appeal from one of two rival suits dismissed by one judgment is preferred it opens the whole judgment and the non-appealing plff. can support the judgment even on points decided against him. A I R (Vol 6) 1919 Oudh 206 : 22 O. C. 29 : 1 U P L R (J C) 38 : 50 Ind Cas 869.

——O. 41, R. 22 — Right to support decree of lower Court.

It is open to a respdt. in an appeal to support the decree on any of the grounds decided against him in the lower court without preferring a cross appeal. A I R (Vol 6) 1919 Pat 196 : (1919) Pat HCC 393 : 51 Ind Cas 981 (DB).

——O. 41, R. 22 — Right to support decree — New ground.

Under the rule, the respdt. can support a decree on any of the grounds decided against him or take cross objections. He cannot take an entirely new ground which was not decided against him and which was not in issue in the lower Court and not made the subject of adjudication. A I R (Vol 5) 1918 Cal 227 : 21 C W N 423 : 38 Ind Cas 536 (DB).

——O. 41, R. 22 — Though a respdt. has not filed cross-objections in an appeal still he is entitled to urge that the decree of the Lower Court errs in favour of the appellant and that it should not be disturbed. Only he cannot claim that the decree should be altered in his favour. A I R (Vol 5) 1918 Lah 129 : 48 P W R 1918 : 125 P L R 1918 : 45 Ind Cas 232 (DB).

——O. 41, R. 22 — Where a suit was dismissed in toto as against the defendant respondent and it is obvious he could not have appealed against that decree what he is clearly seeking by filing objection in an appeal by the plff. is to support the decree on some of the grounds which have been decided against him in the court below. The objections are not cross-objections and did not require any court fee. A I R (Vol 4) 1917 All 158 : 15 A L J 325 : 39 Ind Cas 176.

——O. 41, R. 22 — Cross-objection not filed — Effect.

Respdts. are entitled to maintain the decree in their favour upon any ground decided against them without filing any cross-objections under O. 41, R. 22, C. P. C. A I R (Vol 4) 1917 Lah 39 : 103 P L R 1917 : 85 P W R 1917 : 40 Ind Cas 237.

——O. 41, R. 22 — Failure to file memo. of cross-objections — Effect.

Under O. 41, R 22 a respdt. may support a decree in appeal on a ground decided against him in the Court below without filing cross-objections. A I R (Vol 4) 1917 Oudh 31 : 4 O L J 101 : 39 Ind Cas 153.

——O. 41, R. 22 — On new grounds.

A part is allowed to set up a new argument even on appeal enabling him to prevent the appellants from getting a decree reversed. A I R (Vol 2) 1915 Lah 267 : 8 P W R 1916 : 44 P L R 1916 : 45 P R 1916 : 31 Ind Cas 740 (DB).

——O. 41, R. 22 — Right to support decree — Without filing cross objections.

In an appeal, a respdt. can without filing a cross-objection support the judgment and decree of the lower Court by traversing any ground which that Court may have found against him. But the Court will not of itself raise a case which he does not choose to raise himself. A I R (Vol 1) 1914 Cal 339 : 24 Ind Cas 68 (DB).

——O. 41, R. 22 — Powers of Appellate Court.

O. 41, R. 22, C. P. C. allows a respdt. to support a decree on any of the grounds decided against him by the trying Court. He may not file cross-objection or cross appeal. (1911) 4 Bur L T 209 : 12 Ind Cas 20 (DB).

——O. 41, R. 22 — A non-appealing respdt. may support the decree on grounds decided against him in the lower Courts. He is bound to prefer an appeal only when he takes exception to the decree. (1910) 7 Ind Cas 484 (All).

——O. 41, R. 22 (S. 561 Old Code) — Memo of objections.

It is not necessary to entitle a respondent to support a decree upon a particular ground under S. 561, C. P. C., that the ground should have been in express terms decided against him. (1905) 9 C. W. N. 14 (18) (DB).

16 Second appeal.

See also Note 14.

——O. 41, R. 22 — Refusal of Appellate Court to extend time for filing cross-objection.

It is entirely discretionary with the Court of Appeal below to extend the time for filing cross-objections and in refusing to extend time, it cannot be said that it committed an error of law which could be interfered with in second appeal. A I R (Vol 27) 1940 Cal 150 : 70 C L J 397 : 187 Ind Cas 416 (DB).

——O. 41, R. 22 (1) — Trial Court deciding issue — Party not challenging it in lower Appellate Court — Second appeal.

Order 41, R. 22 (1) does not authorise a respondent to make out a case for a decree for the same amount by questioning an adjudication as to a right or principle found against him and as to which no appeal or objection has been filed by him for the reason that the expression "support the decree" means support the decision and does not refer to the quantum of the decree.

Consequently, where the decision of the trial Court to a particular issue is not legally challenged in the lower Appellate Court it becomes final and binding upon him and it cannot be challenged in second appeal. A I R (Vol 20) 1933 Nag 310 : 146 Ind Cas 152.

——O. 41, R. 22 (1) — Procedure — Rejection of defendant's appeal and plaintiff's cross-objections — Appeal by plaintiff against dismissal of cross-objections — Remedy of defendant for rejection of his appeal.

Where in the lower Court the defendant filed an appeal and the plaintiff filed a memorandum of cross-objections and the lower court dismissed both of them, it is not competent in the appeal filed by the plaintiff against the dismissal of cross-objections for the defendant by way of objections to attack the rejection by the lower Court of his appeal. The proper course for him is to file an independent appeal against the dismissal or rejection of his appeal. AIR (V 18) 1931 Mad 133 : 1930 MWN 1236.

——O. 41, R. 22 — A cross-objection in the second appeal must relate to something decided by a particular decree of the lower appellate Court against which the other party has appealed. It cannot be a cross-objection to something decided by another decree even though that other decree and the decree appealed against arose out of a single decree of the trial Court. AIR (V 13) 1926 All 582 : 24 A L J 694 : 96 Ind Cas 67 (DB).

——O. 41, R. 22 — One judgment and two decrees in first appeal — Second appeal against one decree — Respondents cannot object to other decree under O. 41, R. 22. A I R (Vol 9) 1922 Mad 413 : 70 Ind Cas 579 : 1922 M W N 477 (DB).

——O. 41, Rr. 22, 25 (Ss. 561, 566 Old Code) — Powers of appellate Court after remand to decree more than plaintiff was content with — First decree — No appeal by plaintiff — Defendant's appeal — Decree in favour of defendant — Second appeal by plaintiff — Remand — Power of appellate Court to decree to plaintiff more than what the first Court gave him.

The plaintiff sued in ejectment. The first Court gave him a decree. Defendant appealed. Plaintiff did not even file a memo of objections. Defendant's appeal was allowed. Plaintiff preferred a second

appeal. The case was remanded to the first appeal Court for disposal on fresh investigation.

Held, that the first appeal Court cannot give plaintiff more than what was given to him by the original decree of the Munsif. (1907) 34 C. 996 (998) (DB).

17 When disallowed.

See also N. 18.

——O. 41, R. 22 — Failure to award costs in decree.

Failure to award costs in the decree cannot form the subject-matter of a cross-objection. A I R (Vol 26) 1939 Cal 423 : 43 C W N 794 : 184 Ind Cas 216 (DB).

——O. 41, R. 22 — No cross-objections can be urged in appeal against an order for costs. A I R (Vol 23) 1936 Pat 513 : 17 P L T 279 : 15 Pat 510 : 2 B R 776 : 164 Ind Cas 860 (DB).

——O. 41, R. 22 — Where a person cannot prefer an independent appeal aganist an order, as nothing is decided therein against him, his mere addition as pro forma respondent in the appeal against the order would not entitle him to raise any cross-objection to the order. A I R (Vol 16) 1929 Nag 361 : 118 Ind Cas 867.

——O. 41 R. 22 — Where the cross-objection merely takes the place of an appeal against the order of the lower Court which is not appealable, it cannot be entertained. AIR (V 14) 1927 Oudh 218 : 1 LC 24 : 102 Ind Cas 467.

——O. 41, R. 22 — Letters Patent.

The provisions of the Code of Civil Procedure as to cross-objections do not apply to appeals under the Letters Patent. A I R (Vol 9) 1922 All 55 : 70 Ind Cas 488 (DB).

——O. 41, R. 22 — Letters Patent Appeal — Memo. of objections.

O. 41, R. 22, C. P. C. is not applicable to an appeal under Cl. 15 of the Letters Patent and a memo. of cross-objection cannot be entertained in these appeals. AIR (Vol 7) 1920 Cal 776: 24 CWN 1016: 32 CLJ 43: 59 Ind Cas 589 (DB).

——O. 41, R. 22 — Scope of — Cross-objection to obtain a distinct relief indirectly.

A cross-objection in appeal, that the decree should have been in the form set forth in Appendix D of Schedule I C. P. C., No. 6 the object of which is not so much to have the decree put in proper form, as to obtain a right to claim interest not merely up to date of the judgment of the Lower Court but up to date of realization, could not be allowed as it is in reality a relief claimed in an indirect way, which could have been granted by the Lower Court if the respdt. had applied for amendment of the decree or by the Court of appeal if there had been in the appeal a claim in respect of additional interest. AIR (Vol 3) 1916 Lah 285 : 24 PR 1916: 34 Ind Cas 916 (DB).

13. Who may file.

See also Notes 15 and 18.

——O. 41, R. 22 — Locus standi to file memo of cross-objection — Test to decide.

The test to decide whether a party to an appeal is entitled to file a memorandum of cross-objections is whether the cross-objector could himself have appealed. When he has not taken part in the proceeding in the Court below or raised any point or plea, and no order against them has been made affecting any such case raised by him, he has no locus standi to urge any point by way of cross-objections he having not raised, nor suffered any adverse order on any question which he seeks to urge. AIR (Vol 39) 1952 Cal 232 (DB).

——O. 41, R. 22 — Applicability — Cross-objections by party not competent to appeal — Maintainability — Letters Patent appeal against decision in second appeal — Cross-objections — Competency.

Where a party cannot appeal from a decree, because nothing is decided against him, he cannot file any cross-objections to it, under O. 41, R. 22, C. P. Code.

Quaere.— Whether a respondent to an appeal under Cl. (15) of the Letters Patent, against the decision in a second appeal, can maintain a memo. of cross-objections? AIR (Vol 37) 1950 Bom 161 : 52 Bom LR 97 (DB).

——O. 41, R. 22 — Person not entitled to file.

A person who is not entitled to file an appeal cannot file cross-objections in an appeal filed by his opponent. AIR (Vol 31) 1944 Oudh 57 : 1943 OWN (CC) 470: 1943 AWR (CC) 159: 215 Ind Cas 37 (DB).

——O. 41, R. 22 — Plaintiff obtaining decree — If he wants higher right he must file cross-objections.

Under O. 41, R. 22, the plaintiff can support the decree granted to him on any ground decided against him in the Court below, but if he wants a decree for the higher right of absolute ownership which he prayed for in the plaint but had not been granted to him, it is incumbent on him to file cross-objections or a cross-appeal against the decree and in the absence of such cross objection he is precluded from urging in appeal by the defendant that he has acquired such absolute right. AIR (Vol 29) 1942 Bom 161 : 44 Bom LR 295 : ILR (1942) Bom 357: 201 Ind Cas 420 (DB).

——O. 41, R. 22 — Where the trial Court has ordered the plaintiff to pay a certain amount as deficit court-fee, the defendant, is not entitled to file any appeal against the order under provisions of S. 6-A (1), Court Fees Act on the ground that the plaintiff should have been directed to pay a higher amount of court-fee, as he is not a person who has been called upon to make good a deficiency in a court-fee. Nor can the defendant file cross-objection under O. 41, R. 22, Civil P. C., where the plaintiff has filed an appeal against the order, as, under that rule, a cross-objection can be filed only by a person who is entitled under the law to file an appeal. AIR (Vol 29) 1942 Oudh 391 (1) : 1942 OWN (C C) 382: 1942 AWR (CC) 258: 18 Luck 256: 200 Ind Cas 860 (DB).

——O. 41, Rr. 22, 20 — Person made respondent under R. 20, whether can file cross-objections under R. 22.

Under O. 41, R. 22, any respondent is entitled to file cross-objections and there is no possible reason for interpreting the word 'respondent' in R. 22 differently from the way in which it is interpreted in every other rule. There can be no doubt that a person who has been made a respondent under O. 41, R. 20 has a right under R. 22 to file cross-objections, and his right to file them is in no way dependent on the service on him of notice of the appeal. AIR (Vol 24) 1937 Nag 105: ILR (1937) Nag 401 : 170 Ind Cas 93.

——O. 41, R. 22 (5) — Leave to appeal in forma pauperis refused — Other party appealing — Permission to file cross-objection in forma pauperis on other grounds.

Leave can be granted to file a cross-objection on grounds which are not entirely the same as those which it is necessary to put forward in seeking leave to appeal in forma pauperis which is refused. It is true that the provisions of O. 41, R. 22 (5), say that the provisions relating to pauper appeals shall, so far as they can be made applicable apply to an objection under this rule but when an appeal has already been lodged it is Court's duty to look carefully at the circumstances and see the judgment having been impugned by one party whether,

the other party would not also be in a position to attack it from another angle. AIR (Vol 24) 1937 Rang 81 : 168 Ind Cas 407 (DB).

——**O. 41, R. 22 — Pauper respondents.**

Under O. 41, R. 22, a pauper-respondent is entitled to present a cross-objection to an appeal without payment of stamp duty. AIR (Vol 20) 1933 Nag 158: 29 NLR 225: 144 Ind Cas 217 (DB).

(Overrules (1905) 1 NLR 33).

——O. 41 R. 22 — Original Side Appeal — Memo of objections can be filed AIR 1925 Mad 725. Overruled. AIR (Vol 13) 1926 Mad 316: 50 MLJ 190 : 49 Mad 291 : 24 MLW 571: 93 Ind Cas 293 (FB).

——O. 41, R. 22 (S. 561 old Code) — Procedure by way of objections not open to a party who has in fact appealed.

Held, that objections under S. 561, C. P. C., can only be filed by a party who might have appealed from the decree of the Court below, but has not done so. It is not open to a party who has appealed and whose appeal has been dismissed subsequently to such dismissal, to prefer objections under S. 561. to the decree of the Court below. (1903) 1903 AWN 160 (160) (DB).

——O. 41, R. 23.

See also Ss. 107, 151 and O. 41, R. 25.

1. **Appeal after decision of suit on remand.**
2. **Appeal against an order of remand under this rule.**

See also Note 18 and C. P. C. Ss. 104, 151 and O. 43, R. 1.

3. **Costs.**
4. **Distinction between O. 41, R. 23 and O. 41, R. 25.**
5. **Effect of order of remand.**
6. **Exclusion of evidence by lower Court.**
7. **Grounds of remand.**
8. **Inherent power of remand.**

See also Civil P. C. S. 151.

9. **Jurisdiction after remand depends upon the order of remand.**
10. **Matters decided by order of remand, finality of.**
11. **No appeal in remand order under inherent power.**
12. **Order of remand, when will amount to a decree.**
13. **Powers and duties of the appellate Court.**
14. **Powers and duties of the trial Court.**
15. **Powers of High Court in appeal from order of remand.**
16. **Preliminary point — meaning of.**
17. **Return of plaint.**
18. **Revision.**
19. **Remand.**
20. **Scope and applicability.**

1. Appeal after decision of suit on remand.

——O. 41, R. 23 — Remand order — No stay — Appeal against remand order — If maintainable after the decision at re-hearing on remand.

In the case of a remand it may often be that the first appellate Court formulates an entirely fresh footing on which the parties should proceed to a fresh trial and if the parties do so without in any way signifying or indicating their non-acceptance of this new basis for a fresh hearing, by adopting the simple method of applying for stay of further proceedings under the remand order, they must be deemed to have accepted the new basis and submitted to a fresh trial on the new footing. After a decision in the re-hearing, an appeal against the order of remand is not sustainable and the remedy will be only by way of appeal against the decision at the re-hearing on remand. The wide privileges of appeal conferred by the Legislature should be exercised within the confines of reason and practicability. AIR (Vol 36) 1949 Mad 377: 1948 MWN 736: (1948) 2 MLJ 404.

——O. 41, R 23 — Appeal against order of remand -- No appeal against final decree or remand which had also been confirmed on appeal — Effect.

Where a final decree has been passed on remand which has also been confirmed on appeal and has not been appealed against would render an appeal against the order of remand infructuous. 1949 RD 325.

——O. 41, R. 23 — One Bench setting aside decision of lower Court and remanding the case after laying down the law to be followed — Decision passed after remand — Appeal:

Held, that another Bench of co-ordinate jurisdiction cannot go behind the decision of the previous Bench on the point of law. AIR (Vol 27) 1940 Pat 179: 6 BR 542: 41 Cr L J 504: 21 PLT 608: 187 Ind Cas 721.

——O. 41, R. 23 and O. 43, R. 1 (u), S. 105 (2) — Remand.

An appeal against a remand order can be filed and heard even if the order is already carried out by the first court. (1912) 15 OC 43: 15 Ind Cas 191.

——O. 41, R. 23 — Remand order — Election to abide by the remand order — No appeal from remand after trial of case on the merits.

When a litigant has the right to choose between two remedies which are not co-existent but alternative & adopts one of those remedies, his act at once operates as bar as regards the other and the bar is final and absolute. After having taken the full benefit of an order of remand, it is not open to a party to turn round and appeal against it. (1908) 12 CWN 590: 6 CLJ 547 (556).

——O. 41, R. 23, O. 43, R. 1 (Ss. 562, 588, 28, old Code) — Appeal from remand order after disposal of suit in pursuance of remand order.

The fact that the suit has been decided by the Court of first instance in compliance with an order of remand made under S. 562 of the C. P. C. is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal; and the decree of the Lower Court falls to the ground with the order of remand if set aside. 29 A. 659. overruled; 32 C. 1023 diss. from. (1907) 30 A 479 (485) : 1908 AWN 195: 5 ALJ 447 (FB).

——O. 41, R. 23 (S. 562 old Code) — Remand — Appeal from order of remand after decision of the suit in accordance therewith.

Held, that no appeal will lie from an order of remand passed under S. 568, C. P. C., if such appeal is filed after the suit has, in compliance with the order of remand, been decided and no appeal is preferred from the decree in the suit. 1907 AWN 234 : 29 A 659: 4 ALJ 569 (570) (DB).
See also (1908) 30 A 479 (485) : 5 ALJ 447 (FB) and (1906) AWN 28 : 3 ALJ 40 (42).

——O. 41, R. 23, S. 104, O. 43, R. 1, (Ss. 105, 562, 588, 591 Old Code) — Appeal from remand order after final decree.

An appeal from an order of remand passed under S. 562, C. P. C., cannot be entertained if presented after the final disposal of the suit. Semble: An order of remand under S. 562, C. P. C., is an order which affects the decision of the suit on the merits, and exemption may be taken to the validity of such an order in an appeal from the final decision. (1905) 9 CWN 995: 32 C 1023 (1029) (DB).

——O. 41, R. 23 — Remand order by High Court cannot be questioned in subsequent proceedings

after remand. (1905) 9 CWN 421 (426) : 32 C 582 (DB).

2. Appeal against an order of remand under this rule.

(a) General.
(b) Order purporting to be under this rule.
(c) Suits of small cause nature.
(d) To Privy Council.
(e) Under other Acts.
See also N. 18 and C P. C. Ss. 104, 151 and O. 43. R. 1.
(f) Order under inherent powers.
See Note 11.

(a) General.

——**O. 41, R. 23 (Madras) and O. 43. R. 1, cl. (u) — Order of remand for taking further evidence in a case — Final decision in the suit itself after remand — Subsequent appeal against order of remand, whether permissible.**

A litigant has a right of appeal against an order of remand; he has a right also to contest the proceedings taken in a trial Court pursuant to the order of remand; these are independent legal rights and the exercise of one such right is no bar to the exercise of the other. The aggrieved party is not faced with alternative rights; it is the same right that he wishes to agitate both in the appeal against the order of remand and at the further stages of the trial after the remand. He has not lost the right to have an appeal against an order of remand merely because he has contested the litigation in the lower Court after the remand.

Where in a suit an order of remand was passed and it was carried out and the suit decided the remedy can be also by appeal against the order of remand and not merely by way of appeal against the final decision in the suit. The wide language of O. 41, R. 23, Civil Procedure Code, as amended in Madras gives ample rights to the aggrieved party to file an appeal against an order of remand even after the final decision in the suit has been given. (1948) 2 MLJ 404, dissented from. AIR (Vol 38) 1951 Mad 218: 63 LW 789: (1950) 2 MLJ 379.

——O. 41, R. 23 — Order returning plaint for presentation to proper Court — Appellate order setting aside order and directing suit to be decided according to law:

Held, that the appellate order was not one under O. 41, R. 23, inasmuch as that rule refers to a decree of the lower Court upon a preliminary point against which an appeal is preferred and does not contemplate the case of an order, as distinguished from a decree under O. 7, R. 10. AIR (Vol 29) 1942 Oudh 370: 1942 OWN (CC) 313: 1942 AWR (CC) 208: 200 Ind Cas 512 (DB).

——**O. 41, R. 23, O. 43, R. 1 (w) — Remand order sending back case for disposal in accordance with law.**

Where the lower Appellate Court has sent back the case to the trial Court for disposal in accordance with law, after making certain observations and the trial Court had gone into the merits of the case and had not disposed of the case on preliminary points only, no appeal lies from such an order of remand under O. 41, R. 23 read with O. 43, R. 1 (w) of the Civil P. C. (1942) 8 BR 35: 196 Ind Cas 562.

——**O. 41, R. 23, O. 43, R. 1 (u), O. 7, R. 11 — Rejection of plaint, under O. 7, R. 11 — Appellate court setting aside trial Court's order rejecting plaint under O. 7, R. 11 and remanding suit under O. 41, R. 23 and aggrieved party has right of appeal under O. 43, R. 1 (u).**

The order of remand in such a case could not be made under any other provision of law except under O. 41, R. 23 Civil P. C. Consequently the Appellate Court's order remanding the suit after setting aside the order of the trial Court rejecting the plaint under O. 7, R. 11 must be treated as one under O. 41, R. 23 Civil P. C., so as to give right to appeal to the aggrieved party under O. 43, R. 1 (u). AIR (Vol 28) 1941 Nag 304: ILR (1941) Nag 629.

——**O. 41, R. 23 — O. 41, R. 32-A (Lah) — Order of Appellate Court reversing decree and directing re-trial.**

An order of the Appellate Court reversing the decree and remanding the case for re-trial is appealable under O. 41, R. 23-A formed by the Lahore High Court. AIR (Vol 27) 1940 Lah 63: ILR (1940) Lah 593: 186 Ind Cas 828.

——Order 41, R. 23 — Where the operative portion of the appellate order is "I set aside the judgment and decree of plaintiff No. 3 with costs. The case will be sent back and re-trial according to law from the stage where it has been left by the learned Munsiff", the order is an order of remand contemplated by O. 41, R. 23, Civil P. C., and an appeal lies against such order under O. 43, R. 1 (4). AIR (Vol 27) 1940 Oudh 314: 1940 OWN (CC) 662: 1940 AWR (CC) 316: 15 Luck 686: 187 Ind Cas 889.

——**O. 41, R. 23 — Remand for re-decision on consideration of documents.**

For the purpose of the competency of an appeal, the Court has to see what the lower Court purported to do and actually did and not what the lower Court should have done. Where the Judge has remanded the case under O. 41, R. 23, the order is appealable. AIR (Vol 24) 1937 Lah 454: 38 PLR 1154: 170 Ind Cas 422.

——Order 41, R. 23 — An order of an Appellate Court, setting aside an order of the Court of first instance rejecting a plaint, and directing the Court to proceed with the trial of a suit on its merits, is not an order under O. 41, R. 23, and hence not appealable under O. 43, R. 1 (b), Civil P. C. AIR (Vol 24) 1937 Lah 380: 39 PLR 720: 173 Ind Cas 365.

——**O. 41, R. 23, S. 151 — Remand to begin de novo trial.**

Where on remand the action is to begin de novo, the remand being under S. 151 and not under O. 41, R. 23, no appeal lies from the order of remand. AIR (Vol 23) 1936 Pat 491: 2 BR 795 (2): 164 Ind Cas 1085.

——**O. 41, R. 23, O. 43, R. 1 — Suit not disposed of on preliminary issue — Remand by Appellate Court — Appeal from order of remand, competency of.**

No order of remand can be made under O. 41, R. 23, unless the trial Court has disposed of the whole suit upon a preliminary point; and if an order of remand is not one passed under O. 41, R. 23, it is not appealable. AIR (V 19) 1932 Lah 219: 33 PLR 54: 136 Ind Cas 559.

——Order 41, R. 23 — Where a person has not been adversely affected by an order of remand, it is doubtful, if he can appeal from that order. AIR (Vol 18) 1931 Oudh 242: 8 OWN (CC) 243: 132 Ind Cas 78 (DB).

——**O. 41, R. 23 —Inherent powers — When exercised.**

In an appeal from a mortgage decree the first Appellate Court decided all the points in dispute except these which related to the amount due to the defendants as mortgagees. The decree of the first Court was reversed and that Court was directed to take proper pleadings with regard to the sum due to the mortgagees. In an appeal from the remand order,

Held, that the order was under S. 151. It being neither an order under O. 41, R. 23 nor a decree, no appeal lay. AIR (Vol 16) 1929 Nag 63: 117 Ind Cas 280: 26 NLR 44.

——O. 41, R. 23 — A case was disposed of on preliminary points and in appeal the findings were not reversed. But the appellate Court, on the materials before it, was not able to agree with the findings of the lower Court. The decree was reversed and the case remanded.

Held, that the order remanding the suit was an order under R. 23, O. 41.

Held, further, that if the appellate Court was not satisfied with the findings of the trial Court, it should have itself dealt with it, or if further oral evidence was, in its opinion, necessary to decide the preliminary points, it might have directed under O. 41, R. 27, the trial Court to take such evidence and send it with or without findings. On any view of the case the reversal of the lower Court's decree and a remand were totally uncalled for, for disposal of the preliminary points. AIR (Vol 15) 1928 Mad 1200: 110 Ind Cas 692 (DB).

——O. 41, R. 23 — Appeal — Powers of appellate court.

The hearing of an appeal against an order of remand is not barred by the mere fact that the order has been carried out by the trial Court. (1928) 111 Ind Cas 796 (Lah).

——O. 41, R. 23 — In this case a remand which did not refer to O. 41, R. 23 was construed to be under that rule in view of the policy of the Court to allow as wide a meaning as was reasonably possible to the pprovisions of O. 41, R. 23, and an appeal was held to lie from the order.

Inherent powers of remand of the High Court discussed. AIR (Vol 9) 1922 All 254: 64 Ind Cas 878: 44 All 176: 19 ALJ 971 (DB).

——O. 41, R. 23 — Where the appellate Court remands the case, on the finding that the lower Court has jumbled up the issues and apparently misconceived the real defence and has in fact misdirected itself in limine and that therefore there has never been any real trial of the case as the pleadings required,

Held, that the remand must be taken to be under O. 41, R. 23, on a preliminary point. In the case of an order of remand, it must be presumed, unless the contrary is shown at the time when it is made, that it is one under O. 41, R. 23. An order may be made under that section and yet be wrongly made, but it would nonetheless be appealable. AIR (Vol 9) 1922 All 226: 67 Ind Cas 713: 44 All 492: 20 ALJ 321 (DB).

——O. 41, R. 23 — Where the Appellate Court decides the main point in a case and remands the case for disposal of the remaining issues, the decision is not one on a preliminary point and thus the order is not appealable. AIR (Vol 7) 1920 Mad 759: 60 Ind Cas 609: 12 LW 667 (DB).

——O. 41, R. 23 and O. 43, R. 1 (u) — Appeal — Order of remand — Preliminary point.

Order 41, R. 23, C. P. C. does not contemplate a case decided upon the whole evidence and upon all the issues which were raised. If in such a case an Appellate Court thinks that the burden of proof has been cast on the wrong party it can remand the case for re-trial in the light of the evidence already taken and authorise the taking of fresh evidence. The order of remand is not appealable. AIR (Vol 7) 1920 Pat 666: 1 Pat LT 509: 55 Ind Cas 484 (DB).

——O. 41, R. 23 and O. 43, R. 1 (u) — Remand.

An order of an appellate court setting aside the order of the Lower Court rejecting a plaint and directing it t, to proceed with the trial of the suit on the merits, is not an order under O. 41, R. 23 and so is not appealable under O. 43, R. 1 (u). AIR (Vol 2) 1915 Lah 8: 133 PLR 1915: 85 PWR 1915: 26 Ind Cas 519 (DB).

——O. 41, R. 23 and O. 42, R. 1 — Appeal — Remand order.

When a remand order is not passed under O. 41, R. 23 no appeal is allowed against it under O. 43, R. 1.

Quaere — Whether an appellate court can set aside an ex parte decree and remand the case to the original court, if the deft. could not get an opportunity to adduce his evidence or whether the appellate court should direct the Lower Court to take further evidence and send the case to it for its decision on the merits. (1912) MWN 410: 11 MLT 199: 22 MLJ 409: 15 Ind Cas 367 (DB).

——O. 41, R. 23 and O. 43, R. 1 (u) — Appeal — Order of remand.

Where an appeal would not lie from the final decree of a Divisional Judge, an order of remand by him under O. 41, R. 23 of the Code is not appealable. 101 PR 1910: 41 PLR 1911: 8 Ind Cas 1157 (DB).

——O. 41, R. 23; O. 45, R. 1 (Ss. 562, 594, old Code) — No appeal will lie against an order of remand after the trial of the case on remand, though the judgment has not yet been delivered when the final decree itself has not been appealed against. (1908) 12 CWN 590 (592).

——O. 41, R. 23 (S. 562, old Code) — Remand — Order of remand carried out — Whether appeal against remand rendered nugatory.

An appeal against an order of remand under S. 262, C. P. C., is not rendered nugatory by reason of the order having been carried out. (1906) AWN 28: 3 ALJ 40 (42) (DB).

——O. 41, R. 23; S. 104, O. 43, R. 1, (Ss. 562, 588 old Code) — First Court rejecting plaint for multifariousness — Appellate court reversing and ordering trial — Order under S. 562 — Appeal — Section 588.

An order of an appellate court setting aside an order rejecting a plaint for misjoinder of causes of action and of parties and ordering trial on the merits is an order under S. 562, C. P. C., and is appealable under S. 588, C. P. C. (1902) 6 CWN 585 (587) (DB).

——O. 41, R. 23 (S. 562 old Code) — Appeal — Order directing certain acts which could be passed only under S. 562 — Order not warranted by section — Lower court's decree not set aside — Informality — Appealability of.

Where an appellate court directs the court of first instance to do what could be directed only under S. 562, C. P. C., but the order is informal in that the lower court's decree was not set aside.

Held, that the order was in substance one under S. 562 and is, therefore, appealable. (1902) 6 CWN 326 (327) (DB).

(b) Order purporting to be under this rule.

——O. 41, R. 23 — Applicability — Remand for decision of question as to applicability of S. 14 of the Limitation Act — Appealability.

Where a plaintiff invokes the aid of S. 14 of the Limitation Act and the other side contests his right to invoke it and it is not decided and the case is remanded back to the trial Court by the appellate Court for the decision of the question as to the availability of the benefit of S. 14 to the plaintiff the order of remand falls under O. 41, R. 23 even though the trial Court purported to decide all the issues. Such an order is therefore appealable. AIR (V 35) 1948 Oudh 107 : 231 Ind

Cas 5 : 1947 AWR (CC) 66 : 1947 OWN 157 : 1947 OA (CC) 66 : 22 Luck 237 (DB).

——O. 41, R. 23, Ss. 151, 115 — Order of remand not falling under O. 41, R. 23.

No appeal lies unless the right has been expressly conferred by statute. So far as remands are concerned, an appeal lies only when the remand is under O. 41, R. 23, Civil P. C. It follows that there can be no appeal from an order of remand unless it falls under O. 41, R. 23, or unless it can be said to amount to a decree within the meaning of S. 2(2). It is impossible to hold that an order of remand which does not and cannot fall within the purview of O. 41, R. 23, must nevertheless be deemed to have been one under it simply because the Judge purported to act in accordance with its provisions. The rights conferred are one of substances and cannot be enlarged or whittled down by what Judges do or purport to do. These rights go to the very roots of the Court's jurisdiction. Where, therefore, an order of remand does not fall under O. 41, R. 23, no appeal lies even if the Judge has purported to act under O. 41, R. 23. 31 NLR Supp. 72 : AIR 1936 Nag 8 : 160 Ind Cas 202, Overruled; AIR 1928 Lah 116; AIR 1928 Lah 341; AIR 1935 Cal 134; AIR 1925 Cal 716; AIR 1922 All 254 and AIR 1916 Nag 17, Dissented from. AIR (Vol 27) 1940 Nag 349 : ILR (1940) Nag 538 : 1940 NLJ 350 : 191 Ind Cas 566 (DB).

——O. 41, R. 23 — Court purporting to pass order under O. 41, R. 23 — Appeal lies from order even if wrongly passed.

It is doubtful whether it can be assumed that the Court purports to act under O. 41, R. 23, merely because the form used for the order of remand is the form designed for an order of remand under O. 41, R. 23, and because a certificate is issued for the refund of Court-fees. When it is perfectly clear that O. 41, R. 23 has no application it should not be assumed that the Court thought it was acting under O. 41, R. 23 unless it is quite clear that it did in fact so act.

Still, if a Court purports to pass an order of remand under S. 41, R. 23, even if the order is wrongly passed under that rule, an appeal lies from the order. (Overruled in AIR (Vol 27) 1940 Nag 349.) AIR (Vol 23) 1936 Nag 8.

——O. 41, R. 23, O. 43, R. 1(u) — Remand — Relevant section not mentioned in order — Onus to prove it was under O. 41, R. 23 — Appeal — Competency of.

A Court has inherent power to remand a case for trial although it does not fall within the purview of O. 41, R. 23. The failure of the Judge in not mentioning the relevant section of the Code under which he purports to act cannot be availed of by the aggrieved party as giving him a right of appeal, unless he satisfies the higher Court that the order of remand was one which was intended to be passed under R. 23, and he cannot do so except by satisfying the Court that it was an order which could be passed under that rule.

Where the order of remand is silent as to the rule under which it purports to have been made, the onus is on the appellant to satisfy the Court that the order complained against is an order falling within the purview of R. 23. If he fails to satisfy the Court on that point, he fails to bring his case within the purview of O. 43. R. 1, Cl. (u). But where the order complained against purports to be one under R. 23, an appeal filed against it is prima facie competent.

Per Rupchand, A. J. C.—An order, which gives no finality in relation to the suit but keeps the suit a live suit in which the rights of the parties have still to be determined, is an interlocutory order. AIR (Vol 20) 1933 Sind 279 : 27 SLR 341 : 146 Ind Cas 777 (FB).

——O. 41, R. 23 — Appeal — Order purporting to be under rule.

Appeal lies if Court purports to act under O. 41, R. 23. AIR (Vol 17) 1930 Lah 221 : 30 PLR 645 : 119 Ind Cas 330.

——O. 41, R. 23 — Right of appeal is determined by what the Court purported to do, and not by what the Courts should have done and so when the Court purported to make a remand under O. 41, R. 23, C. P. Code though in reality it should have been under S. 151, C. P. Code an appeal from such a remand is competent. AIR (Vol 15) 1928 Lah 341 : 107 Ind Cas 284.

——O. 41, R. 23 — Although the Court ordering the remand may have had no jurisdiction under R. 23 to pass the order, nevertheless if the order of remand as made purports to be an order under O. 41, R. 23 and appears to be in form and substance an order under that rule, it is to be regarded as an order of remand passed under R. 23 and, therefore, subject to appeal.

Where the lower appellate Court in a case which was not decided on a preliminary point, instead of retaining the appeal in his Court and referring merely an issue to be determined by the trial Court, illegally and without jurisdiction remanded the case to the trial Court for the issue of limitation to be determined and the case disposed of by that Court.

Held no appeal would lie as the lower appellate Court did not purport to act under R. 23. AIR (V 14) 1927 Cal 642 : 31 CWN 878 : 104 Ind Cas 422 (DB).

——O. 41, R. 23 — Where a case is remanded not for the whole claim but only as to a portion, the remand is not one under R. 23 and is not appealable. AIR (Vol 13) 1926 Pat 514 : 8 PLT 9 : 1926 PHCC 279 : 97 Ind Cas 1 (DB).

(c) Suits of small cause nature.

——O. 41, R. 23 and O. 43, R. 1, Cl. (u) — Appeal — Small cause nature — Order of remand in appeal — Whether appeal lies.

No appeal lies against an order of remand passed by the first appellate Court in a suit of a nature cognizable by a Court of Small Causes. AIR (V 3) 1916 All 125 : 36 Ind Cas 396.

(d) To Privy Council.

——O. 41, R. 23 — An order under O. 41, R. 23 is neither decree nor final order within the meaning of S. 109. (1935) 158 Ind Cas 1117 (Lah).

——O. 41, Rr. 23 and 25 — Powers of Appellate Court — Evidence wholly adduced in trial.

It is an unusual course to remand for fresh evidence an appeal which has been argued and which ought prima facie to be decided on the materials which were before the Courts below. The Privy Council refused to remand a case for trial on the question whether a mortgage was validly attested. AIR (Vol 5) 1918 PC 3 : 45 Cal 748 : 45 IA 94 : 4 Pat LW 349 : 16 ALJ 409 : 34 MLJ 545 : 27 CLJ 548 : 22 CWN 697 : 20 Bom LR 587 : 23 MLT 388 : (1918) MWN 382 : 8 LW 176 : 45 Ind Cas 1.

(On appeal from (1910) 14 CWN 165 : 3 Ind Cas 311.)

——O. 41, R. 23 — An objection by the appellants that in taking additional evidence that the High Court had not acted in accordance with the provisions of S. 568 of the C.P.C., 1882, was disallowed as the appellants had without raising any objection at the time, consented to the additional evidence being taken:

Held, that it was not open to a party on appeal to the Privy Council to take exception to the regularity of their procedure. (1909) 36 Cal 833 :

19 MLJ 375 : 11 Bom LR 861 : 13 CWN 830 : 10 CLJ 74 (PC).

(e) Under other Acts.

——O. 41, R. 23 — Appeal — Remand under B. T. Act.

An appeal against an order of remand passed by the Special Judge under the provisions of the Bengal Tenancy Act is incompetent. AIR (Vol 10) 1923 Cal 333 : 72 Ind Cas 1013 : 37 CLJ 314 (DB).

——O. 41, R. 23 — Appeal — Remand under Agra Tenancy Act.

Under the Agra Tenancy Act an order of remand made by the District Judge under O. 41, R. 23 is not appealable. AIR (Vol 3) 1916 All 333 : 35 Ind Cas 105 (DB).

——O. 41, R. 23 — Appeal — Remand under Agra Tenancy Act, S. 193.

An order of remand in a suit brought under S. 193 of the Agra Tenancy Act is not appealable. (1912) 14 Ind Cas 176 (All) (DB).

(f) Order under inherent powers.

See Note 11.

3. Costs.

——O. 41, R. 23 — Costs — Remand — Indulgence.

Where an appeal is remanded to the Lower Court because the appellant did not set out his case properly in the first Court and support it by proper evidence the respondent must be paid his costs of the appeal. AIR (Vol 3) 1916 Mad 429 : 18 MLT 247 : 2 LW 755 : 30 Ind Cas 785 (DB).

4. Distinction between Order 41, R. 23 & Order 41, R. 25

——O. 41, Rr. 23, 25, O. 43, R. 1 (u) (Oudh) — Order under O. 41, R. 25 — Whether amounts to an 'order remanding a case'.

There is a distinction between an order remanding a case under O. 41, R. 23, and an order remitting issues for decision under O. 41, R. 25. An order under R. 25 does not amount to an "order remanding a case" within the meaning of O. 43, R. 1, Cl. (u) as amended by the Oudh Chief Court and is hence not appealable. The expression remanding a case, means returning a case for decision. The order passed under R. 25 does not return the case for decision but merely remits or remands specified issues for decision. AIR (Vol 22) 1935 Oudh 333: 1935 OWN (CC) 352: 154 Ind Cas 676 (DB).

——O. 41, Rr. 23 and 25 — Adverse possession — Suit by co-sharer for profits — Adverse possession upheld — No finding regarding profit — Appeal — Case remanded.

A suit for profits of certain land alleged to have been owned in certain shares by plaintiffs and defendants, was brought under S. 108 (15), Oudh Rent Act. The Court found defendants to be in possession of part jointly and dismissed the suit without deciding the amount of profit the plaintiffs would be entitled to, holding defendants to be in exclusive possession adversely to the plaintiffs for more than 12 years. The Appellate Court differing on the point of adverse possession remanded the case:

Held, that the order of remand was one under O. 41, R. 23, and not under O. 41. R. 25. AIR (Vol 20) 1933 Oudh 560: 18 RD 21: 10 OWN (CC) 1326: 149 Ind Cas 1172.

——O. 41, R. 23 — Anomalous order of remand.

There is a broad distinction between orders which may be passed under R 23 and R. 25. In the case of an order passed for remand under O. 41, R. 23 the whole case goes for decision to the Court of first instance; whereas in the case of an order for remand passed under O. 41, R. 25 the case is retained on file of the Court which passes the order for remand.

Anomalous orders, i. e., orders which are neither passed under R. 23 nor R. 25 are very often passed by the Subordinate Courts and in a case in which the case is not kept on the file of the Court itself, but the whole case is sent down for proper investigation on remand it is not unreasonable to suppose that the Court means to act under the provision of O. 41, R. 23. AIR (V 14) 1927 Cal 401 : 102 Ind Cas 384: 45 CLJ 194 (DB).

——O. 41, R. 23 . — Preliminary decree in partition suit passed—Appeal filed—Appellate Court remanding case for retrial — Proper order would be under R. 25 and not R. 23. AIR (V 14) 1927 Oudh 591 : 101 Ind Cas 89 (DB).

——O. 41, R. 23 — Where the decree was not reversed on appeal nor was the suit disposed of upon a preliminary point, the appellate Court should not remand the case under O. 41, R. 23. But if the evidence on the record is sufficient for the proper decision of the issues, it should decide the issue itself; or, if it requires further evidence, it should proceed under R. 25 or R. 27 of O. 41. 91 Ind Cas 351: AIR (Vol 13) 1926 Lah 184.

——O. 41, R. 23 — An order of remand under O. 41, R. 23, cannot be made unless the decision of the first Court has been set aside on a preliminary point. If the appellate Court desires certain additional issues to be tried, the order ought to be under R. 25. 7 LLJ 351: 26 PLR 629: AIR (Vol 12) 1925 Lah 480.

——O. 41, R. 23 — Distinction.

Where an appellate Court at the first hearing does not decide the case but merely remits certain specific issues, it is open to the Court before which the case ultimately comes to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order.

An order remanding issues under R. 25 is not a final order. No appeal lies against it. The responsibility for the decree ultimately passed is entirely that of the Court before which the case comes after remand.

It is quite otherwise with an order of remand passed under O. 41, R. 23, for this is an order which does finally determine, subject to any right of appeal, the issues which it decides. 74 Ind Cas 1014: AIR (Vol 10) 1923 All 384.

——O. 41, R. 23 — Distinction.

A distinction has always been drawn between an order remanding the case for decision on the merits under O. 41, R. 23, (S. 562, old Code), and an order under O. 41, R. 25 (S. 566, old Code), which merely remands specific issue for decision. An order of the former class is final order which is subject to appeal and cannot be reconsidered by the Court which passed it except on review whereas an order under R. 25 is an interlocutory order which it is open to the Court to reconsider. 69 Ind Cas 730: 9 OLJ 235: 25 OC 189: AIR (Vol 9) 1922 Oudh 236 (DB).

——O. 41, Rr. 23 and 25 — Preliminary point — Decision on some issues.

Where the appellate Court decides some of the issues in a case and leaves the other issues to be decided by the trial Court, the remand must be made under R. 25 and not under R. 23, which applies only when the order of the First Court is reversed on a preliminary point. AIR (Vol 4) 1917 All 187: 40 Ind Cas 58 (DB).

——O. 41, Rr. 23 and 25 — Powers of Appellate Court.

The proper course to follow by an Appellate Court is to proceed under O. 41, R. 25 and not R. 23 when it does not definitely reverse the finding of the Lower Court but is of opinion that upon a certain finding that a person was not in possession, the suit was liable to be dismissed. AIR (Vol 2) 1915 All 460: 26 Ind Cas 454 (DB).

5. Effect of order of remand.

——O. 41, R. 23 — Re-hearing after remand — Scope — Mere direction to re-hear case in the light of certain observations — Effect of — Power to allow fresh evidence to be adduced.

Where the appellate Court in appeal reverses the decision of the lower Court and remands the case for a re-hearing in the light of the observations contained in its judgment, without a specific direction to hear the case on the evidence already on the record and also on such further evidence as the parties might adduce, the proper construction to be put on the order of remand is that the same case is to be heard again and not a different case with its scope enlarged by the introduction of further evidence. If the lower Court in such a case allows further evidence to be given, it would be acting erroneously, though, if an application be made to it under O. 41, R. 21, it might have to consider the request for taking fresh evidence on the merits. AIR (Vol 39) 1952 Cal 368 (DB).

——O. 41, R. 23 — (Madras) — In circumstances of case defendant appellant was not precluded from raising question of jurisdiction in second appeal.

The President of the Union Board filed a suit against the Secretary of State to recover certain amount which he was made to pay as a surcharge for the Board's failure to collect certain arrears of tax and which was paid under protest. He averred that it would have been unlawful for him to collect the arrears of tax, because, according to him, the notification under which the tax was levied was invalid. The defendant's contention that the Court had no jurisdiction to try the suit was rejected by the Court who accepted the plaintiff's plea that the notification was invalid. The defendant appealed.

The Appellate Court concurred in the findings of the trial Court but at the request of the plaintiff remanded the case to the trial Court to decide whether the tax could be deemed to be lawfully levied under an earlier notification and set aside the decree which the trial Court had passed. On remand, the trial Court held that the earlier notification was also invalid and accordingly passed a fresh decree. This resulted in the defendant again appealing. The Appellate Court held that the trial Court was also right in declaring the earlier notification to be invalid.

The defendant then appealed to the High Court. The plaintiff contended that as there was no appeal against the order of remand, the defendant-appellant was precluded from raising the question whether the trial Court had jurisdiction to entertain the suit and the question of the validity of the finding with regard to jurisdiction and the legality of the latter notification, on an appeal from the order of remand:

Held, that in remanding the suit the lower Appellate Court set aside the decree of the trial Court and therefore there was no decree from which the defendant-appellant could appeal. The appellant was not aggrieved by the order of remand and, therefore, there was no ground for an appeal. The defendant-appellant was not precluded from raising the question of jurisdiction.

The decree of the Appellate Court on the appellant's second appeal must be taken to embody the previous findings of the Appellate Court that the trial Court had jurisdiction and that the later notification was invalid and hence the appellant had a right in second appeal to question all the decisions made by the lower Appellate Court except the decision to order a remand. AIR (Vol 28) 1941 Mad 530: 54 MLW 7: (1941) 2 MLJ 47: 1941 MWN 644: ILR (1941) Mad 850: 196 Ind Cas 353 (FB).

——O. 41, R. 23 — Remand on question of limitation — Whether implies confirmation of findings of trial Court on other questions.

From the fact that the Appellate Judge who passed the remand order found it necessary to pass a remand order on the question of limitation he cannot be taken to have confirmed the finding of the lower Court, apart from the question of limitation. Every case of a remand must be considered on its own facts. AIR (Vol 28) 1941 Nag 188: 1941 NLJ 117: ILR (1942) Nag 441: 195 Ind Cas 527 (DB).

——O. 41, R. 23 — Proceedings under order of remand which is interfered with by High Court — Validity.

Whether all the proceedings, taken by the 1st Court under an order of remand that is subsequently held by the High Court to be wrongly made, are null and void, depends on the circumstances of each case and on the nature of the invalidity of the order. Where a remand order is interfered with as being pre-mature and circumstances are such that in the end it turns out to be perfectly justified, the proceedings in the first Court under the order of remand ought to be held to be de bene esse. 66 Ind Cas 317: 44 All 211: 20 ALJ 44: AIR (Vol 9) 1922 All 35 (DB).

——O. 41, R. 23 — Effect of order — Whole case open — Second finding different from prior one.

A suit by plaintiff to recover possession of certain lands on the strength of a Patni Settlement in his favour was dismissed on the ground that the Patni was a benami transaction. But the Appellate Court found that the Patni was not Benami. Defendant appealed to High Court which remanded the case for a finding whether the Patni fell within the class of tenures described in S. 71 (b) of the Assam Land & Revenue Regulation. The Lower Appellate Court found that the Patni was not bona fide and therefore did not come under the foregoing section. The plaintiff objected that that Court, having already found that the Patni was not benami had no power to arrive at a contrary finding.

Held, that the finding was justified, as in arriving at its previous finding the Court apparently had not considered all the facts. AIR (Vol 7) 1920 Cal 350 : 56 Ind Cas 1001 (DB).

——O. 41, R. 23 — Effect of order — Appeal by some of the defendants — Whole case open.

Where an Appellate Court remands a case for retrial on the appeal of some defendants who did not join in a reference to arbitration on the ground that the award was not binding on them the whole case is re-opened even in respect of those who did not appeal. AIR (Vol 6) 1919 Mad 150: 37 MLJ 100: 52 Ind Cas 569 (DB).

——O. 41, R. 23 — Effect of order — New plea before the lower Court.

The mortgagees sued on a mortgage but their suit was dismissed on the ground that there was no consideration for the mortgage. On appeal to the High Court, the consideration was found to be proved but the case was remanded for the decision on the merits. The defendants did not

support the decision of the Lower Court on any other ground before the High Court, but raised the question of invalid attestation under S. 59 of the T. P. Act after remand before the lower Court.

Held, that the lower Court could not frame a fresh preliminary issue where the case is remanded, as the effect of the remand order was to send back the case to the first court to try the remaining issues. The technical plea of attestation ought to be treated as raised for the first time in appeal. The defendants having failed to raise the objection before the High Court precluded themselves from raising it at the subsequent stage of the same litigation either as res judicata or on the general discretion of the Appellate Court in dealing with substantially new pleading taken up in appeal for the first time and incapable of disposal without fresh evidence. AIR (Vol 3) 1916 All 213: 35 Ind Cas 571 (DB).

——O. 41, R. 23 — Effect of order — What it includes.

A remand order to find whether a person has a title includes an inquiry as to whether he has lost the title or whether he is precluded from relying upon the title. AIR (Vol 3) 1916 Cal 722: 20 CWN 149: 31 Ind Cas 987 (DB).

——O. 41, R. 23 — Effect of order — Whole case if re-opened — High Court's power of remand.

A High Court in the exercise of its power of supervision under the Charter can assume in certain cases, an authority to limit the scope of certain appeals remanded to the lower Courts without keeping them in its own file. But in such a case it is absolutely essential that the High Court should lay down clearly that it did intend to limit the scope of the appeal to certain specified questions. In the absence of any limitation, the whole appeal on remand becomes open for decision by the lower Appellate Court.

A remand made by an Appellate Court without retaining the appeal on its own file necessarily re-opens the whole case and the Lower Court of appeal to which the case is remanded is bound to hear the appeal upon the judgment of the Court of first instance. AIR (Vol 3) 1916 Cal 77: 20 CWN 584 :32 Ind Cas 240 (DB).

——O. 41, R. 23 — Effect of order — Whole case open.

When a case is remanded under O. 41, R. 23, the Lower Court can form its own conclusions irrespective of any, arrived at by its predecessor in respect of matters not touched by the Appellate Court. (1911) 14 OC 321: 13 Ind Cas 813 (DB).

——O. 41, R. 23 — Effect of order — Remand by Appellate Court without jurisdiction.

Where remand has been rightly made by Appellate Court without jurisdiction an inquiry by the Lower Court competent to try the case is valid in spite of the defect of jurisdiction of the Appellate Court. 26 PWR 1909: 1 Ind Cas 460 (DB).

6. Exclusion of evidence by lower Court.

——O. 41, R. 23 — Order 41, R. 23-A (Lah), Rr. 25, 27 — Appellate Court finding that trial Court did not frame proper issues and wrongly excluded certain documentary evidence.

Where the Appellate Court finds that the trial Judge had not framed proper issues and had wrongly excluded certain documentary evidence which the appellant wished to produce, the Appellate Court should frame additional issues and remand the case under R. 25 of O. 41, and at the same time direct the trial Judge under R. 27 to admit the excluded evidence. It should not remand the case under O. 41, R. 23-A. AIR (V 29) 1942 Lah 201 : 44 PLR 253 : ILR (1943) Lah 569 : 201 Ind Cas 667 (DB).

——O. 41, R. 23 — At a trial it is the duty of Counsel to see that he calls sufficient evidence to prove his case, and if in deference to some observation from the Bench he refrains from calling evidence, the Appellate Court should not reverse the decree of the trial Court without allowing the party to give the evidence which the first Court had thought unnecessary. AIR (V 20) 1933 Bom 303 : 35 Bom LR 578 : 144 Ind Cas 754 (DB).

——O. 41, R. 23 — There would be a remand if lower Court fails in its duty to discuss the evidence bearing on a point, and comes to a conclusion not on the pleading of the parties, but on the evidence adduced before the Court. AIR (V 10) 1923 Pat 174 : 67 Ind Cas 710.

——O. 41, R. 23 — High Court holding in second appeal that certain evidence was improperly rejected in lower Court cannot weigh the evidence and decide question of fact but must remand the case. AIR (V 9) 1922 Pat 417 : 65 Ind Cas 536 : 3 PLT 303 (DB).

——O. 41, R. 23 — Exclusion of evidence — Remand for re-hearing.

Where certain documents having some bearing on the case were improperly excluded from consideration by the Appellate Court as being inadmissible in evidence, it is impossible to say what effect the consideration of those documents, as evidence, might have had on the judgment of the Appellate Court. Therefore, the case must be remanded for a re-hearing of the appeal on consideration of the whole of the evidence including those documents. AIR (V 6) 1919 Cal 902 : 47 Ind Cas 159 (DB).

——O. 41, Rr. 23 and 27 — Exclusion of evidence — Procedure.

Where the Appellate Court finds that certain evidence refused to be recorded by the lower Court ought to have been recorded, it has no power to remand the suit for trial ab initio under O. 41, R. 23, C. P. C., but can direct any additional evidence to be recorded under O. 41, R. 27, C. P. C. AIR (V 5) 1918 Oudh 170 : 5 OLJ 139 : 45 Ind Cas 832.

——O. 41, R. 23 — Exclusion of evidence — Powers of Appellate Court — New and old Code compared.

The powers to remand conferred on Appellate Courts are much wider under the new than under the old Code. The power to remand is not only to be used where the trial Court has disposed of a case on a preliminary issue but also where important evidence has been wrongly excluded or important questions wrongly disallowed. AIR (V 4) 1917 Cal 556 : 36 Ind Cas 813 (DB).

——O. 41, R. 23 — Rejection of evidence — Remand.

Where a District Judge decided an appeal holding erroneously that a copy of a chitta admitted in the trial Court without objection, was not admissible in evidence, the case was remitted for reconsideration. AIR (V 4) 1917 Cal 78 : 41 Ind Cas 71 (DB).

——O. 41, Rr. 23 and 33 — Exclusion of evidence — Remand.

When the ground on which an Appellate Court declares a document admissible has arisen subsequently to disposal of the suit by the lower Court, the order of remand may be made under O. 41, Rr. 23 or 33 of the C. P. C. of 1908. (1911) 9 MLT 317 : 10 Ind Cas 675 (DB).

——O. 41, Rr. 23 and 27 — Exclusion of evidence — Procedure.

When the Appellate Court finds that the lower Court has shut out evidence, the evidence should be admitted in appeal under O. 41, R. 27 and the case should not be remanded to the lower Court. (1909) 6 MLT 273 : 4 Ind Cas 1062 (DB).

7. Grounds of remand.

(a) General.
(a-1) Burden of proof.
(b) Error of law.
(c) Evidence.
(d) Findings.
(e) Issue not decided.
(f) Jurisdiction.
(g) Law point.
(h) Local investigation.
(i) Limitation.
(j) New case.
(k) New plea.
(l) Technical point.

(a) General.

——O. 41, R. 23 — **Addition of parties.**

Suit for partition — Appeal — Necessary parties not impleaded — Proper procedure is to remand the case to the Court of first instance with a direction that the Court should implead those persons and then proceed to dispose of the case. AIR (V 27) 1940 All 399 : 1940 AWR (HC) 375 : 190 Ind Cas 384.

——O. 41, R. 23 — It is desirable that this practice should be reviewed on the ground that it is Counsel's duty to see that he calls sufficient evidence to prove his case and that the Judge ought not to stop parties from calling such evidence as they think proper unless the evidence is manifestly unnecessary. I must, therefore, remand the case to the trial Court for the plaintiff's further evidence to be heard, but I think also that the issues should be extended . . . . I therefore propose to reverse the decree of the lower appellate Court and remand the case to the trial Court with directions to hear further evidence as to the plaintiff's possession and to amend the issues as suggested and both parties will be at liberty to call such further evidence as they think right. AIR (V 20) 1933 Bom 303 : 35 Bom LR 578 : 144 Ind Cas 754 (DB).

——O. 41, R. 23 — Hand-note — Material alteration — Addition of thumb impressions of some executants — Suit based not only on hand-note but also on original loan — Suit dismissed on ground of material alteration of deed — Entire suit held, was not liable to be thrown out — There should be re-trial. AIR (V 18) 1931 Cal 472 : 53 CLJ 219 : 134 Ind Cas 766.

——O. 41, R. 23 — **Grounds for remand — Proper grounds — Difficulty in determining question involved from materials on record.**

If a Court of appeal finds difficulty in determining the question involved on the materials on the record, it will be open to it to remand the case to the trial Court for a decision with directions as to taking further evidence and issue of commission for a correct appreciation of the points in controversy and the facts at issue. AIR (V 17) 1930 Pat 7 (DB).

——O. 41, R. 23 — But an order of remand cannot be made under R. 23 of O. 41 unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case from being tried to the end. AIR (V 10) 1923 Oudh 177 : 73 Ind Cas 791 : 26 OC 10 : 10 OLJ 36.

——O. 41, Rr. 23 and 25 — **Grounds for remand — Decision in ignorance of admissions.**

Where the lower appellate Court did not realise the legal effect of admission by the pleader of a party and decided the case against a party, the case must be remanded to that Court in order that the appeal might be re-heard, on the footing that the admission in question was in fact made in the trial Court. AIR (V 5) 1918 Cal 282 : 44 Ind Cas 18 (DB).

——O. 41, R. 23 — **Preliminary point — Practice.**

In a redemption suit defendant put in preliminary plea that by foreclosure proceedings there was a sale in his favour and the lower Appellate Court found against the plea

Held, that in the circumstances the lower Appellate Court ought to have remanded the case for entertaining the further pleas of the defendant on the merits. The practice of allowing pleas piecemeal in original suits is open to objection. AIR (V 2) 1915 Lah 449 : 57 PLR 1916 : 121 PWR 1915 : 30 Ind Cas 817.

(a-1) Burden of proof.

——O. 41, R. 23 — **Further evidence.**

There is no law which can justify an Appellate Court in remanding a case to the trial Court in order that a party who, in its opinion whether right or wrong, has failed to discharge the burden that lay on him, may be enabled to have another opportunity of producing the evidence. AIR (V 31) 1944 All 293 : 1944 OWN (HC) 122 : 1944 AWR (HC) 192 : ILR (1944) All 594 : 218 Ind Cas 130.

——O. 41, R. 23 — In the absence of proof of some fact within S. 32, Evidence Act what the appellate Court has to do is to find whether or not there was any real contention that the writer was still alive and if so grant a remand. AIR (V 14) 1927 Cal 855 : 104 Ind Cas 733 : 46 CLJ 253 (DB).

——O. 41, R. 23 — **Burden of proof thrown on wrong party.**

Where the lower appellate Court is largely influenced in arriving at its finding by the question of burden of proof incorrectly thrown on the plaintiffs, the only course open in second appeal is either to send the case back to the lower Court for proper findings on the evidence adduced, or to go into evidence and to record a finding after hearing the parties. AIR (V 13) 1926 All 453 : 94 Ind Cas 944 : 24 ALJ 513 (DB).

——O. 41, R. 23 — Where the lower appellate Court placed the burden of proof wrongly and came to a certain conclusion.

Held, remand should be ordered though it may be possible that the lower appellate Court might still come to the same conclusion after the consideration of the probabilities and the evidence in the case. AIR (V 11) 1924 Mad 770 : 47 MLJ 14 : 79 Ind Cas 899 : 34 MLT 201 : 19 MLW 627.

——O. 41, R. 23 — **Burden of proof — Error as to.**

If a case is decided on a wrong view of Ss. 107 and 108 Evidence Act it should be remanded to the Court as a case of wrong disposal on a preliminary point. AIR (V 7) 1920 Bom 85 : 22 Bom LR 771 : 57 Ind Cas 525 (DB).

——O. 41, R. 23 — **Burden of proof — Error as to.**

A Shah Jog hundi is a negotiable instrument presumed to be drawn for due consideration under S. 118 (a) of the Neg. Ins. Act. When the question of the consideration for the hundi is raised in a suit and the first appellate Court compels the wrong party to prove it, the second appellate Court can rectify the mistake, disregarding the first decision. AIR (V 7) 1920 Lah 295 : 1 Lah 429 : 58 Ind Cas 982 (DB).

——O. 41, R. 23 — **Burden of proof — Error as to.**

The decision of an appeal on a wrong view as to the burden of proof will entail a remand in

second appeal. AIR (V 4) 1917 Mad 872 : 40 Mad 654 : 3 LW 331 : 19 MLT 275 : 30 MLJ 514 : 34 Ind Cas 294 (DB).

——O. 41, R. 23 — Burden of proof — Error as to — Preliminary point — What is.

A wrong view of the burden of proof is no sufficient ground for an order of remand unless the Appellate Court finds the decision too was wrong. (1912) 34 All 612 : 10 ALJ 190 : 17 Ind Cas 94 (DB).

(b) Error of law.

——O. 41, R. 23 — Appellate Court deciding that decision of trial Court was wrong on legal issue.

Where an Appellate Court decides that the decision of the trial Court is wrong on a legal issue, it should remand the case for trial on the remaining issues and it should not decide an issue of fact itself in the absence of evidence on it. AIR (V 22) 1935 Rang 34 : 155 Ind Cas 997.

——O. 41, R. 23 — Grounds for remand — Error of law.

If the defendant's plea is one of a subsisting tenancy the position created by S. 202 of Agra Tenancy Act arises and the Appellate Court can remand the suit if the lower Court overlooked it. AIR (V 3) 1916 All 145 : 38 All 533 : 14 ALJ 734 : 35 Ind Cas 41 (DB).

——O. 41, R. 23 — Remand — Objection at last stage.

Case where an objection being taken at a late stage that a mortgage-bond was not attested as the law required, by two witnesses, the suit instead of being dismissed, was sent back to enable plaintiff to adduce further evidence to prove that at least two of the persons whose names appeared on the face of the document were attesting witnesses. (1903) 7 CWN 160 (162) (DB).

(c) Evidence.

——O. 41, R. 23 — Ground for remand — Admission of fresh evidence.

The admission of fresh evidence affords no ground for remanding a suit, because the evidence could and should be considered by the appellate Court, together with the evidence already on record. An order of remand can only be passed when the Court has decided that it is necessary to set aside a decree. 61 LW 711 : 1948 MWN 728 : AIR (Vol 36) 1949 Mad 394: (1948) 2 MLJ 413.

——O. 41, Rr. 23, 25, 27 — Trial Court deciding question on evidence placed before it by plaintiff — Appellate Court considering evidence insufficient.

Appellate Court cannot remand a case to allow the plaintiff to produce additional evidence he desires on the ground that the evidence of the plaintiff was not sufficient to establish his case, when the plaintiff had placed evidence before the trial Court and the trial Court had decided the question on that evidence. It is the duty of the Appellate Court to come to its conclusions on the evidence on the record and decide the appeal either for the appellant or for the respondents in accordance with its conclusion. AIR (Vol 25) 1938 All 621: (1938) ALJ 930: 1938 AWR (HC) 617: ILR (1938) All 952: 178 Ind Cas 309.

——O. 41, R. 23 — Suit for compensation for non-delivery against railway — Trial Court dismissing suit for want of "wilful neglect" leaving undecided question of damages — Lower appellate Court holding that "wilful neglect" was proved and remanding on question of damages — Remand is under O. 41, R. 23, and not under S. 151. 112 Ind Cas 736: 10 Lah 360: 30 PLR 541: AIR (Vol 15) 1928 Lah 774 (DB).

——O. 41, R. 23 — Question of fact raised in lower appellate Court for the first time — Case should be remanded. 86 Ind Cas 750: AIR (Vol 13) 1926 Cal 414 (DB).

——O. 41, R. 23 — Where an issue though necessary was not framed, the Court should not remand the case but should refer the issue for taking additional evidence and for returning the case to it with its findings. 78 Ind Cas 1: AIR (Vol 12) 1925 Mad 169 (DB).

——O. 41, R. 23 — Where parties agreed not to adduce evidence and asked the Judge to inspect the locality and then give a judgment,

Held, that no remand with liberty to parties to adduce evidence should be ordered. AIR (Vol 11) 1924 Sind 134: 76 Ind Cas 309: 18 SLR 306 (DB).

——O. 41, R. 23 — A remand should not be allowed after a long trial merely for the purpose of making an enquiry whether there is any evidence to be produced. 66 Ind Cas 287: 34 CLJ 205: AIR (Vol 8) 1921 Cal 661 (DB).

——O. 41, R. 23 — Inadmissible evidence — Remand for retrial.

A case can be remanded in second appeal, where the decision of the Appellate Court is based upon a document inadmissible in evidence. AIR (Vol 8) 1921 Pat 61: 5 Pat LJ 410: 1 Pat LT 702: 57 Ind Cas 561 (DB).

——O. 41, Rr. 23 and 25 — Grounds for remand — Admission of inadmissible evidence—Remand.

Where the lower Court has admitted inadmissible evidence the proper procedure for the Appellate Court is to remand the case, as it is not possible to ascertain how far the former was influenced in arriving at its conclusion by that piece of evidence. AIR (Vol 7) 1920 Pat 726: 2 UPLR (Pat) 49 : 1 Pat LT 224: 55 Ind Cas 922.

——O. 41, Rr. 23 and 25 — Grounds for remand — Additional evidence — Evidence not given by over sight.

Where in a suit upon a mortgage purporting to have been executed by the husband of a lady on her behalf under a power of attorney from her, the plaintiff did not take steps for the production of the power or to prove it, or to give secondary evidence of its contents.

Held, that the case ought not to be remanded to give him the opportunity of producing and proving the power. AIR (Vol 6) 1919 Cal 836: 53 Ind Cas 562 (DB).

——O. 41, Rr. 23 and 25 — Inadmissible evidence — Remand — Appellate Court — Decision on evidence before it.

It is competent to the Appellate Court to decide a case on the evidence on record after excluding irrelevant or unsatisfactory portions. AIR (Vol 6) 1919 Cal 96: 50 Ind Cas 301.

——O. 41, R. 23 — Grounds for remand — Evidence taken by first Court fully.

Where a Court returns the plaint for presentation to a court having pecuniary jurisdiction to entertain it on a consideration of the evidence it is not competent to the Appellate Court to remand the whole case under O. 41, R. 23 of the C. P. C. merely because in its opinion the appointment of an experienced Commissioner is expedient to revalue the properties. AIR (Vol 6) 1919 Mad 561: 49 Ind Cas 750.

——O. 41, R. 23 — Inadmissible evidence — Admission of.

O. 41, R. 23 applies where a final decree has been passed upon the report of a Commr. who had been superseded and whose report therefore could not be legally used as the basis of a final decree. AIR (Vol 4) 1917 All 148: 39 Ind Cas 951 (DB).

——O. 41, R. 23 — Grounds for remand — Strict proof.

The legislature seems to avoid remands as far as possible and to provide that the Appellate Court should dispose of the case if there is sufficient evidence and should not put the parties to unnecessary expense. A remand, on the ground that a particular piece of land was not proved to be in mortgagee's possession and there is difference of opinion as to certain items of accounts, the suit being one for accounts and redemption, is bad. (1913) 37 Bom 289: 14 Bom LR 1154: 17 Ind Cas 891 (DB).

——O. 41, R. 23, O. 41, R. 25 (Ss. 562, 566, old Code) — Appellate Court, powers of — Remand order of, where decision of Subordinate Court is on merits — Remand of particular issues only allowable.

Where a Subordinate Court has dealt with questions arising on the merits of the case, no order of remand can be made by the appellate Court under S. 562, C. P. C., but if the appellate Court is of opinion that there should be a finding upon any particular issue, or further evidence should be taken on any issue, it may make an order of remand under S. 566, C. P. C. (1905) 9 CWN 54 (56) (DB).

(d) Findings

——O. 41, R. 23 — Grounds for remand — Findings not clear.

In a suit for possession of land the lower Appellate Court said on the question of limitation "it does not appear that the plaintiff's claim for possession is barred" On appeal a single Judge of the High Court held that a mere statement of this sort was not sufficient and remanded the case for a proper finding. On remand it was found that the plaintiff was not in possession within 12 years of suit.

Heid, the first finding was sufficient and that the order of the remand was wrong. (1912) 16 CLJ 259: 17 Ind Cas 224 (DB).

——O. 41, R. 23 — Grounds for remand — Findings sufficient.

If the findings of the Lower Court are sufficient to dispose of the case, remission of issues to the Lower Court is not necessary. (1910) 6 Ind Cas 499 (All) (DB).

(e) Issue not decided.

——O. 41, R. 23 — Order under O. 41, R. 23.

Where the Court of first instance framed six issues and recorded evidence on all of them, and decided only four issues leaving the other two undecided, and where when the lower Appellate Court set aside the decision of the Court of first instance and remitted the case for decision on the remaining two issues, it did so under O. 41, R. 23. AIR (Vol 20) 1933 Rang 413: 149 Ind Cas 1120.

——O. 41, Rr. 23 and 25 — Grounds for remand — — Issue of fact — No decision by Appellate Court.

The appellant is entitled to have the opinion of the Appellate Court on an issue of fact and if such Court fails to determine the point the High Court will remand the case for re-decision of the appeal. AIR (Vol 7) 1920 Pat 642: 55 Ind Cas 233.

——O. 41, Rr. 23 and 25 — Grounds for remand — Absence of issue

Where evidence was led and the Court came to a finding on a certain point the fact that no issue was founded thereon is not sufficient for a remand. AIR (Vol 5) 1918 Lah 264: 137 PWR 1918: 46 Ind Cas 659.

(f) Jurisdiction.

——O. 41, R. 23 — Where no question of jurisdiction is raised by the parties in the pleadings, but only in appeal, the Appellate Court is entitled to remand the suit for re-hearing on the question of jurisdiction. AIR (Vol 25) 1938 Pat 97: 16 Pat 632: 4 BR 315: 19 PLT 259: 173 Ind Cas 644 (DB).

(g) Law point.

——O. 41, R. 23 — If the grounds which the appellants wish to urge in the Court below are all grounds of law which can be argued equally well in High Court, it will not send back the case to have the appeal re-argued in the Court below on the same legal grounds. 69 Ind Cas 667: 9 OLJ 439: AIR (Vol 9) 1922 Oudh 268.

(h) Local investigation.

——O. 41, R. 23 — Grounds for remand — Remand on issues already tried and for local investigation — Impropriety of.

Held, that the order of remand was unnecessary, and vexatious as the additional issues framed were covered by some of the issues decided in the judgment of the Original Court and the plaintiffs having refrained from applying for local investigation in the first Court, should not be given another opportunity of establishing their case. AIR (Vol 5) 1918 Cal 907: 43 Ind Cas 815 (DB).

(i) Limitation.

——O. 41, R. 23 — Where the plaintiff's suit to enforce a compromise could not be sustained because the compromise though acted upon was unregistered and was consequently inadmissible in evidence and it appeared that by the time the appeal was heard a fresh suit for specific performance would be barred by limitation, held, that the Court could send the case back under O. 41, R. 23 to the lower Court with directions to allow the plaintiff to amend his plaint so as to make it a claim for specific performance but on condition of his paying costs of both the Courts. (1929) 27 ALJ 487: 116 Ind Cas 871 (DB).

(j) New case.

——O. 41, R. 23 — A remand in order to enable the plaintiff (appellant) to ascertain whether or no a demand was made within three years of the institution of the suit which would save limitation, was refused, when it was mentioned in the plaint as to when the cause of action arose. 82 Ind Cas 91: AIR (Vol 10) 1923 Lah 645 (DB).

——O. 41, Rr. 23 and 25 — Grounds for remand — New case on appeal — Remand.

A party who in the trial court fails to establish the case which he set up is not entitled to advance a new case in appeal nor is he entitled to remand to enable him to establish his claim on the new case set up. AIR (Vol 7) 1920 Cal 107: 54 Ind Cas 645.

(k) New plea.

——O. 41, R. 23 — (Oudh) Rule 23 refers only to questions raised by parties on pleadings in trial Court.

Order 41, R. 23, Civil P. C., as amended by the Oudh Chief Court, refers to questions which were raised by the parties on their pleadings in the trial Court and not to questions which may be raised subsequently at the stage of the appeal from any cause whatsoever. AIR (Vol 31) 1944 Oudh 117 : 1943 OWN (CC) 537: 1944 AWR (CC) 1: 19 Luck 411: 211 Ind Cas 396 (DB).

——O. 41, R. 23 — No grounds.

Point not expressly pleaded in trial Court nor in grounds of appeal before District Judge. No remand in second appeal to deal with the point. (1935) 37 PLR 454.

——O. 41, Rr. 23, 25 and O. 43, R. 1 (u) — New plea — Appeal — Remand.

An Appellate Court is not entitled to raise new points involving fresh evidence in appeal and remand the suit for trial on those questions. Though this was not a case under O. 41, R. 23 yet as the order appeared to be in form and substance an order under that rule and not under R. 25, an appeal lay against it. AIR (Vol 7) 1920 Cal 569: 44 Ind Cas 416 (DB).

——O. 41, R. 23 — New plea — Implied grant — Easement of necessity — New issues inconsistent pleas — Second Appeal.

Where plaintiff claimed a right of way based on a immemorial user and failed to establish such right he could not in Second Appeal obtain a remand for a retrial on issues of an implied grant or an easement of necessity. AIR (Vol 7) 1920 Cal 14: 55 Ind Cas 435.

——O. 41, Rr. 23 and 25 — New plea — Power of High Court on second appeal to remand.

Even if it be competent to the High Court. on Second appeal to remit a case for rehearing on an issue not raised in the pleadings or even suggested in the courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs. In the case on hand, there being no kind of surprise or discovery of fresh facts, the appellant was not entitled to the indulgence and the High Court erred in remanding the case on a totally new issue. AIR (Vol 3) 1916 PC 126: 43 Cal 1104: 43 IA 172: 20 MLT 235: 20 CWN 1245: (1916) 2 MWN 175: 4 LW 251: 14 ALJ 1009: 18 Bom LR 838: 24 CLJ 296: 31 MLJ 745: 37 Ind Cas 223.

——O. 41, R. 23 — New plea — Power to allow.

A new contention, not arising out of the pleadings and not raised in the Lower Court is not allowed to be raised on remand. AIR (Vol 3) 1916 Pat 262: 1 Pat LW 188: 2 Pat LJ 8: (1917) Pat HCC 308 : 38 Ind Cas 509 (DB).

——O. 41, R. 23 — New plea — Order of remand, if can be made — Where reconsideration of evidence would result.

The High Court will not make an order of remand in second appeal for the decision of any question if the decision involves not only a reconsideration of evidence on record but also of taking fresh evidence where the point was not raised before. (1911) 11 Ind Cas 84 (Cal).

(l) Technical point.

——O. 41, R. 23 — Grounds for remand — Technical point — Disposal on.

Where the first Appellate Court decides only on technical grounds the second Appellate Court can dispose it off on merits or it may remand the case. AIR (Vol 3) 1916 Oudh 257: 2 OLJ 562: 32 Ind Cas 380.

8. Inherent power of remand.

See also Civil P. C., S. 151.

——O. 41, R. 23 — Order 41, R. 23, Civil P. C., contemplates the case of a remand when the Appellate Court has reversed the decree of the trial Court and all the questions arising in the case have not been tried by the trial Court. Where however the trial Court has decided all the issues, but in doing so has almost entirely been influenced by the findings of a Revenue Court to which it remitted these issues and the Court of Appeal finding that the Civil Court alone has jurisdiction to decide those issues remands the case, the remand is not under O. 41, R. 23, but under its inherent powers. AIR (Vol 32) 1945 Oudh 133: 1944 OWN (CC) 390: 1944 AWR (CC) 272.

——O. 41, R. 23 — Powers of Appellate Court as regards remand are not restricted to cases specified in O. 41, R. 23. AIR (Vol 31) 1944 Sind 73: ILR (1943) Kar 429 : 214 Ind Cas 256 (DB).

——O. 41, R. 23 — Where all the questions were decided by the Court of first instance, the order of remand passed by Appellate Court is not one under O. 41, R. 23 but only under its inherent powers. AIR (Vol 30) 1943 Oudh 35: 1942 OWN (CC) 520: 1942 RD 764: 1942 AWR (CC) 322 (2): 203 Ind Cas 236 (DB).

——O. 41, R. 23, Ss. 151, 100 — Suit for assessment of fair rent — Court finding that rent was fixed and defendant liable to pay some — Appeal by plaintiff — Appellate Court remanding suit for further investigation of question of fair and equitable rent.

Plaintiff sued for assessment of fair rent. The defence was that rent was already fixed. The trial Court found that the rent was already fixed and that the defendant was liable to pay that rent. The plaintiff appealed. The whole suit was remanded by the Appellate Court for further investigation of the question of fair and equitable rent and on remand, the trial Court assessed the fair rent. The defendant appealed and the Appellate Court found that the defendant was liable to pay rent at the original rate found by the trial Court to have already been fixed and declined to consider the question of assessment of fair rent.

The plaintiff filed second appeal. It was contended that the order of remand was intended to overrule the defence by directing the trial Court to take additional evidence and that the Appellate Court was precluded from going into that question in appeal by the defendant:

Held, that the order of remand did not fall under O. 41, R. 23, but was one made under the inherent jurisdiction of the Court. The first Appellate Judge was more impressed by the scanty evidence than by anything else and he remanded the suit without determining anything and hence it was open to him to decide the point that the rent was already fixed and the point could also be pressed by either side in second appeal. AIR (Vol 28) 1941 Cal 446 : 74 CLJ 535: 195 Ind Cas 864.

——O. 41, R. 23 (Oudh) — Rule as amended is wider than before — Appellate Court coming to conclusion that though everything was decided by trial Court, it had been decided improperly and one or both parties had been prejudiced — Case remanded for fresh trial.

Rule 23 of O. 41, as amended by the Chief Court of Oudh is wider than the rule before amendment. The words used in the rule as amended make it quite clear that for a remand to be under this rule there must have been a decree and there must have been something left undecided by the original Court.

Where a remand in a case for fresh trial was not because in the opinion of the Appellate Court the trial Court had left something undecided which the Appellate Court could not decide, but because the pleadings had not been made clear, proper issues had not been framed and facts had been gathered from evidence, mainly oral, without giving the parties full opportunity to rebut them with the result that the trial Court had made out a case totally different from the one arising out of the pleadings: in other words the order was made because Appellate Judge came to the conclusion that one or both parties had been prejudiced and though everything had been decided, it had been decided improperly; the order of remand is one made under the inherent powers of the Court and not under O. 41, R. 23, and is not open to appeal. AIR (Vol 26) 1939 Oudh 157: 1939 OWN (CC) 246: 180 Ind Cas 321 (DB).

——O. 41, R. 23, S. 151 — Suit decided on merits and on preliminary point — Remand on appeal.

Where the trial Court has decided the case on the merits as well as on a preliminary point, and it is remanded in appeal, the remand is not under O. 41. R. 23, but under the inherent powers of Court under S. 151, whatever the Appellate Court thought it may have been doing. AIR (Vol 23) 1936 Pat 491: 2 BR 795 (2): 164 Ind Cas 1085.

——O. 41, R. 23 — It is true that Appellate Courts have inherent power of remand as well as specific power of remand given them by the Civil P. C., but the Courts should be slow to exercise that jurisdiction and should only use it in appropriate cases. The power of remand is not intended to allow an unsuccessful plaintiff, who had failed to prove his cause of action to have another attempt and call witnesses whom he might have called on the first occasion. AIR (Vol 23) 1936 Pat 160: 16 PLT 795: 2 BR 358: 161 Ind Cas 699 (DB).

——O. 41, R. 23 — Nature of order.

In considering whether a remand is one under O. 41, R. 23, Civil P. C., the fact that the Appellate Court had purported to act under S. 151 is not conclusive. AIR (Vol 21) 1934 Mad 643: 40 MLW 372: (1934) MWN 1070: 151 Ind Cas 721 (2).

——O. 41, Rr. 23, 25, O. 43, R. 1 (u) (Oudh) — Order of remand for determination of certain issues.

An order remanding a case under O. 41, R. 25, to the Court of first instance for determination of certain issues is not appealable. The alteration made by the Oudh Chief Court and the High Court at Allahabad in the language of Cl. (u) of R. 1 of O. 43, was intended to and does cover by its language such orders of remand also as are not specifically made under R. 23, but may fall to be made by a Court in the exercise of its inherent jurisdiction ex debito justitiae or under the provisions of S. 151. The alteration in question does not cover a remand under O. 41, R. 25. AIR (Vol 20) 1933 Oudh 350 : 10 OWN (CC) 664: 147 Ind Cas 452 (1) (DB).

——O. 41, R. 23 — Order 41, Rr. 23 and 25 are not exhaustive. Remand may also be ordered under inherent powers under S. 151. AIR (Vol 20) 1933 Pat 706 : 148 Ind Cas 167.

——O. 41, R. 23 — The power of remanding a case, when O. 41, R. 23, does not apply, should be most sparingly used by the Court of first appeal. 117 Ind Cas 280: 26 NLR 44: AIR (Vol 16) 1929 Nag 63.

——O. 41, R. 23 — The powers of the Appellate Court as regards remand are not restricted to the cases specified in O. 41, R. 23. The Court is entitled to make an order of remand under the provisions of S. 151. 106 Ind Cas 542: 32 CWN 101: AIR (Vol 15) 1928 Cal 812 (DB).

——O. 41, R. 23 — Trial Court deciding on all issues — Lower Appellate Court framing more issues and remanding case — Remand is under inherent power — Order of remand is not decree within C. P. Code, S. 2. A I R (Vol 14) 1927 Pat 296 : 6 Pat 380 : 103 Ind Cas 722 (DB).

——O. 41, R. 23 — Necessity of joining other parties and properties to the suit.

When the Appellate Court thinks it necessary that other parties should be joined as defendants and certain other properties should be included in the suit, the only course for it to take is to reverse the decision and to remand the suit for a fresh trial from the commencement and that can only be done under the inherent jurisdiction of the Court. A I R (Vol 13) 1926 Cal 1076 : 43 C L J 601 : 97 Ind Cas 188 (DB).

——O. 41, R. 23 — Remand under S. 151, should not be ordered when it can be ordered under another provision. A I R (Vol 13) 1926 Lah 537 : 95 Ind Cas 169.

——O. 41, R. 23 — Apart from O. 41, R. 23, the Court has inherent jurisdiction to remand the case. A I R (Vol 11) 1924 Lah 362 : 76 Ind Cas 496 : 5 L L J 384.

——O. 41, R. 23 — The power of the Appellate Court to direct a remand is wider than that indicated in O. 41, R. 23. The Appellate Court has inherent power to direct a remand where such remand is needed in the ends of justice. Assuming for a moment that an order made in the exercise of the inherent powers of High Court has been improperly made; that is, made under circumstances which do not justify it, such an order is not without jurisdiction. 72 Ind Cas 588: AIR (Vol 10) 1923 Cal 385 (DB).

——O. 41, R. 23 — An Appellate Court has inherent power to order a retrial but that course should not be adopted except in exceptional circumstances, and where the Code does not provide an adequate procedure. (1922) 64 Ind Cas 599 (Cal).

——O. 41, R. 23 — The power of the Appellate Court as regards remand are thus not restricted to the case specified in O. 41, R. 23, but the Court, by reason of its inherent jurisdiction recognised and preserved in the Code, may order a remand in cases other than the case specified in O. 41, R. 23, if it is necessary for the ends of justice. 41 Cal 108 Diss.

Inherent jurisdiction must be exercised with care, subject to general legal principles and to the condition that the matter is not one with which the legislature has so specifically dealt as to preclude the exercise of inherent power. AIR (Vol 4) 1917 Cal 44: 44 Cal 929: 21 CWN 877: 26 CLJ 49: 41 Ind Cas 598 (FB).

——O. 41, R. 23 and S. 151 — Inherent power — Tenant raising title of third person — Remand — Appellate Court for determination of question of title — Validity.

In an appeal against a rent decree where the tenant had pleaded the title of a third person though such third person was not an absolutely necessary party, the Appellate Court may remand the case for determination of the question of title, to enable it to effectually and completely adjudicate upon the questions involved within O. 1, R. 10 by virtue of the inherent powers conferred under S. 151. (1912) 15 CLJ 6: 11 Ind Cas 183 (DB).

——O. 41, R. 23 — Inherent power.

The power to remand is not confined to cases which are decided on a purely preliminary point. (1911) 1 MWN 199 : 9 MLT 373 : 9 Ind Cas 790 (DB).

——O. 41, R. 23 — Remand — Appellate Court, power of — Addition of party.

O. 41, R. 23, makes provision for a particular contingency but its scope is neither exclusive nor all-embracing. It is competent to an appellate court to remand a case when the original court has committed any error, omission or irregularity by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit, and the party who complains of such error, omission, or irregularity, has been thereby materially prejudiced. An appellate court is competent to set aside the order of the original Court, to remand the case, and to direct the plaintiff to continue the suit by the addition of a new party. (1910) 7 Ind Cas 75 (78): 12 CLJ 368 (DB).

——O. 41, R. 23; O. 41, R. 25 (Ss. 562, 564, 566, old Code) — Power of Appellate Court to remand for

trial on the merits otherwise than under the provisions of.

S. 562 of the Code of Civil Procedure must be read subject to the Code, for example, those contained in S. 27, S. 32 or S. 53. An appellate court has power to make an order under any of those sections, and in order to give effect to the provisions of the section which is applicable it is necessary that it should in certain cases send back the case to the court of first instance under such circumstances S. 564 of the Code will not preclude an appellate court from remitting a case to the court of first instance. The appellate Court has no inherent power to remand 'Exdebits justitiae' apart from the Civil Procedure Code. (1901) AWN 39: 23 A 167 (174) (DB).

9. Jurisdiction after remand depends upon the order of remand.

——O. 41, R. 23 — Remand for additional evidence — Dismissal at subsequent stage — Appellate Court — Decision on preliminary point calling for additional evidence — Duty to decide case on merits as well.

The mere fact that a Judge of the Appellate Court in the first instance remanded a case for taking additional evidence cannot deprive him of his jurisdiction to dismiss the appeal at a later stage if it is found to be incompetent.

Where the Appellate Court decides a case on a preliminary point, and thinks that additional evidence should in the first instance be taken in the case, the proper course for it is to decide the case on merits as well, so as to obviate a remand if the decision of the lower Court on the preliminary question of law did not commend itself to the High Court. AIR (Vol 18) 1931 Cal 353 : 34 CWN 839 : 131 Ind Cas 562 (DB).

——O. 41, R. 23 — Court to which case is remanded only can try.

Where the High Court remanded the case for trial by the Munsif's Court of Madura Town.

Held, the Court of Madura Taluk which is a different Court altogether has no jurisdiction to deal with it or pass any orders on it and consequently the orders passed by that Court must all be set aside and the Town Court directed to dispose of the case. The jurisdiction of the Court trying remanded case depends entirely on the order of the High Court when remanding the case. It is not a matter of doubt or difficulty: nor is it a matter for the parties to make up their minds about. AIR (Vol 10) 1923 Mad 351 : 44 MLJ 238 : 1923 MWN 194 : 32 MLT 276 : 17 MLW 355 : 72 Ind Cas 314.

——O. 41, R. 23 — Remand — Evidence, taking of, on remand.

It is the invariable practice of the Courts in the mofussil that when a remand involving the taking of fresh evidence is ordered, the District Court sends down the case to the first Court in order that the evidence may be taken there, and this is done in the interest of the parties themselves, and for their convenience. But, nevertheless, the District Court still remains empowered by the order of remand to take what evidence it may see fit to take and record its finding upon it. (1908) 10 Bom LR 536 : 32 Bom 441 (445) (DB).

10. Matters decided by order of remand, finality of.

——O. 41, R. 23 — Successor, if can go behind order.

Where the Judge remanding the case had heard the parties at length and given well-considered final decisions on the points involved and it was in consequence of this that a remand was considered necessary by him, his successor should not go behind those findings, either under S. 152 or by way of review. AIR (Vol 20) 1933 Lah 423: 34 PLR 215: 144 Ind Cas 973.

——Order 41, R. 23 — A remand order made on second appeal is, unless, a review of it be obtained within the prescribed time, conclusive determination of the points of law involved in it, and the correctness of the law laid down upon a remand cannot be questioned on a subsequent second appeal; the policy of the legislature as indicated in the C. P. Code of 1908 is in favour of finality of orders of remand. Nor is the fact of the Court's adopting a different view of the law after an order has been made, in general a good ground for allowing a review of such an order after the time for a review has elasped. AIR (Vol 10) 1923 Cal 385: 72 Ind Cas 588 (DB).

——Order 41, R. 23 — Issues decided by remand order — Cannot be re-opened in later stages of litigation. AIR (Vol 10) 1923 Oudh 50 (2): 70 Ind Cas 983: 25 OC 245 (DB).

——O. 41, Rr. 23 and 25 — Finality of order — Order not to be questioned on appeal after remand.

Where the High Court in its order of remand, decides a certain question it cannot be re-opened on appeal to the High Court after remand. AIR (Vol 7) 1920 Mad 900: (1919) MWN 662: 53 Ind Cas 677 (DB).

——O. 41, Rr. 23 and 25 — Finality of order — — Decision on issues in remand order, if binds Judge or his successor at final hearing — Decision, if preliminary decree or interlocutory order — Appeal.

Where an Appellate Court remands a suit for findings on certain issues and it decides certain issues on receipt of the findings of the first Court on these issues, the Court is not bond to reconsider its findings on the merits whether the officer before whom the appeal finally came for hearing was the same or another officer.

Richardson, J. :— An opinion incidentally, or provisionally, expressed in a remanding judgment would not amount to a final adjudication so as to conclude the parties but an adjudication by the remanding Judge would bind him and his successor at the final hearing. One test for determining whether such an adjudication is or is not final and conclusive so far as it goes is whether it does or does not amount to a preliminary decree.

Per Mullick, J. :— Though a Court can revise after remand interlocutory decisions made either by itself or by any officer of co-ordinate jurisdiction, yet as a matter of practice a Court will not and ought not to do so. When however, the interlocutory decision amounts to a preliminary decree within S. 2 of the C. P. C., the Court is not competent to revise that decree till it duly set aside or amended according to law. Authorities reviewed. AIR (Vol 4) 1917 Cal 701: 20 CWN 43: 32 Ind Cas 866 (DB).

——O. 41, Rr. 23 and 25 — Finality of order — Subordinate Court — Duty of, to follow.

It is the duty of a Subordinate Court to accept a pronouncement made by an Appellate Court which the parties have chosen not to appeal against and have acted upon. AIR (Vol 3) 1916 Mad 421 : 28 Ind Cas 982 (DB).

——O. 41, R. 23 — Finality of order — Remand.

Where the Judge of an Appellate Court decides a particular point and remands the case for a decision of other questions, his successor cannot when the case comes up again in appeal, reverse his finding. (1912) 34 Mad 72: 8 MLT 233: (1910) MWN 692: 7 Ind Cas 858 (DB).

——O. 41, R. 23 — Finality of order — Power of successor

In an appeal remanded by the Dsitrict Judge, a decree was made by the first Court and an appeal was heard by the Sub-Judge against that decree.

Held, the Sub-Judge could not go behind the remand order. (1910) 12 CLJ 428: 7 Ind Cas 846 (DB).

——O. 41, R. 23 — Finality of order — Appellate Court cannot re-open.

When a Court of appeal has passed an order remanding a suit to the first Court for trial on the merits, the successor in office of the Judge of the appellate Court cannot review his predecessor's order, when the appeal is heard after submission of the revised decree by the first Court. (1909) 32 Mad 318: 5 MLT 75: 2 Ind Cas 525 (DB).

11. No appeal in remand order under inherent power.

(a) General.
(b) Exceptions.

(a) General.

——O. 41, R. 23 — Order of remand — Appeal — Oaths Act, S. 11.

By offering to be bound by the oath of the defendant the plaintiff cannot be said to have submitted his dispute to his arbitration. The decision to be given is that of the Court though based upon evidence which carries with it the effect of conclusive proof.

Accordingly, an order of remand passed by the appellate Court in such a suit is one passed under its inherent jurisdiction and not under O. 41, R. 23, C. P. Code, the suit not having been disposed of on a preliminary point, and is therefore not appealable. Nor is it appealable as a decree, as the judgment of the appellate Court has not conclusively determined the rights of the parties. AIR (Vol 33) 1946 Pat 272 : 12 BR 223 : 27 PLT 22 : 222 Ind Cas 210.

——O. 41, R. 23 (Oudh), O. 43, R. 1(u) and S. 141 — All issues decided by Court of first instance — Order of remand is not under O. 41, R. 23 but under inherent powers.

Under O. 41, R. 23 a remand is permissible only where an Appellate Court has reversed the decree and all questions arising in the case have not been decided by the Court of first instance. When all questions arising in the case had been decided by the Court of first instance, the order of remand does not come under O. 41, R. 23 but must be taken to be under the inherent powers of the Court and is not appealable under O. 43, R. 1(u). AIR (Vol 31) 1944 Oudh 130 : 1944 OWN (CC) 50 : 20 Luck 45 : 1944 AWR (CC) 22 : 215 Ind Cas 295 (DB).

——O. 41, R. 23, O. 43, R. 1(u) — Court of first instance deciding all issues — Order 41, R. 23, does not apply — Remand order.

Order 41, R. 23, Civil P. C., applies where an Appellate Court has reversed a decree and all questions arising in the case have not been decided by the Court of first instance. Where all the issues have been decided by the Court of first instance, R. 23, O. 41, has no application. In such a case the order of remand falls under S. 151 of the Code and is not appealable under O. 43, R. 1 (u). (1943) 209 Ind Cas 357 : 1943 OWN (CC) 310.

——O. 41, R. 23, O. 43, R. 1, Cl. (u), S. 151 — Subordinate Court disposing of case not on preliminary point but on all points arising in case — In appeal District Judge being of opinion that points were not properly dealt with remanding case.

Even apart from the provisions of O. 41, R. 23 an Appellate Court may remand a case in the exercise of its inherent jurisdiction where the case has not been properly disposed of by the Subordinate Court.

Where the Court from whose decree the appeal is preferred to the District Judge has not disposed of the suit upon any preliminary point but has dealt with all the points which arose in the case and passed a decree after deciding those points and the District Judge in appeal being of opinion that those points had not been properly dealt with remands the case, the order of remand is one made under the inherent powers of the Court and does not fall under O. 41, R. 23, Civil P. C., and hence is not appealable under O. 43, R. 1. Cl. (u).

The order of the District Judge, even if looked upon not as an order of remand but as a decree is not appealable. The reason is that the District Judge has not determined the rights of the parties either conclusively or otherwise or at all. All that he has done is to hold that the rights of the parties cannot be decided until certain important matters are decided. He has, therefore, left them very much at large. Therefore, the order of the District Judge cannot be looked upon as a decree within the meaning of that term as used in S. 2 of the Civil P. C. AIR 1920 Pat 738 : 58 Ind Cas 909, overruled; AIR 1922 All 226, Not foll. AIR (Vol 29) 1942 Pat 194 : 8 BR 186 : 197 Ind Cas 13 (DB).

——O. 41, R. 23 (Oudh), S. 115, O. 6, R. 17 — Order of Appellate Court allowing amendment of plaint.

No appeal is maintainable against the order of the Appellate Court allowing an amendment of the plaint and remanding the case to the trial Court for de novo in the light of the amended plaint. AIR (Vol 27) 1940 Oudh 367 : 1940 OWN (CC) 500.

——O. 41, R. 23 — Order under S. 104(1)(f), is not decree — Order of trial Court dismissing application to file award on ground that it was vitiated by misconduct is 'order' and not decree — Order of Appellate Court on appeal remanding case holding that award was not vitiated.

An order made by the Civil Judge dismissing an application to have an award made by arbitrators filed on the ground that the award was vitiated by the misconduct of the arbitrators comes under the scope of the definition of "order" in S. 2, Cl. 14, and not within that of 'decree', and the remand order made by the Appellate Court in an appeal from such order holding that the award was not vitiated by misconduct, does not arise out of a decree and is not, therefore, an order of remand under the terms of O. 41, R. 23, Civil P. C., and as it does not fall within the provisions of O. 41, R. 25, it can be nothing other than a remand made in the exercise of the inherent powers of the Court. An order of remand made in the exercise of inherent powers is not appealable.

The expression "any adjudication from which an appeal lies as an appeal from an order", in S. 2, Cl. 2, Civil P. C., refers to S. 104, which deals with appeals from orders, and it follows clearly that an order under S. 104(1)(f), cannot by any possibility be treated as a decree. AIR (Vol 26) 1939 Oudh 104 : 1939 OWN (CC) 128 : 179 Ind Cas 799 (DB).

——O. 41, Rr. 23, 25; O. 43 R. 1 — Remand of case by lower Appellate Court for re-trial after addition of party — No decision on merits arrived at — Order, whether falls under O. 41, R. 23 or R. 25.

Where a lower Appellate Court adds a person as a party to the suit and remands the case for re-trial, without coming to any decision on the soundness or otherwise of the trial Court's decision, the order is not one to which the provisions of O. 41, R. 23, are applicable, because this is not

a case in which the lower Appellate Court has reversed the order of the trial Court.

Similarly it is not an order of remand under the provisions of O. 41, R. 25. Such order of remand is one made in the exercise of the inherent powers of the Court, and an order of remand made in the exercise of the inherent powers of the Court is not appealable under the provisions of O. 43, R. 1. AIR (Vol 26) 1939 Oudh 102 : 1939 OWN (CC) 181 : 14 Luck 447 : 179 Ind Cas 1004 (DB).

——O. 41, R. 23 — Trial Court deciding case on certain admissions made by both parties — Trial Court's decisions is not on preliminary point.

An order of remand can be appealed against only if it is made under O. 41, R. 23, i.e., where the trial Court has disposed of the suit on a preliminary point. But there is no appeal if the order of remand is passed under the inherent powers of the Court given by S. 151. In the trial Court both sides gave evidence in the sense that they made certain admissions to the Court, and asked the Court, to adjudicate on their contentions with reference to those admissions. On appeal from the decree of the trial Court, lower appellate Court remanded the case.

Held, that the decision of the trial Court could not be said to be on a preliminary point. The order of remand was not under O. 41, R. 23 and could not be appealed against. AIR (Vol 16) 1929 Mad 205 : 119 Ind Cas 705 (DB).

——O. 41, R. 23 — An order of remand passed by the first Appellate Court in the exercise of its inherent jurisdiction and for the ends of justice is not appealable. AIR (Vol 15) 1928 Cal 305 : 107 Ind Cas 746.

——O. 41, R. 23 — Where the Court did not decide the suit on any preliminary point but on all the issues raised, an ex parte decree is set aside and the suit remanded for trial, such a remand is not under O. 41, R. 23, but it is a remand under S. 151, C. P. Code and no appeal lies from such order. AIR (Vol 14) 1927 Mad 1190(1) : 1927 MWN 286 : 102 Ind Cas 28 (DB).

——O. 41, R. 23 — Where after the original Court has disposed of a suit by trying all the issues before it, the Appellate Court allows an amendment of the plaint and remands the suit, for trial on the amended plaint, the order of remand is one passed under the inherent powers of the Court and an appeal from the order of remand is incompetent. AIR (Vol 14) 1927 Mad 859 : 103 Ind Cas 670 (DB).

——O. 41, R. 23 — An appellate Court has an inherent power of remand under S. 151 apart from O. 41, R. 23 and no appeal lies against an order made in exercise of this power. AIR (Vol 14) 1927 Mad 335 : 52 MLJ 90 : 25 MLW 198 : 38 MLT 15 : 100 Ind Cas 135 (DB).

——O. 41, R. 23 — Remand on the ground that suit was not properly tried — No appeal lies where remand is under S. 151 and not O. 41, R. 23. AIR (Vol 13) 1926 Pat 516 : 7 PLT 811 : 1926 PHCC 302 : 96 Ind Cas 440 (DB).

——O. 41, R. 23 — Where the trial Court decided all the issues and Appellate Court allowed the plaint to be amended and remanded the case for trial on the amended plaint to the trial Court:

Held, that the order of remand was not one passed under O. 41, R. 23 and was therefore not appealable. AIR (Vol 12) 1925 Mad 229 : 47 MLJ 552 : 48 Mad 713 : 20 MLW 711 : 35 MLT 135 : 1924 MWN 922: 84 Ind Cas 965 (DB).

——O. 41, R. 23 — Where there was no question of any preliminary point and the order of remand affected the whole decision of the whole suit.

Held, that the remand must be taken to have been made under inherent powers and no appeal lies. AIR (Vol 12) 1925 Pat 760 : 92 Ind Cas 684.

——O. 41, R. 23 — An order under the inherent powers of the Court under S. 151 of the C. P. Code and not under O. 41, R. 23, is not appealable. AIR (V 11) 1924 Lah 487 : 6 LLJ 153 : 78 Ind Cas 408.

——O. 41, R. 23 and O. 43, R. 1 (u) — Inherent power — Appeal.

An Appellate Court has an inherent power to remand a case under conditions other than those referred to in O. 41, R. 23, C. P. Code. Where a case is remanded in the exercise of the Courts inherent jurisdiction no appeal lies from the order of remand. The decision on a preliminary point means a determination not affecting the merits of the case. A remand in consequence of the opinion that the settlement of accounts by a party as agent is not binding on him as a partner is not a remand on a preliminary point. A reversal of the judgment with a direction to admit evidence said to have been improperly excluded is not a disposal on a preliminary point. AIR (Vol 7) 1920 Mad 898 : 37 MLJ 536 : 10 LW 359 : 53 Ind Cas 417 (DB).

——O. 41, R. 23 and O. 43, R. 1(u) — Inherent power — Appeal.

Where an appellate Court decided the main issue in the suit and remanded it to the trial Court for disposal on the remaining issues the order of remand is not one under O. 41, R. 23 but within S. 151 of the C. P. C. and is not appealable. AIR (Vol 7) 1920 Mad 759 : 12 LW 667 (DB).

——O. 41, R. 23 — S. 151, O. 41, R. 23 and O. 43, R. 1(4) — Decree versed and case remanded under S. 151 — Order of reveral is appealable but not order of remand.

Where the decree of a trial Court is reversed on appeal and the appellate Court, in the exercise of its inherent power remands the case to the trial Court for a fresh decision, no appeal lies against the order of remand as such, inasmuch as, the order does not fall within the purview of O. 43, R. 1(4), but an appeal lies from the decree of the appellate Court reversing the decree of the trial Court (Overruled in AIR 1942 Pat 194.) AIR (Vol 7) 1920 Pat 738.

——O. 41, Rr. 23 and 25 — Inherent power — Appeal.

An Appellate Court has an inherent power to remand a case though not falling under O. 41, Rr. 23 and 25 of the Code. But the power is one that must be cautiously exercised and there is no appeal from an order of remand in such a case. AIR (Vol 5) 1918 Pat 505 : 3 Pat LJ 253 : 4 Pat LW 450 : 43 Ind Cas 959 (DB).

(b) Exceptions.

——O. 41, R. 23, S. 151 — Remand, held one under S. 151 and appealable.

The trial Court had decided several issues on merit except one. The suit was not disposed of upon any preliminary point. The Appellate Court remanded the case on issue not decided by the trial Court:

Held, that the order was not one under O. 41, R. 23 but under inherent powers and could be challenged in appeal from the decree. (1945) 79 CLJ 229 (DB).

——O. 41, R. 23 — Suit not decided on preliminary point — Order of remand under R. 23 — Appeal lies — Order under inherent powers to be made only where justice demands it — C. P. Code, S. 151.

Where the trial Court did not decide the suit on a preliminary point but the Appellate Court passes an order under O. 41, R. 23, remanding the case.

Held, that an appeal lies from the order. To say that, there is no appeal where the Court acts in contravention of the rule and reverses the judgment of the trial Court and remands the case, would be to refuse an appeal in every case where

the order of remand is erroneous. An appellate Court has inherent powers to order a remand which can however be made only where the justice of the case demands it. AIR (V 9) 1922 Cal 279 : 80 Ind Cas 172 (DB).

12. Order of remand — When will amount to a decree.

——O. 41, R. 23, S. 2 (2) — Some cardinal issues conclusively decided by lower Appellate Court — Suit remanded for fresh trial — Decision is decree and is appealable.

Where the decision of the lower Appellate Court conclusively determines so far as that Court is concerned, some at least of the cardinal issues in the suit and remands the case for new trial, the decision fulfils the provisions of the definition of the decree and is, therefore, appealable. A I R (Vol 27) 1940 Nag 349 : I L R (1940) Nag 538 : 1940 N L J 350 : 191 Ind Cas 566 (DB).

——O. 41, R. 23 — Remand order setting aside decree.

An order of remand cannot be treated as a decree merely because it sets aside the decree of the trial Court. A I R (Vol 21) 1934 Pat 97 (2) : 14 P L T 735 : 149 Ind Cas 311.

——O. 41, R. 23 — When in a suit for enhancement of rent the lower Appellate Court remanded the case to the trial Court after determining the true principle on which assessment was to be made.

Held, the order of remand was really a decree and was appealable. A I R (Vol 20) 1933 Cal 416 : 37 C W N 1084 : 143 Ind Cas 823 (DB).

——O. 41, R. 23 — Case decided on important points but remanded to lower Court for some purpose — Order is not a decree.

An order which does not dispose of a case finally for the time being (subject of course to any further appeal), cannot be called a decree terminating the case. It may be that all the important points have been disposed of and the case has for all practical purposes been decided on the merits, but if something is still left to be done by the Court of first instance before the suit is finally disposed of, the order sending back the case to the trial Court for that purpose can only be an order of remand and not a final decree. A I R (Vol 15) 1928 All 13 : 107 Ind Cas 677 : 8 L R A Rev. 361 : 26 A L J 103 : 9 L R A Rev. 243 (DB).

——O. 41, R. 23 — Appeal — Test.

Where the adjudication as embodied in the remanding judgment clearly adjudicates the rights of the parties in regard to certain matters in controversy between them, it has all the force of a decree and is appealable as such. A I R (Vol 15) 1928 Nag. 68 : 105 Ind Cas 567.

——O. 41, R. 23 — An order of remand under S. 151 is appealable only when it amounts to a decree. Where the order of remand merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to any of the matters in controversy in the suit, it cannot amount to a decree and must be treated as an order: and no appeal would lie against it as a decree. The mere fact that the order reverses the decree of the trial Court and deprives the plaintiffs of the valuable right they had acquired thereunder would not make an order of remand a "decree" unless that order itself determines any of the points arising for determination in regard to the matters in controversy in the suit. AIR (V 13) 1926 Pat 457 : 6 Pat. 160 : 7 P L T 535 : 1926 P. H. C. C. 333 : 97 Ind Cas 105 (DB).

——O. 41, R 23 — Powers of Appellate Court — Decree on merits.

The Lower Appellate Court cannot set aside the decree of the first court, when that decree is not based on a preliminary ground but given on the merits. (1912) 15 C L J 310 : 6 Ind Cas 206 (DB).

13. Powers and duties of the appellate Court.

(a) General.
(a-1) Amendment of plaint.
(b) Ex parte decree.
(c) Order of remand not appealed against.
(d) Transfer of cases.
(e) When all evidence is before the Court.
(f) Where court decides on all issues.

(a) General.

——O. 41, R. 23 — When the allegations in pleadings are of undue influence and consequent fraud & the fraud is proved the issue of undue influence should also be decided. In such cases the proper course to be followed by the Appellate Court is to remand the case under O 41 R 23. (1935) 1935 M W M 1187.

——O. 41, R. 23 — When it comes to the Appellate Court's notice from the evidence that the consideration for the transaction was immoral, but the trial Court has not raised an issue on the point and the defendant has not raised any objection on that score, it is proper that the Appellate Court should remand the case for a finding on that point. A I R (Vol 20) 1933 Mad 187 : 145 Ind Cas 599.

——O. 41, R. 23 — The District Court has the power to remand the case for the determination of a question of fact appearing to him to be essential to the right decision of the suit upon its merits. A I R (Vol 17) 1930 Rang. 188.

——O. 41, R. 23 — Correct procedure indicated.

Under the provisions of O 41, when the appellate Court is of opinion that certain findings of fact are necessary for the proper disposal of an appeal, and that evidence should be led on these points the proper procedure is under R. 25, by which the appellate Court may frame issues and refer them for trial to the Court whose decree is appealed from. It cannot act partly under R. 23, which only applies to the case of a suit which has been decided on a preliminary point, and partly under R. 25, by calling for further findings. An order remanding a case for giving parties an opportunity to adduce evidence on a certain point and disposal and at the same time settling aside the trial Court's decree dismissing the suit is technically wrong. A I R (Vol 16) 1929 Bom 175 : 118 Ind Cas 790 : 31 Bom L R 208 : 53 Bom 335 (DB).

——O. 41, R. 23 — Where the appellate Court finds that the trial in the trial Court is misconceived, it cannot set aside the whole judgment simply because of the unsatisfactory way in which the trial Court dealt with the matter of local investigation. The proper procedure is to make an order for local investigation itself or direct the trial Court to appoint a Commissioner for making a local investigation and proceed under O. 41, Rr. 27, 28 and 29. After the local investigation is made and any evidence desired by the appellate Court to be taken, is taken, the appellate Court should decide the appeal on all questions arising in the suit itself. A I R (Vol 15) 1928 Cal 749 : 110 Ind Cas 427 (DB)

——O. 41, R. 23 — Where a Judge has jurisdiction to try a case under the ordinary procedure, the mere fact that he tries it under a special procedure is no ground for dismissing that suit. The proper procedure is a remand. AIR (V 14) 1927 Lah 174 : 99 Ind Cas 648 : 8 Lah 156 : 9 LLJ 57 : 28 PLR 539 (DB).

——O 41, R 23 — To meet ends of justice.

The powers of the appellate Court as regards remand are not restricted to the case specified in O.

41, R. 23, but the Court by reason of its inherent jurisdiction vested in it by S. 151 of the C. P. Code may remand in any case other than the case specified in O 41 R 23, if it be necessary for the ends of justice to do so. A I R (Vol 12) 1925 Cal 1157 : 87 Ind Cas 575 (DB).

——O. 41, R. 23 — An appellate Court s not c nfined to the grounds mentioned in R. 23 and if for the ends of justice it is necessary to remand a case for a fresh trial it may do so on any other good ground. AIR (V 11) 1924 Lah 36 : 74 Ind Cas 497 : 5 LLJ 269 (DB).

——O. 41, R. 23 — Where instead of passing an order under O. 41, R. 25, C. P. Code, an Appellate Court remanded for rehearing under O. 41, R. 23, the Court cannot be said to have acted without jurisdiction to justify interference in revision under S. 115, C. P. Code. The Appellate Court has inherent power to make a remand. (1922) 64 Ind Cas 436 (Cal).

—O. 41, R. 23 — The Appellate Court has an inherent jurisdiction to remand a case to the lower Court and the improper exercise of such jurisdiction in any case does not necessarily warrant interference in revision. AIR (Vol 8) 1921 Mad 716: 69 Ind Cas 826 : 16 MLW 515 (DB).

——O. 41, R. 23 — Inherent power — Reversal and remand of appellate courts — Effect of S. 107 (b).

A Lower Appellate Court's power of reversal and remand are strictly limited to the position described in O. 41, R. 23. The apparently wide powers contemplated under S. 107 (b) C. P. C. get restricted when due weight is given to the meaning of the proviso to S. 107, C. P. C. AIR (Vol 4) 1917 Cal 657: 43 Cal 148: 33 Ind Cas 329 (DB).

(But see AIR (Vol 4) 1917 Cal 44: 44 Cal 929: 41 Ind Cas 598 (FB.).)

——O. 41, R. 23 — Inherent power.

An Appellate Court adding a new party has an inherent power to reverse the decree of first Court and remand for retrial which power O. 41, R. 23 does not affect in any way. AIR (Vol 3) 1916 Mad 957: 2 LW 1034 : 31 Ind Cas 263 (DB).

——O. 41, Rr. 23 and 25 — Inherent power.

An Appellate Court has no inherent power of remand except under O. 41, Rr. 23 and 25 of the Code. S. 107 (1) (6) is restricted by O. 41, Rr. 23 and 25, C. P. C. AIR (Vol 1) 1914 Cal 163: 41 Cal 108 : 18 CLJ 613: 20 Ind Cas 39 (DB).

(This is no longer Law See. AIR (Vol 4) 1917 Cal 44: 44 Cal 929 : 41 Ind Cas 598 (FB.).

——O. 41, R. 23 — Powers of Appellate Court — Remand by consent.

The Appellate Court can pass an order of remand by consent of parties in excess of its powers under the Code. AIR (Vol 1) 1914 Mad 15: (1914) MWN 90: 22 Ind Cas 41 (DB).

——O. 41, R. 23 — Appellate Court — Sessions Judge's power to remand case on the ground that judgment unsatisfactory — Remand.

If the lower court's judgment is unsatisfactory, the proper course for the appellate court is not to remand the case, but to hear itself the case fully into the merits and pass its own judgment. (1905) 32 C 1069 (1071) (DB).

(a-1) Amendment of plaint.

——O. 41, R. 23 — Amendment of plaint — Amendment introducing time-barred cause of action — Dismissal of suit on merits disallowing amendment — Appellate Court can remand the case for fresh disposal after allowing the amendment sought for. AIR (Vol 18) 1931 Mad 1 : 60 MLJ 713: 33 MLW 210: 132 Ind Cas 311.

——O. 41, R. 23 — Remand to try case after amendment.

Order 41, R. 23, applies only where the case has been decided by the First Court on a preliminary point. Appellate Court has power to make an order of remand under S. 151 only when O. 41, R. 23 does not apply. An order of remand to try the case after amending the plaint is not one under O. 41, R. 23. AIR (Vol 11) 1924 Lah 245: 73 Ind Cas 915.

——O. 41, R. 23 and O. 6, Rr. 17 and 18 — Inherent power — Plaint, amendment of, in appeal — Remand — Appellate Court, power of.

There are other provisions for remand under the C.P.C., than those given under O. 41, R. 23. When a plaint is amended in appeal under O. 6, Rr. 17 and 18 and a deft. desires to traverse the facts stated in the amendment. the Appellate Court has power to remand the case, 41 C. 108, disappr. AIR (Vol 4) 1917 Cal 391 : 32 Ind Cas 906 (DB).

——O. 41, R. 23 — Inherent power — Amendment of plaint.

When a plaint is allowed to be amended by addition of parties in appeal, the appellate Court has power to remand the whole case. AIR (Vol 3) 1916 Cal 283 : 43 Cal 938 : 20 CWN 547 : 32 Ind Cas 791 (DB).

(b) Ex parte decree.

——O. 41, R. 23 — Appeal against order rejecting application for setting aside ex parte decree — Appellate court can decide the case finally treating it as appeal against ex parte decree itself. AIR (Vol 13) 1926 Cal 1232: 45 CLJ 117: 97 Ind Cas 313 (DB).

——O. 41, R. 23 — A suit was tried ex parte and decreed in plaintiff's favour on meagre evidence.

Held, on facts, that if the plaintiff had, even by way of a subsidiary defence to the appeal submitted a formal application supported by an affidavit to the effect that he would have produced further evidence in the Trial Court if the Court itself had not intimated that the evidence actually tendered was sufficient to warrant the passing of an ex parte decree, the Court would have felt much disposed to send the case back to the Trial Court to be fully tried out on the merits. AIR (Vol 10) 1923 All 287: 71 Ind Cas 749: 21 ALJ 168: 45 All 311: 4 LRA Civ. 380 (DB).

——O. 41, R. 23 — When a suit is decided ex parte, an appellate Court to which an appeal from the decree is preferred has jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the case ex parte and has also power to remand the suit for re-hearing.

The Code of Civil Procedure must, in view of Ss. 100 (2), 105 (1) and (2) and S. 107, be held to permit a remand by an appellate Court not in the particular case set forth in O. 41, R. 23, but also in all cases where there has been any error, defect or irregularity which has vitiated the whole decision of the case, provided that procedure under O. 41, Rr. 24 and 25, does not meet the case. AIR (V 10) 1923 Oudh 177 : 73 Ind Cas 591 : 26 OC 10 : 10 OLJ 36.

——O. 41, R. 23 — Power of remand.

An appellate Court has not only power to reverse an ex parte decree passed on plff.'s evidence but it can also remand it for retrial. AIR (Vol 7) 1920 Upp. Bur 37: (1919) 3 UBR 198: 56 Ind Cas 255.

——O. 41, R. 23 — If the deft. appeals against an ex parte decree passed against him without seeking to set it aside, the Appellate Court should not remand the case for retrial under O. 41, R. 23 but should itself dispose it off on the merits. AIR (Vol

4) 1917 Lah 362: 24 PLR 1917: 20 PWR 1917: 39 Ind Cas 749.

——O. 41, R. 23; (96); (104) O. 43. R. 1 (Ss. 564, 543, 540, 588 old Code) Cl. 4. — Remand, powers of, in appeals from ex parte decrees — Appeals from ex parte decrees under S. 540, Civil Procedure Code — Powers of remand.

Where a suit is decided ex parte, an appellate Court has jurisdiction in an appeal against the decree so passed to reverse the decree of the Court of first instance on the ground that the first Court was wrong in proceeding to decide the suit ex parte and remand the suit for rehearing, such order of remand not being passed under S. 562, or for any of the reasons mentioned therein. An appeal lies from an ex parte decree both on the merits and on the ground that the defendant was not in default in failing to appear. 23 C. 738 not followed. 17 B. 733 and 23 M. 260 dissented from. (1905) 16 MLJ 479: 30 Mad 54 (60) (FB).

(c). Order of remand not appealed against.

——O. 41, R. 23 — Appellate order not appealed against.

An order of remand, though an irregular one, being an appealable one, if not appealed against, prevents the aggrieved party from challenging it. AIR (Vol 23) 1936 Cal 590: 168 Ind Cas 959.

——O. 41, R. 23 — Exercise of powers under O. 41, R. 2.

Where the order of remand was appealable under O. 43, R. 1, C. P. Code, but the appellant did not appeal against it and he was precluded from disputing the correctness of the order of remand in final appeal.

Held : that this preclusion of a party does not take away the power which vests in a Court of appeal under O. 41, R. 2, to base its decision upon a point not urged in the memorandum of appeal and therefore, it can grant relief to the appellant in a fit case. Where the lower appellate Court remanded an appeal for admission of oral evidence when such evidence was not admissible.

Held : that it was a fit case for the exercise of the power conferred on appellate Court under O. 41, R. 2. AIR (Vol 13) 1926 Nag 147: 89 Ind Cas 1019.

——O. 41, R. 23 (S. 562 old Code) — Remand — Appeal from order of remand after decision of the suit in accordance therewith.

No appeal will lie from an order of remand passed under S. 562 of the Code of Civil Procedure, if such appeal is filed after the suit has been decided in compliance with the order of remand and no appeal is preferred from the decree in the suit. (1908) 30 A 191: (1908) AWN 76 (76) : 5 ALJ 270 (DB).

(d) Transfer of cases.

——O. 41, R. 23 — A remand order cannot confer on the subordinate Court a jurisdiction which that Court would not have had but for the remand. It would be highly anomalous to hold that a Court not having jurisdiction in the ordinary course becomes competent in consequence of a remand by a superior Court. AIR (Vol 16) 1929 Lah 534 : 116 Ind Cas 324 : 30 PLR 244 (DB).

——O. 41, R. 23 — According to O. 41, R. 23, C. P. Code the remand should be to that Court from whose decree the appeal is preferred, but if the Appellate Court has power to transfer a case from one Court to another, there is nothing illegal in remanding the case to another Court. The Additional Judge has no power under the Punjab Courts Act or the Code of Civil Procedure to transfer a case from one Subordinate Court to another. His order therefore remanding the case to another Court to that which tried it is, therefore, illegal. AIR (Vol 9) 1922 Lah 239: 66 Ind Cas 113: 25 PWR 1922.

——O. 41, Rr. 23 and 25 — Transfer of case — Power of lower Appellate Court to send the case for trial to first Court.

Where the Chief Court remanded the case to the lower Appellate Court for further inquiry it was not the intention of the Chief Court when issuing the remand order, that the lower Appellate Court should be precluded from directing the first Court to record any additional evidence if necessary. AIR (Vol 5) 1918 Lah 342 : 47 PLR 1917: 44 Ind Cas 907.

——O. 41, R. 23 — Order of remand — Procedure irregular.

When a case is remanded on account of illegality of the Appellate Court in receiving documents very late without assigning any reasons the case may be sent to another court for hearing. AIR (Vol 4) 1917 Cal 201: 24 CLJ 457: 35 Ind Cas 698 (DB).

——O. 41, R. 23 — Remand to another court when permissible.

Except when it has power to transfer the case from one court to another the Appellate Court can remand the case under O. 41, R. 23 only to the Court from whose decree the appeal is preferred. 158 PWR 1913: 279 PLR 1913: 20 Ind Cas 788.

——O. 41, R. 23 — Remand by High Court — Power of Dist. Judge to send down.

A Dist. Judge has no jurisdiction to remand a case to the Munsif, wnen the case has been remanded to him by the High Court. (1910) 6 Ind Cas 400 (All).

——O. 41, R. 23 — Transfer to another Court.

Where there was a complete failure on the part of the lower court to deal with a case, the case was directed to be sent to another court on remand order by the High Court. (1909) 1 Ind Cas 110 (Cal).

(e) When all evidence is before the Court.

——O. 41, Rr. 23, 25, S. 151 — Evidence on record — Definite finding by trial Judge — Order of remand.

Though it cannot be laid down that an Appellate Court has no power to remand a case to the trial Court unless the case falls strictly within the purview of R. 25 of O. 41 yet where, whatever evidence the parties chose to produce was on the record and the trial Judge has recorded a definite finding on that evidence, it is wholly unnecessary for the Appellate Court to remand the case for further inquiry, especially when there is no reason to think that the objectors did not get an opportunity of producing all the evidence that they desired to produce in the trial Court.

It is the duty of the Judge of the Appellate Court to come to a finding on the evidence already on the record and though order of remand is neither illegal nor without jurisdiction, it is not a proper order. AIR (Vol 24) 1937 Oudh 338: 1937 OWN (CC) 377: 13 Luck 209: 167 Ind Cas 922 (DB).

——O. 41, R. 23 — Exhaustive evidence and issues.

It is not desirable to direct a remand in a case which has been tried on various issues not preliminary ones and has already involved parties in great labour, time and expense with regard to adducing evidence. If in such a case the appellate Court finds that the suit is bad for multifariousness the Judge should put the plaintiffs upon their election or strike out a particular party from the array of defendants and proceed with the trial of the appeal upon all questions of law and fact which are raised before him. AIR (Vol 17) 1930 All 180: 123 Ind Cas 324: 1930 ALJ 99 (DB).

——O. 41, R. 23 — Where evidence is fully placed before the trial Court and the trial Court has determined the several questions one way or the other, it is the duty of the appellate Court Judge if he is dissatisfied with the view taken by the trial Judge to come to a proper conclusion on the evidence, for himself, after arriving at the necessary findings of facts and of law, instead of entailing on the parties unnecessary trouble and expense of a de novo trial. AIR (Vol 17) 1930 Cal 235: 33 CWN 1211(DB).

——O. 41, R. 23 — The appellate Court cannot remand the whole case for retrial merely because it wishes further evidence on some issues, particularly when the trial Court has considered those issues on the evidence which was put in before it and recorded its finding thereon. (1926) 92 Ind Cas 1045: 1926 MWN 48 (DB).

——O. 41, Rr. 23 and 25 — Grounds for remand — Evidence on record.

An Appellate Court can decide a case on the evidence before it when the parties have produced their whole evidence. It is illegal to remand a case when it has been fully tried but if any further enquiry is necessary the proper course is to proceed under O. 41, Rr. 25 and 28. AIR (Vol 6) 1919 Lah 119: 177 PWR 1918: 50 Ind Cas 299.

——O. 41, Rr. 23 and 25 — Grounds for remand — Evidence on record.

When issues have been framed and all the evidence has been produced but some of the issues have not been decided, the proper order of the appellate Court is to call for findings under R. 25 and not under R. 23. AIR (Vol 4) 1917 All 451: 38 All 520: 14 ALJ 754: 36 Ind Cas 245 (DB).

——O. 41, Rr. 23 and 25 — Ground for remand — Evidence on record — Suit for declaration of title and possession.

Where there is evidence on record on all the material issues an Appellate Court's order of remand is illegal. AIR (Vol 4) 1917 Cal 105: 41 Ind Cas 735 (DB).

——O. 41, R. 23 — Powers of appellate Court — Case cannot be sent down for reconsideration denovo and fresh judgment.

Where there is ample evidence on the record the appellate Court cannot require the Court of first instance to reconsider the whole case denovo and write another judgment: it should itself re-appreciate the evidence allowing necessary amendments of pleadings if necessary consistent with the case set up in the first Court. AIR (Vol 3) 1916 Bom 275: 18 Bom LR 27: 33 Ind Cas 576 (DB).

——O. 41, R. 23 — Powers of Appellate Court — Materials on record sufficient — Remand.

Where the materials on the record are sufficient the Appellate Court should not remand a case to the original Court for retrial, but should decide the case itself. 180 PLR 1912: 234 PWR 1912: 16 Ind Cas 847.

(f) Where Court decides on all issues.

——O. 41, R. 23 — Where the trial Court has disposed of the suit completely on the merits, and on the pleadings no issues emerged for trial which had not been disposed of by the Trial Court it is beyond the competence of the appellate Court to direct a remand upon grounds which do not arise from the pleadings. (1929) 119 Ind Cas 2 (All) (DB).

——O. 41, R. 23 — Where the issues framed by the trial Court covered all the pleadings and there is no alternative relief prayed, it is not competent for the appellate Court to make a new case for the parties and remand the case . AIR (Vol 14) 1927 Lah 42: 98 Ind Cas 906.

——O. 41, R. 23 — First appellate Court ought not to remand cases for re-trial when the trial Court has really disposed of them on the merits. In such cases if the appellate Court considers that it ought to have a finding on some issue or issues which the trial Court has not decided, it can always remit issues under O. 41, R. 25, but it is not legitimate for an appellate Court to send back the case from its file merely because it differs radically from the conclusions of the Court below on the facts or because it considers that the discussion of the evidence in the trial Court's judgment is inadequate AIR (V 13) 1926 All 65 : 23 ALJ 880 : 88 Ind Cas 1021 (DB).

——O. 41, R. 23 — Appeal — Decision on all issues.

An order of remand in a case where the trial Court has disposed itself of all the issues and given a decree on those findings cannot come within the scope of O. 41, R. 23, and therefore no appeal lies. (1926) 92 Ind Cas 1045: 1926 MWN 48 (DB).

——O. 41, R. 23 — The Code makes no provision for a remand where the issuues had been settled and the case had been fully tried. AIR (Vol 11) 1924 Cal 148: 80 Ind Cas 623: 27 CWN 1025 (DB).

——O. 41, R. 23 — Where the first Court has framed a number of issues arising out of the points on which the parties joined issue in their pleadings and has decided every one of them in its judgment, it is not open to an appellate Court to remand the case under Rule 23 of Order 41, as though the suit had been decided on a preliminary point. An appeal against such a remand order will lie as the order must be deemed to be under Order 41, Rule 23 and not under Section 151. AIR (Vol 10) 1923 Mad 331: 71 Ind Cas 204 : 17 MLW 159 (DB).

——O. 41, Rr. 23, 25 and 27 — Grounds for remand — Case not decided on preliminary point — Procedure.

If the trial Court has decided a case not upon a preliminary point, but after taking all the evidence and trying all the issues, the Appellate Court should not remand the case for trial under O. 41, R. 23. In making an order the rule, however, the Court cannot direct the omission of one of the essential issues in the case. If the Court considers a fresh local investigation or fresh evidence necessary on any point, its order should be one under O. 41, Rr. 25, 27 and 29 C. P. C. AIR (Vol 7) 1920 Cal 374: 56 Ind Cas 984 (DB).

——O. 41, R. 23 — Grounds for remand — Lower Court deciding all issues — Order of remand — Legality.

Where the lower Court has decided all the issues that arise in the case and recorded its findings on them, the order of the Appellate Court remanding the case for a trial on the merits under O. 41, R. 23 is not a proper order even though the Appellate Court puts the plaintiff appellant on terms. The Lower Appellate Court could act under O. 41, R. 27 if additional evidence was necessary. AIR (Vol 3) 1916 All 258 : 35 Ind Cas 239 (DB).

——O. 41, R. 23; O. 41, R. 25 (Ss. 562, 566 old Code)— Remand.

When a Court of first instance does not decide a case on a preliminary point, but raises all the issues and goes fully into the matters in issue, it is not open to the appellate Court to remand the case under S. 562, C. P. C.; but if it thinks that the determination of any particular question is necesary, it may make an order under S. 566, C. P. C. (1906) 10 CWN 422 (423) also (1908) 7 CLJ 379 (380) (DB).

——O. 41, R. 23 (S. 562 old Code) — Preliminary point — Remand — Suit decided with reference to some only of several issues framed.

Held, that it is competent to an appellate Court to remand a case under S. 562 where the Court of first instance, having framed issues and recorded all the evidence has decided the suit with reference to its finding upon one or more of the issues framed by it, leaving the other issues undecided. (1905) AWN 159: 2 ALJ 685: 27 A 691 (694) (DB).

14. Powers and duties of the trial Court.

——O. 41, R. 23 — Remand — Power of Court to arrive at finding independently.

In a case remanded under O. 41, R. 23, the Judge to whom it is sent back can from his own conclusions irrespective of any finding arrived at by his predecessor at the original trial in respect of matters which were not touched by the original Court. AIR (V 19) 1932 Oudh 123 : 9 OWN (CC) 60 : 7 Luck 454 : 137 Ind Cas 102 (DB).

——O. 41, R. 23 — It is the duty of the Court to which remand is made to record findings to all the questions sent on remand and not to omit certain answers because of the view it takes of the law. The law is for the appellate Court finally to decide. AIR (Vol 14) 1927 Bom 594: 105 Ind Cas 871: 51 Bom 1026: 29 Bom LR 1336 (FB).

——O. 41, R. 23 — Subordinate Judges, if can question remand order made by District Judge — High Court, power of — Tenant questioning title of person suing for rent.

Where the decree made by the Subordinate Judge is erroneous, because he proceeded on the assumption that it was competent to him to question the validity of the order of remand made by the District Judge the whole matter is set free as it becomes open to the court to consider without recourse to a remand followed by an appeal, the real merits of the controversy between the parties. The position of the parties might have been different if the order of remand had been made under Act V of 1908. (1910) 12 CLJ 428 : 7 Ind Cas 846 (848) (DB).

15. Powers of High Court in appeal from order of remand.

——O. 41, R. 23 — Appellate order holding court-fee paid proper and remanding case for trial on merits — No second appeal.

Where the trial Court rejects the plaint on ground of want of sufficient court-fees but the Appellate Court, on appeal, remands the case for trial on merits, the order does not fall under O. 41, R. 23 and no second appeal is maintainable.

High Court, however, could interfere in revision. AIR (Vol 32) 1945 Mad 430: (1945) 1 MLJ 259: ILR (1945) Mad 886 : 1945 MWN 291.

——O. 41, R. 23 — Trial Court dismissing suit on ground that plaint disclosed no cause of action — Appellate Court holding suit maintainable and remanding case — Second appeal:

Held, that the decision of the trial Court could not be regarded as a rejection of the plaint, but must be taken to be an adjudication on matters raised by the defence. Nor could it be said that the Appellate Court had remanded the suit for admission of the plaint. Second appeal was, therefore, competent from the order of the Appellate Court. AIR (Vol 29) 1942 Lah 179: 44 PLR 236: 201 Ind Cas 619.

——O. 41, R. 23 — High Court if can look at evidence to see whether finding can be warranted by remaining evidence.

The High Court has, generally speaking, on second appeal no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted is sufficient to warrant the finding of the Court below. The only cases which can with propriety be disposed of under such circumstances without a remand, are those where independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusions upon other grounds. AIR (Vol 24) 1937 Cal 537: ILR (1937) 2 Cal 661: 67 CLJ 488: 176 Ind Cas 429 (DB).

——O. 41, R. 23 — Son's suit for declaration that property mortgaged by father being ancestral it could not be sold in execution of mortgage decree against father . Onus is on son to prove that property was ancestral —Issue throwing the onus upon the wrong party is wrongly framed. The proper course for the High Court to follow was to frame the issue and remand the case to the lower Court. AIR (Vol 23) 1936 All 613: (1936) ALJ 323: 1936 AWR (HC) 377: 162 Ind Cas 62 (DB).

——O. 41, R. 23 — High Court remanding case without consent of parties or either of them — New bargain made between parties to sale.

The High Court in appeal has no jurisdiction to make a new bargain between the parties to the sale, to split the parcels and to compel the vendee to accept a portion of the properties arbitrarily assigned to him for the amount justified by necessity or any other sum. An order of remand for the purpose without consent asked for or given by the parties or either of them, is beyond the competence of the High Court. AIR (Vol 22) 1935 PC 62: (1935) MWN 288: 1935 OWN (CC) 336: 1935 AWR (CC) 435: 1 BR 414: 68 MLJ 452: 41 MLW 581: (1935) ALJ 603: 61 CLJ 221: 39 CWN 709: 58 Mad 350: 62 IA 70: 154 Ind Cas 972.

——O. 41, R. 23, O. 43, R. 1 — Remand of suit to determine it finally.

Although the provisions of O. 41, R. 23, might not strictly apply where the Court of Appeal has remanded the suit to the first Court which has been asked to determine finaliy the suit by the order of remand, an appeal to the High Court is permissible under the provisions of O. 43, R. 1. AIR (Vol 22) 1935 Cal 134 : 38 CWN 1202: 155 Ind Cas 506 (DB).

——O. 41, R. 23 — Point not considered by lower Court — Remand for considering it.

The High Court has ample power to make a remand in order that a point which nas not been considered by the lower Court, may be considered by it. AIR (Vol 21) 1934 Rang 168: 155 Ind Cas 912 (DB).

——O. 41, R. 23 — Order of remand — Court not stating provision of law under which order was passed.

Where the lower appellate Court did not say anywhere in its judgment under what provisions of law it purported to pass an order of remand, the High Court refused to hold that the order was not passed under the provisions of O. 41, R. 23 of the Civil Procedure Code. To hold otherwise would be to curtail the right to appeal which should not be done except upon very clear proof of circumstances justifying such curtailment. The High Court assuming that the lower Court made the order under the provisions of O. 41, R. 23, although it might not be that the provisions of that rule strictly justified the order in question, held that an appeal lay to itself from the order. AIR (Vol 12) 1925 Cal 1151 : 87 Ind Cas 575 (DB).

——Order 41, R. 23 — In a second appeal involving several points difficult to disentangle, the appropriate course to follow is to make, not an order under O. 41, R. 25, but an order of remand in the exercise of inherent power of the Court. AIR (Vo 10) 1923 Cal 521: 74 Ind Cas 39?: 37 CLJ 122 (DB).

——Order 41, R. 23 — Remand for re-hearing by single judge in second appeal — Order is a 'Judgment within Cl. 10 and if not appealed against cannot be questioned in appeal from decree on remand.

AIR (Vol 9) 1922 Pat 384: 65 Ind Cas 175: 3 PLT 343: 1 Pat 246 (DB).

——O. 41, Rr. 23 and 25.

The powers if the High Court as to remand are not restricted by the provisions of O. 41, Rr. 23 and 25 and the High Court can always make an order of remand if the exigencies of the case demand it. AIR (V 4) 1917 Cal 269 : 43 Cal 1001 : 20 CWN 1192 : 34 Ind Cas 235 (DB).
(Also AIR (Vol 4) 1917 Cal 44: 44 Cal 929: 41 Ind Cas 598 (FB).)

——O. 41, R. 23 — Question of law — Second appeal.

The High Court can decide a question of law in second appeal, and remand the case on questions of fact to the lower Appellate Court for disposal according to its decision on the question of law. (1910) 6 NLR 20: 5 Ind Cas 701.

——O. 41, R. 23 (S. 562 old Code) — Appeal from order of remand — Power of High Court to decide appeal in the suit.

After issues had been framed in a suit, the pleader for the plaintiff and the mukhtar for the defendant filed an application, praying that the case might be decided on a question of law, and the case to be gone into. The next day, the defendant himself put in an application objecting to what his mukhtar had done and alleging that the mukhtar was not empowered to forego the decision of the case on the facts. That application was rejected, and the suit was tried with reference solely to the question of law raised therein and was dismissed.

The plaintiff appealed, and the defendant filed objections raising the question of the authority of his mukhtar to relinquish his right to have the case decided on the questions of fact therein involved. The appellate court reversed the decision of the first court on the point of law, and remanded the case under S. 562 of the Code of Civil Procedure for decision of the remaining issues, primarily for the determination of the mukhtar's power to forego the decision of the case on the facts.

On appeal to the High Court against this order of remand the court held that the lower appellate court ought to have decided the question of the mukhtar's authority instead of leaving it for the court of first instance, which had already pronounc-thereon and itself examined the mukhtar's power-of-attorney, and came to the conclusion that the mukhtar had authority to bind his client in that particular matter, and in consequence decreed by plaintiff's appeal. 1901 AWN 141 (141).

——O. 41, R. 23; S. 104, O. 43, R. 1, (Ss. 105, 562, 588, 591 old Code).

Remand order in contravention of S. 564 — Whether the remand and the subsequent proceedings null and void — Whether legality of remand order could be questioned on an appeal from the final decree.

Held, also, that the legality of a remand order and the subsequent proceedings could be questioned on second appeal from the final decree although no appeal had been preferred against the order itself under S. 588 Cl. 28) of the Civil P. C. (1901) 5 CWN 509: 28 C. 324 (328) (DB).

16. Preliminary point — Meaning of.

(a) General.

(b) Entire case must have been disposed of on a preliminary point.

(a) General.

——O. 41, R. 23 — If confined to legal points in bar of suit.

The expression 'Preliminary point' in O. 41, R. 23, C. P. Code, is not confined to such legal points only as may be pleaded in bar of a suit, but comprehends all points or issues, whether of fact or of law, the determination of which has precluded the necessity for determining other points or issues which have, therefore, been left undetermined. AIR (Vol 34) 1947 Sind 94 : ILR (1946) Kar 380 : 227 Ind Cas 633 (DB).

——O. 41, R. 23 — A preliminary point does not necessarily mean a point collateral to the merits of the case but would include any point whether of fact or law, the decision on which renders the decision of other issues arising in the case unnecessary. AIR (Vol 29) 1942 Lah 135 : 44 PLR 133 : 201 Ind Cas 159.

——O. 41, R. 23 — Rejection of a plaint under O. 7, R. 11, Civil P. C. can be regarded as a preliminary point in an appeal from the rejection of a plaint. A preliminary point is one which when determined in favour of the plaintiff permits the progress of the suit but when determined against him concludes the suit. The preliminary point may arise before or after admission of the plaint. In either case if the decision on the preliminary point is against the plaintiff that would stop the further progress of the suit so as to compel the Court to dispose of the suit finally without deciding merits of the controversy.

The words 'where the Court from whose decision' and the "decree is reversed in appeal" occurring in R. 23 of O. 41, are significant. The words 'disposed of the suit' literally apply to a case of rejection of a plaint. The order rejecting a plaint, has the force of a decree under S. 2(2) of the Civil P. C., and the rejection of the plaint brings about the disposal of the suit. When an appeal is preferred against an order rejecting a plaint which has the force of a decree and the Appellate Court sets aside that order it has to remand the case for the trial of the issues arising in the case. AIR (Vol 28) 1941 Nag 304 : ILR (1941) Nag 629 : 1941 NLJ 410 : 197 Ind Cas 43.

——O. 41, R. 23 — Suit decided only one point of law — If decided on preliminary point — Finding set aside in appeal — Case, if can be remanded.

The only meaning that can properly be given to the words "preliminary point" in O. 41, R. 23, Civil P. C., is "any point the decision of which avoids the necessity for the full hearing of the suit". Where a suit is decided only on the strength of a finding on a point of law, and the questions of fact having not been tried or decided by reason of that finding, the suit can be deemed to have been disposed of on a preliminary point, and if that finding be set aside in appeal, it is open to the Appellate Court to remand the suit under O. 41, R. 23. AIR (Vol 27) 1940 Bom 22 : ILR (1939) Bom 653 : 41 Bom LR 1177 : 186 Ind Cas 695.

—— O. 41, R. 23 — Appeal allowed on preliminary point — Remand — Remarks on merits of case.

When the Judge of an Appellate Court allows an appeal on a preliminary point of law, which necessitates the remand of the suit for further trial or a re-trial of the suit, he should refrain from making any remarks in his judgment concerning the merits of the claim, as by so doing he must necessarily prejudice the further trial or new trial on remand. AIR (Vol 23) 1936 Rang 251 : 163 Ind Cas 397 (2).

——O. 41, R. 23 — A preliminary objection is one that challenges the competence of a Court to hear and decide a particular cause before it. AIR (Vol 22) 1935 All 310 : 1935 AWR (HC) 559 : (1935) ALJ 527 : 57 All 810 : 156 Ind Cas 1088 (DB).

——O. 41, R. 23 — A preliminary point is not necessarily a point of law upon which the whole case is disposed of nor is it necessarily a point of fact on which the case is disposed of. Any point the de-

cision of which avoids the necessity for the full hearing of the suit is a preliminary point. AIR (Vol 22) 1935 Pat 49 : 1 BR 350 : 154 Ind Cas 859 (DB).

——O. 41, R. 23 — Tests to see if decision is on preliminary point.

The true test of deciding as to whether a decision of the issue was a decision of a preliminary point or not is to see whether the decision of the issue prevented the decision on the other issues. The words "preliminary point" are not confined to such legal points only as will be applied as a bar in suit but comprehend all such points as may have prevented the Court from disposing of the case on the merits whether such points are pure questions of law are pure questions of fact. A preliminary point must be one which must be independent of the merits. AIR (Vol 21) 1934 Cal 49 : 57 CLJ 473 : 150 Ind Cas 68 (DB).

——O. 41, R. 23 — Disposal of the suit on a preliminary point is the essential necessity for the application of O. 41, R. 23, Civil P. C., and a preliminary point within the meaning of that rule is any point, the decision of which avoids the necessity for the full hearing of the suit. AIR (Vol 21) 1934 Pat 13: 151 Ind Cas 947.

——O. 41, R. 23 — The question if plaintiff is entitled to an unconditional decree for possession, or one subject to defendant's right to redeem is a preliminary point.

Where in a suit for possession of immoveable property an issue was framed which was intended to raise the question whether the plaintiff was entitled to an unconditional decree for possession and also whether the defendants would be entitled to redeem, in which case the plaintiff would be entitled to possession only if the defendants failed to redeem, and the trial Court held that the defendants were not entitled to redeem and gave the plaintiff a decree for unconditional possession of the property but on appeal by the defendants the appellate Court took a contrary view holding that the defendants were entitled to redeem and remanded the suit for finding out the exact amount payable on redemption and for disposal of the suit according to law.

Held, that the decision of the trial Court was on a preliminary point, that the appellate Court was entitled to remand the suit under O. 41, R. 23 and that the appeal against the order of remand was maintainable under O. 43, R. 1(u). AIR (Vol 17) 1930 Mad 1017 : 1930 MWN 1021 : 32 MLW 843 : 60 MLJ 72 (DB).

——O. 41, R. 23 — Preliminary point is one which, when determined in favour of the plaintiff, permits the progress of the suit, but when determined against him concludes it. AIR (Vol 17) 1930 Nag 295.

——O. 41, R. 23 — Dismissal of suit on inadmissibility of document is on a preliminary point. AIR (Vol 14) 1927 Lah 592 : 103 Ind Cas 298.

——O. 41, R. 23 — Suit remanded for retrial on amended plaint — Remand is on a preliminary point. AIR (Vol 14) 1927 Lah 196 : 100 Ind Cas 49.

——O. 41, R. 23 — A preliminary point is a point which, when decided in the way in which it is in fact decided, determines the result of the suit. AIR (Vol 14) 1927 Mad 1159 : 99 Ind Cas 974 (DB).

——O. 41, R. 23 — An order returning the plaint under R. 10 of O. 7 is not a decision of case on a preliminary point and an appeal is provided against such an order under O. 43, R. 1, Cl. (a) and as the order passed by the appellate Court becomes final under S. 104, Cl. (2), S. 105 does not preclude the aggrieved party from disputing the correctness of the remand order in second appeal if he is otherwise entitled to do so. AIR (Vol 13) 1926 Mad 900 : 51 MLJ 119 : 1926 MWN 613 : 24 MLW 630 : 97 Ind Cas 790 (DB).

——O. 41, R. 23 — The question whether the trial of suit is barred by the events in an earlier suit is a preliminary point. AIR (Vol 12) 1925 Mad 483 : 48 MLJ 100 (2) : 21 MLW 318 : 1925 MWN 82 : 86 Ind Cas 548 (DB).

——O. 41, R. 23 — A remand should be made when a preliminary point only is decided or where the trial Court has not understood the case and a new trial is desired. AIR (Vol 12) 1925 Oudh 692 : 87 Ind Cas 950.

——O. 41, R. 23 — First Court holding evidence irrelevant — Appellate Court holding evidence relevant and remanding case — Remand is on a preliminary point.

The meaning of the words "preliminary point" in the rule is any point the decision of which avoids the necessity for the full hearing of the suit. The points are preliminary to the final disposal of the case. AIR (Vol 9) 1922 Mad 505 : 43 MLJ 354 : 45 Mad 900 : 16 MLW 425 : 1922 MWN 589 : 31 MLT 208 : 69 Ind Cas 828 (FB).

——O. 41, R. 23 — A preliminary point is one either collateral to the merits which precluded their determination altogether, or some particular question which though relating to the merits precluded their general determination.

Where the questions are whether there was an agreement between the parties and whether it was broken by either of them the finding that the agreement had been proved is one on a preliminary point. the question for decision on the merits being whether the agreement has been broken by the plaintiff or the defendant. AIR (Vol 8) 1921 Mad 113 : 13 MLW 54 : 61 Ind Cas 829 (DB).

——O. 41, R. 23 — The expression "disposed of the suit on a preliminary point" in O. 41, R. 23, C. P. C. means disposed of the whole suit on the preliminary point only. AIR (Vol 7) 1920 Mad 88 : 11 LW 611 : 57 Ind Cas 800 (DB).

——O. 41, R. 23 — Preliminary point — Decision — Remand to first Court.

The lower Appellate Court having remanded a suit to a Munsif who after framing four issues disposed of the suit on a decision of the first issue which finally decided the case it was held by the High Court that the decision of the Munsif was only on a preliminary point and that the remand was proper under the Code. AIR (Vol 4) 1917 All 243 : 39 All 165 : 15 ALJ 30 : 37 Ind Cas 383 (DB).

——O. 41, R. 23 — Decision on a preliminary point, whether of law or of fact, which dispenses with the decision of other issues, is a disposal on a preliminary point. AIR (Vol 4) 1917 Pat 577 : 2 Pat LW 23 : 2 Pat LJ 398 : 41 Ind Cas 202 (DB).

——O. 41, R. 23 — Preliminary point — Dismissal of suit for default.

An appeal from an order dismissing a suit for default under O. 9, R. 8, C. P. C., cannot be entertained nor can the case be remanded as though it had been decided on a preliminary point under O. 41, R. 23, C. P. C. AIR (Vol 3) 1916 All 326 : 38 All 357 : 14 ALJ 347 : 33 Ind Cas 737 (DB).

——O. 41, R. 23 — When the question on which a case is disposed of involves an important issue relative to the merits of the case it is not a preliminary question. (1911) 1 MWN 199 : 9 MLT 373 : 9 Ind Cas 790 (DB).

——O. 41, R. 23 — Parties, addition of — C. P. C. (O. C., S. 564) — Legality.

An order of remand of an appellate Court directing the lower Court to add parties is an order upon a point necessarily preliminary to the proper

decision and trial of the suit and is perfectly legal. (1910) 5 Ind Cas 998 (999) : 37 C 171 (DB).

——O. 41, R. 23 (S. 562 old Code) — Remand — Preliminary point, what is — Liability for compensation — Amount of damages.

Where by reason of the decision on one or more of the issues recorded in the case, there has been no necessity for the consideration of the other issues, the suit was dismissed on a preliminary point the appellate Court finding that the issues considered were wrongly decided and the suit wrongly dismissed, remanded the case for the disposal of the suit after consideration of the remaining issues.

Held, the suit was properly remanded under S. 562. There were two questions in the case viz., the liability of the defendant to compensate the plaintiffs, and the amount of damages. The Court of first instance held the plaintiffs were not entitled to damages and dismissed the suit on this preliminary point. On appeal, the Court of appeal held the plaintiff was entitled to damages and remanded the suit for ascertainment of damages. (1908) 8 Cal LJ 159 (161).

——O. 41, R. 23 (S. 562 old Code) — "Preliminary point".

Held, that the decision on an issue as to whether or not the document which formed the basis of the suit was void in consequence of its having been executed in favour of a minor was a decision on a preliminary point, such as justified a remand under S. 562, C. P. C. (1907) 30 A 63 (66) : 1908 AWN 10 : 5 ALJ 14.

——O. 41, R. 23 (S. 562 old Code) — Remand — Reversal on preliminary point — Time to take objection to reversal.

Where the Court of first instance decides a suit on a preliminary point and the appellate Court reverses the decision on such point and remands the suit for disposal on the merits, the proper time for the High Court to consider the correctness of the decision on the preliminary point is in second appeal, if any, preferred from the decree after remand. (1905) 15 MLJ 292 : 28 M 444 (451, 452) (DB).

(b) Entire case must have been disposed of on a preliminary point.

——O. 41, R. 23 — Disposal of suit on statement made on special oath — If disposal on preliminary point — Order of remand — Appeal — Oaths Act, S. 11.

When a suit is disposed of on a particular evidence which has the effect of conclusive proof of the facts in controversy between the parties, it cannot be said that the suit has been disposed of on a preliminary ground. It may be that elaborate evidence may not be given at such a trial; but all the same, the suit is disposed of on merits. A suit disposed of on a statement made by the defendant on special oath, cannot therefore be said to have been disposed of on a preliminary ground, as under S. 11 of Oaths Act such statement is conclusive proof of the matter stated as against the plaintiff who has offered to be bound by that oath. By offering to be bound by the oath of the defendant, the plaintiff cannot be said to have submitted his dispute to his arbitration. The decision to be given is that of the Court, though based upon evidence which carries with it the effect of conclusive proof. AIR (Vol 33) 1946 Pat 272: 27 PLT 22: 12 BR 223: 222 Ind Cas 210.

——O. 41, R. 23 — All issues except one decided — Case tried fully.

The remand contemplated by . 41, R. 23, Civil P. C., is one made in a case where the first Court has disposed of the suit on a preliminary point so as to exclude evidence of essential facts. Where every single issue which the parties had raised in the first Court is decided execpt one and the parties were not shut out from adducing any evidence they pleased upon it and the decision came later, after the case had been tried as fully as the parties desired, a decision of such kind cannot be considered as one upon a preliminary point. AIR (Vol 27) 1940 Nag 349: ILR (1940) Nag 538: 1940 NLJ 350: 191 Ind Cas 566 (DB).

——O. 41, R. 23 — Suit for arrears of rent and ejectment — Court finding notice was given and decreeing suit — Appellate Court concurring on issue of notice but dismissing suit on other ground — High Court setting aside decree of Appellate Court and remanding case under O. 41, R. 23 — Question of service of notice, if can be re-agitated on remand.

A suit was brought for the recovery of arrears of rent and for possession of a plot of land by the removal of a house built thereon. The suit was contested by the defendants on various grounds. The Court of first instance found on the ground of notice that notice for ejectment was given by the plaintiff and decreed the suit against the defendants but on appeal the District Judge held that notice was proved to be given but reversed the decree of the Court of first instance on the ground that the 'sarkhat' which was the basis of the suit, was inadmissible in evidence as it was unregistered.

The High Court on appeal set aside the decree of the lower Appellate Court and remanded the case to the trial Court under O. 41, R. 23. The Court decreed the claim of the plaintiff. On appeal the lower Appellate Court again reversed the decree of the trial Court on the ground that no notice was legally served on the defendants as required by S. 106 of the T. P. Act. It was contended in second appeal that in view of the concurrent findings of two Courts on issues of notice against the defendants, it was not open to them to raise the same question again on remand:

Held, that the case was decided on a preliminary point and by the remand order of the High Court under O. 41, R. 23, the case was re-opened and therefore, it was open to the defendants to reagitate the question of due service of notice in the light of the fresh evidence produced by them. AIR (Vol 25) 1938 All 388: (1938) ALJ 511: 1938 AWR (HC) 328: 176 Ind Cas 393.

——O. 41, R. 23 — Material document not considered.

Where a suit is dismissed after considering the evidence but in appeal it was held that a material document was not taken into consideration and the case was remanded under O. 41, R. 23, for redecision:

Held, that it was open to the party who relied on this document to prove it in the trial Court. As this was not done by or on behalf of the plaintiff, he was not entitled to a fresh trial. The case was not decided on a preliminary point by the trial Court and the Appellate Court had no power to remand the case for a fresh decision under O. 41. R. 23. AIR (Vol 24) 1937 Lah 454: 38 PLR 1154: 170 Ind Cas 422.

——O. 41, R. 23 — Issues framed and evidence recorded in lower Court — Suit disposed of on finding of same — Remand.

The expression 'preliminary point' used in O. 41, R. 23, is not confined to such legal points only as may be pleaded in bar of suit, but comprehends all such points as may have prevented the Court from disposing of the case on the merits whether such points are pure questions of law or pure question of fact. It is competent to an Appellate Court

to remand a case, where the Court of first instance, having framed issues and recorded all evidence has decided the case with reference to its findings on one or two issues leaving the other issues undecided. AIR (Vol 20) 1933 Rang 413: 149 Ind Cas 1120.

——O. 41, R. 23 — Where a Court has disposed of the whole suit as it stands before it, it cannot be said that the disposal was on a preliminary point merely because it has not dealt with the further issues, which might have arisen if the suit had been framed otherwise originally or if an amendment of the pleadings had been allowed later in the history of the suit. AIR (Vol 18) 1931 Mad 1: 33 MLW 210: 60 MLJ 713: 132 Ind Cas 311 (DB).

——O. 41, R. 23 — Preliminary point — Trial Court deciding on merits also — Remand — Propriety.

A preliminary point must be decided as a preliminary point and at the earliest stage of the suit. It is not proper that a preliminary point should be decided along with the points involved in the merits of the case.

Where the defendant raises the plea that the plaintiff has no right to maintain the suit and also that the suit is bad for misjoinder of parties and causes of action and the trial Court decides the case even on merits and dismissess the suit in appeal from the order of dismissal the appellate Court should accede to the request of the plaintiff to ignore the defect of misjoinder of causes of action and parties because the suit had been tried on merits and should not allow the plaintiffs to withdraw the suit as against certain defendants and to maintain it as against others inasmuch as this would mean that the case under trial should be thrown away and the defendants should be exposed to the harassment of the second and subsequent suit. AIR (Vol 17) 1930 All 863 (DB).

——O 41, R. 23 — Where a case has been decided by the trial Court on merits and not on a preliminary point, remand under O. 41, R. 23, was set aside. 123 Ind Cas 542: AIR (Vol 17) 1930 Lah 181.

——O. 41, R. 23 — Decision as to rejection of evidence in order to make it a decision on a preliminary point, must restrict the trial of the suit.

Decision as to rejection of evidence in order to make it a decision on a preliminary point within O. 41, R. 23, must be found to have restricted the trial of the suit.

Where the 1st Court tried all the issues framed in the case and recorded evidence on all the issues, but declined to allow one document to be filed or one witness to be examined or even one question to be put, with which view the appellate Court might not agree.

Held, that it was not a decision by the 1st Court on a preliminary point. 112 Ind Cas 1: 1928 MWN 104: AIR (Vol 15) 1928 Mad 991 (DB).

——O. 41, R. 23 — A Court of appeal is not competent to remand a case under O. 41, R. 23, for retrial where the lower Court has not decided it upon a preliminary point. 103 Ind Cas 537: AIR (Vol 14) 1927 Lah 618.

——O. 41, R. 23 — Where the trial Court has not decided the suit on a preliminary point, remand cannot be ordered under R. 23, it can then be ordered under R. 25. (1926) 96 Ind Cas 44 (Lah).

——O. 41, R. 23 — Where the death of one defendant was brought to the notice of the Court, but the Court continued the suit and passed a decree without legal representative.

Held, that the lower Court must be taken to have disposed of the case on a preliminary point. Remand under O. 41, R. 23, ordered. 74 Ind Cas 682: 5 LLJ 187: AIR (Vol 11) 1924 Lah 33 (DB).

——O. 41, R. 23 — A case decided only on a preliminary issue as to stamp was remanded and the decision on the preliminary issue reversed, on the assumption of proof of a certain question of fact which was necessary for that decision. The trial Court was directed to try the question of fact first and to consider its effect on the contract in question. 67 Ind Cas 965: 24 Bom LR 820: AIR (Vol 10) 1923 Bom 142 (DB).

——O. 41, R. 23 — Where a case is not decided on a preliminary point the appellate Court has no power to remand the case under O. 41, R. 23. 70 Ind Cas 547 : 35 CLJ 345 : AIR (Vol 9) 1922 Cal 456 (DB).

——O. 41, R. 23 — Preliminary point — Disposal on — Decision on the whole case — Suit not maintainable.

Where the Court goes into the evidence and records findings on all the issues, but dismisses the suit as not maintainable, the disposal is on a preliminary point. An Appellate Court remanding the suit for retrial acts under O. 41, R. 23 though the Appellate Court might frame certain additional issue and send them also for trial. Such an order of remand if not appealed against under S. 105 becomes final. AIR (Vol 7) 1920 Pat 735: 4 PLJ 645: (1920) Pat HCC 91: 52 Ind Cas 125 (DB).

——O. 41, R. 23 — Inherent power — Preliminary point.

An Appellate Court has no power to remand a case when it was not disposed of on a preliminary point in the Court of First Instance. AIR (Vol 4) 1917 Cal 94: 38 Ind Cas 196 (DB).

(But see AIR (Vol 4) 1917 Cal 44: 44 Cal 929: 41 Ind Cas 598).

——O. 41, Rr. 23 and 25 — Preliminary point — Point involving merits of the case.

Where a suit involved the consideration of the issues whether the plaintiffs had title to the lands in suit and whether they were entitled to 'khas' possession and the first court found against the plaintiffs on the first point but did not decide the other and the Lower Appellate Court reversed the finding of the first Court and remanded the suit for decision on the second issue.

Held, the decision of the Munsif was not on a preliminary point within O. 41, R. 23 which has not changed the law under the old Code. (1911) 15 CWN 575: 9 Ind Cas 224 (DB).

——O. 41, Rr. 23 and 25 — Preliminary point — Remand.

The order of the lower Appellate Court remanding a suit to the first Court, directing it to make certain persons parties and to take some other action, is an order upon a point necessarily preliminary to the proper decision of the suit, and hence the order is not illegal. (1910) 37 Cal 171: 5 Ind Cas 998 (DB).

——O. 41, R. 23 — (S. 562, old Code) — Remand — Suit not decided upon a preliminary point.

In a suit for ejectment of the defendants as trespassers and for damages, the Court of first instance found that the plaintiff had failed to establish the title alleged by him and accordingly dismissed the suit. The lower appellate Court found that the plaintiff's title was proved, and remanded the case to the Court of first instance under S. 562.

Held, that the suit has not been decided upon a preliminary point, and that there was no occasion to remand the whole case to the Court of first instance. (1905) 1905 AWN 157 (157) (DB).

17. Return of plaint.

——O. 41, R. 23 and S. 115 — Remand after setting aside order of lower Court returning plaint for

presentation to proper Court — Appeal — Revision — Competency.

An appeal against an order passed by the lower appellate Court remanding a case to the trial Court by reversing the decision of that Court that it had no jurisdiction to decide the suit and that the plaint should be returned for presentation to the proper Court, is incompetent. Nor can such an order be revised under S. 115, C. P. Code. 23 Luck 293: 1948 OA (CC) 1: 1948 AWR (CC) 1: AIR (Vol 35) 1948 Oudh 305: 1948 OWN 133 (DB).

——O. 41, R. 23, O. 43, R. 1 (u) — Suit for contract — Order dismissing claim on account of valid clause for arbitration — Appellate order setting aside order of trial Court — Appeal.

In a suit for accounts, the trial Judge decided that according to the contract the matter in dispute had to be referred to arbitration, and he made an order rejecting the claim with costs. The decree, which followed upon the judgment, made it clear that it was the plaint filed by the plaintiffs which was rejected.

The plaintiffs preferred an appeal against the order of rejection, and the Court of Appeal set aside that order on the ground that it was the duty of the defendants to apply to the Court to stay the suit under the Para. 18 of the Second Schedule to the Civil P. C. The learned Judge of the Appellate Court also determined the question of territorial jurisdiction in favour of the plaintiffs, and remitted the case to the Court of first instance for decision on other issues arising between the parties.

It was urged in appeal that the trial Court rejected the "claim" and not the plaint; and that the order of the first Appellate Court should be treated as an order setting aside the decision of the Court of first instance on a preliminary point and remitting the case for a fresh decision, and that the order was, therefore, appealable under O. 43, R. 1 (u):

Held, that the order of the first Court was only an order rejecting the plaint, that the order of the Appellate Court setting aside that order was not an order under O. 41, R. 23, and no appeal lay under O. 43, R. 1 (u). AIR (Vol 18) 1931 Lah 497: 32 PLR 409: 131 Ind Cas 750 (DB).

——O. 41, R. 23 — An order of an appellate Court setting aside an order of the Court of first instance rejecting a plaint and directing it to proceed with the trial of the suit on the merits is not an order under O. 41, R. 23 and is not appealable under O. 43, R. 1: 108 Ind Cas 597: AIR (Vol 16) 1929 Lah 83.

18. Revision.

——O. 41, R. 23 — Order remanding case and directing refund of stamps.

Revision is competent from an order remanding case under O. 41, R. 23, and directing refund of stamps even after the finding has been given on the issue remanded. AIR (Vol 27) 1940 Lah 290: 42 PLR 201: 189 Ind Cas 464.

——O. 41, R. 23 (Oudh), S. 115, O. 6, R. 17 — Amendment to O. 41, R. 23, construction — Revision, if lies.

The words "have not been decided" of the amendment of O. 41, R. 23, Civil P. C., made by the Oudh Chief Court, do not mean "have not been decided by the Appellate Court." The amendment clearly refers to a decision of all the questions arising in the case, by the trial Court and not to their decision by the Appellate Court itself.

A revision however can be maintained. AIR (Vol 27) 1940 Oudh 367: 1940 OWN (CC) 500: 1940 AWR (CC) 248: 16 Luck 65: 188 Ind Cas 893 (DB).

——O. 41, R. 23 — An improper order of remand can be interfered with in revision. AIR (Vol 23) 1936 Pat 160: 16 PLT 795: 2 BR 358: 161 Ind Cas 699.

——O. 41, R. 23 — Although the Court has inherent power to remand a case even where O. 41, R. 23 does not apply provided that interests of justice require it, yet the Court has no inherent power to disregard a method of procedure enjoined or provided by the Code and adopt a different one unless it really is necessary in the interests of justice. Where the Court does this it acts without jurisdiction and the High Court can interfere in revision. AIR (Vol 22) 1935 Bom 216: 37 Bom LR 203: 156 Ind Cas 381.

——O. 41, R. 23 — Order returning plaint set aside and case remanded on appeal — Order of remand is not appealable — Appeal may be treated as a revision. AIR (Vol 22) 1935 Mad 574: 158 Ind Cas 252.

——O. 41, R. 23 — Dismissal of suit on ground of res judicata — Remand for decision on merits — Revision against order of remand — Competency of.

An order of remand under O. 41, R. 23, simply sets aside the order of the original Court only on that issue, or in other words, decides that issue differently and directs the original Court to decide the rest of the case. Where a suit for partition of a vacant site is dismissed on the ground of the matter being res judicata on account of a prior decision by which the site was left joint for the use of all co-sharers and on appeal the suit is remanded for decision on merits under O. 41, R. 23 the order not being one by which a case is decided, cannot be subject of a revision. AIR (Vol 20) 1933 Pesh 48: 147 Ind Cas 703 (DB).

——O. 41, R. 23 — Suit under-valued — Objection to jurisdiction not raised — Remand by Appellate Court on the ground of want of jurisdiction.

Where a suit for maintenance was valued at Rs. 3,000 and filed in the Court of a Subordinate Judge of the Second Class and decided on the merits, and on appeal it was found that the proper valuation of the suit was Rs. 18,000 and the Appellate Court set aside the decree of the trial Court for want of jurisdiction and remanded the case for re-trial to the Court of a Subordinate Judge of the First Class, and an appeal was preferred to the High Court against the order of remand:

Held, (1) that the order was not appealable as it was not one made under O. 41, R. 23, but could be revised under S. 115;

(ii) as the objection to jurisdiction had not been raised in the Court of first instance and it was not found that any failure of justice had occurred, the objection should not have been entertained in the Appellate Court and the order of remand was, therefore, illegal on the merits. AIR (Vol 19) 1932 Lah 538 (539): 33 PLR 634: 138 Ind Cas 62 (2).

——O. 41, R. 23 — Order of remand — Interference in revision.

Where the order of remand is not justified, the High Court can interfere in revision. AIR (Vol 17) 1930 All 863 (DB).

——O. 41, R. 23 — In a municipal election the petitioner filed an application before the Subordinate Judge for declaring the election of the respondent, illegal. The Subordinate Judge held that the election was vitiated by illegality and allowed the petition. An application was made to the High Court by the respondent which came on for hearing before a single Judge. He held that he was bound by the decision of the Subordinate

Judge on the question of illegality and remanded the petition to the Subordinate Judge for a fresh finding upon the issue "whether the election was materially affected by the irregularity found" and for disposal accordingly. The Subordinate Judge on remand found that the irregularities, if any, did not affect the result of the election.

Held, that the High Court could go into the question of illegality in revision. AIR (Vol 16) 1929 Mad 391: 113 Ind Cas 548.

——O. 41, R. 23 — Both parties having no evidence to offer on points in issue — Case decided on admissions made — Appellate Court allowing fresh questions to be raised and remanding case for fresh evidence — Remand can be set aside in revision. AIR (Vol 16) 1929 Mad 205: 119 Ind Cas 705 (DB).

——**O. 41, R. 23 — Inherent powers — No revision.**

Assuming that the Appellate Court has improperly used the inherent power under S. 151 in remanding a case, the case is not one of jurisdiction and its order cannot be interfered with in revision. AIR (Vol 14) 1927 Mad 335: 100 Ind Cas 135: 25 MLW 198: 38 MLT 15: 52 MLJ 90 (DB).

——O. 41, R. 23 — Revision lies against order of remand finally disposing of matter before Court. AIR (Vol 13) 1926 All 55: 89 Ind Cas 404: 48 All 27: 23 ALJ 891: 6 LRA Civ 575 (DB).

——O. 41, R. 23 — A remand order passed by an appellate Court which it was not competent to pass is liable to set aside in revision. AIR (Vol 12) 1925 Mad 171: 79 Ind Cas 857 (DB).

——O. 41, R. 23 — No revision lies from an order of remand. AIR (Vol 10) 1923 All 464: 76 Ind Cas 525.

——**O. 41, R. 23 — Appeal — Revision.**

An order of remand under O. 41, R. 23 which is not appealable is not open to revision. 10 PWR 1912: 140 PLR 1912: 13 Ind Cas 855.

——**O. 41, R. 23 — Burden of proof — Error as to Punjab Courts Act (1884) S. 70 (1) (b) and (a).**

An order of Divisional Judge remanding a case for fresh trial on the ground that the onus of proof lay on opposite party is not appealable. No revision lies under S. 70 (1) as the order is not a 'decree' but it can by revised under S. 70 (1) (a) as the order was bad, the Divisional Court not having reversed the decision of the original court. 17 PLR 1910: 123 PWR 1910: 6 Ind Cas 491.

——**O. 41, R. 23 (S. 562 Old Code) — Remand — Appeal — Revision.**

A judgment-debtor made an application under S. 258, C. P. C., that a notice be issued to a decree-holder to show cause why a certain adjustment should not be certified. The application was allowed. The decree-holder applied under S. 108, C. P. C., to have the order set aside. The application was refused and the prayer to treat it as one for review was also refused. On appeal, the District Judge remanded it under S. 562 with directions to treat the application as for a review of judgment. The judgment-debtor appealed.

Held, that an appeal lay from the order of remand under S. 562 and even if not, the appeal can be treated as an application for revision, the lower court having acted without jurisdiction. (1906) AWN 58 (59): 3 ALJ 119 (DB).

19. Remand.

(a) Defective trial — Remand.
(b) Effect of remand by consent.
(c) Illegal order of remand.
(d) Improper order of remand.
(e) Must mention provision on remand.
(f) Procedure and rights of the parties on remand.
(g) Remand on question of custom.
(h) Refund of court fees on remand.
(i) Remand when justified.

(a) Defective trial — Remand.

——**O. 41, R. 23 — Applicability — Essential issues not framed and decided — Conflicting findings given — Sufficient ground for remand for fresh trial — Procedure.**

Where, on the pleadings in the case, it is essential that the Court should decide questions of possession, title and limitation, before disposing of the suit, but does not decide those issues, and makes a decree, the appellate Court will set aside the decree and remand the suit especially which there are conflicting findings given in the suit; and the lower Court will have to try the case afresh after framing the necessary issues and taking evidence on the points arising for consideration. A I R (Vol 37) 1950 Pat. 656 (DB).

——**O. 41, R. 23 — No proper trial.**

Where apart from the allegations of fraud it was of the utmost importance to determine the exact age of the plaintiff on the date of the institution of the previous suit and no issue was framed on the point and there was no proper trial, it was a fit case to be remanded. A I R (Vol 24) 1937 Lah 903 : 171 Ind Cas 205.

——**O. 41, R. 23 — Lower Court disallowing question in cross-examination.**

Where it appears clear that the procedure adopted by the Court below disallowing questions in cross-examination was wholly unjustifiable, regard being had to the nature of the issue raised in the suit; and the Judge's manner of dealing with the points arising for consideration in the case, on the pleadings of parties, and on the issues raised for determination in the suit was wholly unsatisfactory, the High Court will remand the case to the lower Court for a re-trial of the same in accordance with law after the parties concerned have been given opportunity of placing further evidence before the Court if they desire to do so. A I R (Vol 23) 1936 Cal 195 : 162 Ind Cas 697 (DB).

——O. 41, R. 23 — Document put in — Mechanically exhibited without reason in trial Court — Objection to admissibility in second appeal — Appellate Court ordered re-trial. A I R (Vol 14) 1927 Lah. 45 : 99 Ind Cas 920 : 8 L L J 537.

——**O. 41, R. 23 — Issue not tried by lower Court.**

Where a case is badly conducted in the lower Court and an important point has not been put in issue, an appellate Court can raise the issue and remand the case for re-trial. A I R (Vol 6) 1919 Lah 250 : 64 P R 1919 : 51 Ind Cas 712 (DB).

——O. 41, R. 23 — Where a Court refused to grant time for the production of certified copies of certain material documents and disposed of the suit on the materials on record the appellate Court remanded the suit for trial after taking the evidence adduced. A I R (Vol 5) 1918 All 375 : 43 Ind Cas 57 (DB).

——O. 41, R. 23 — Where in a suit for possession by an auction purchaser in execution of a mortgage decree the defts. pleaded tenancy rights as a bar to the suit, the court is bound to adjudicate upon the plea. If not, the appellate court will remand. A I R (Vol 5) 1918 Cal 492 : 42 Ind Cas 550 (DB).

——**O. 41, R. 23 — Procedure.**

When a Court of first instance fails to frame and determine a particular issue, the case should be sent below for a finding on that issue and the decree should not be set aside entirely and the case remanded for a re-trial. A I R (Vol 4) 1917 Pat 463 : 38 Ind Cas 641.

——O. 41, R. 23 — Suit dismissed on a preliminary point.

When the lower Court has disposed of a case on a preliminary point, the Appellate Court will not set aside the decree and remand the case, without evidence or without any statement based upon affidavit to induce the Court to hold that evidence is forthcoming which ought to have been produced in the Lower Court and which would have been produced but for some grave error on the part of the pleader. A I R (Vol 2) 1915 Bom 57 : 39 Bom 352 : 17 Bom L R 187 : 28 Ind Cas 485 (DB).

——O. 41, R. 23 — Preliminary point — Evidence not placed on record.

An order of remand may, in some cases, be made by an Appellate Court, even where the disposal has not been on a point which can be strictly called a preliminary point.

In an inquiry as to whether a dispute between the parties was settled out of Court, the Munsif looked at a receipt, and without exhibiting it in evidence or taking other evidence, decided that there had been a settlement out of Court.

Held, that the Dt. Judge had power to order a remand, for rehearing. (1913) 36 Mad. 492 : 24 M L J 512 : (1912) M W N 1000 : 15 Ind Cas 859 (DB).

——O. 41, R. 23 — Pleadings — Evidence — Remand.

Where the appellate Court finds that the plff. is prejudiced by defective pleadings and a finding on evidence which was insufficient and which he had not the opportunity of meeting the proper course would be to remit an issue on the point. (1912) 15 Ind Cas 3 (All).

——O. 41, R. 23 — Powers of Appellate Court.

The powers of appellate courts, under the new Code are much wider than under the old Code of 1882 in respect of remand. Where the Appellate Court finds there had been no proper trial in the court below and important questions had been disallowed and opportunity was not given to the parties to adduce evidence fully, the Appellate Court can remand the case for retrial though the lower Court had not disposed of the case on a preliminary point. (1912) 15 C L J 258 : 12 Ind Cas 684 (DB).

——O. 41, R. 23 — Where a lower Appellate Court thinks the first Court should have framed an issue and given a decision thereon, it should remand the case. 223 P L R 1911 : 121 P W R 1911 : 12 Ind Cas 53.

(b) Effect of remand by consent.

——O. 41, R. 23 — Suit not decided on preliminary point — Remand — Consent of parties—Illegality—Waiver — Estoppel — Effect of setting aside — Remand. (1905) 15 M L J 236 : 28 M 437 (443).

(c) Illegal order of remand.

(i) General.

(ii) Effect.

(i) General.

——O. 41, Rr. 23, 25 and 28 — Duty of appellate Court to indicate provision of law under which the remand is made.

It is not proper for an appellate Court to pass a vague order that the decree is set aside and the suit remanded for fresh decision after allowing both parties to lead evidence. The Courts of first appeal should not remand suits to trial Courts without giving any indication as to the provision of law under the C. P. Code, under which they are passing their order or without giving any clear direction to the trial Court as to what it has to do. 1945 R. D. 558 : 1945 A. W. R. (Rev.) 263 (DB)

——O. 41, R. 23—Appellate Court can remand case for fresh disposal under inherent powers. But these powers have to be exercised with discretion. Lower Court dealing with issues elaborately — Appellate Court reversing judgment and remanding case for re-trial on ground that lower Court had committed several mistakes.

Held, that the remand order was almost an abuse of power. A I R (Vol 22) 1935 Mad 715 : (1935) M W N 539 : 41 M L W 758 : 156 Ind Cas 958.

——O. 41, R. 23 — Preliminary point — Must be independent of merit — Remand order being not a decision on preliminary point — Whether bad.

Where, in a suit to set aside an award, many issues were framed, and the suit decreed on the ground that the arbitrators had no jurisdiction to pass the award, by deciding only issue No. 5 and on appeal there was an opposite finding and the case was remanded for trial on the issues, under O. 41, R. 23.

Held, that the order of remand was bad as the provisions of O. 41, R. 23, did not apply, the decision on issue No. 5 was really a decision affecting the merits of the case. A I R (Vol 21) 1934 Cal 49 : 57 C L J 473 : 150 Ind Cas 68 (DB).

——O. 41, R. 23 — Local investigation accepted by trial Court — Appellate Court if not satisfied with it can direct trial Court to take evidence under Rr. 27, 28 and 29 but cannot order retrial. A I R (Vol 15) 1928 Cal 748 : 110 Ind Cas 448 (DB).

——O. 41, R. 23 — There is no point in sending the case down to the trial Court if the only object of adopting that course is to have an enquiry under S. 158, Bengal Tenancy Act by a revenue officer. The result of such enquiry may be taken into consideration by the appellate Court itself and then the appeal may be finally disposed of. A I R (Vol 15) 1928 Cal 43 : 105 Ind Cas 133 (DB).

——O. 41, R. 23 — Where the trial Court framed seven issues, but decided only the first two and dismissed the suit, and the appellate Court remanded the case without deciding any of the issues.

Held, that the order of the appellate Court was wrong as neither R. 23 nor R. 25 of O. 41 applied. A I R (Vol 14) 1927 Lah 886 : 103 Ind Cas 119.

——O. 41, R. 23 — Where the case had not been disposed of by the lower Court upon a preliminary point, an order of remand made by the lower appellate Court under O. 41, R. 23 is illegal. A I R (Vol 10) 1923 Lah 171 : 70 Ind Cas 1008.

——O. 41, R. 23 — Where the appellate Court finds that there was no full enquiry, it should remand the case for fresh trial without recording a finding on any issue. It cannot find on one issue in favour of the plaintiffs and remand the whole case for trial to the lower Court. A I R (Vol 10) 1923 Mad. 113 : 70 Ind Cas 655 : 16 M L W 593 : 30 M L T 314.

——O. 41, R. 23 — Powers of Appellate Court.

The Appellate Court can under the rule only frame an issue and send it down to the Lower Court for a finding. It cannot remand the case for further evidence and pass a fresh decree itself. A I R (Vol 3) 1916 Pat 172 : 2 Pat L J 61 : 3 Pat L W 258 : 38 Ind Cas 797 (DB).

(ii) Effect.

——O. 41, R. 23, S. 115 — Illegal order of remand.

Appellate Court setting aside lower Court's order and remanding suit with re-framed issue with directions to take further evidence if necessary — Order is not legal — Appeal, does not lie — Order

can be set aside under S. 115. A I R (Vol 22) 1935 Lah 161 : 158 Ind Cas 86.

——**O. 41, Rr. 23 and 25 — Order R. 23 — Legality.**

An order on remand under R. 23 must be set aside, when it should have been made under R. 25. A I R (Vol 3) 1916 Lah 298 : 103 P L R 1916 : 96 P W R 1916 : 36 Ind Cas 211.

——**O. 41, R. 23 and S. 99 — Grounds for remand.**

An order of remand by an appellate Court for retrial of a suit on the ground of the unsatisfactory nature of a plan to which no exception was taken by the parties at the trial court is an illegal order contrary to the provisions of S. 562 and could not be validated by S. 578 of the Code. (1909) 32 Mad. 83 : 1 Ind Cas 746 (DB).

——**O. 41, R. 23, S. 99 (O. C. Ss. 562, 578) — Remand — Contrary to provision of S. 562 illegal — No appeal from remand order — No waiver.**

A remand contrary to the provisions of S. 562, C. P. C. (1882) is illegal and cannot be validated by S. 578 C. P. C., (1882); and even if there could have been a waiver or consent to cure it, the mere failure to appeal did not amount to such consent or waiver. (1909) 32 M 83 : 4 M L T 479 : 1 Ind Cas 746 (746, 747) (DB).

——**O. 41, R. 23: O. 45, R. 1, (Ss. 562, 594 old Code).**

An order of remand contrary to the provisions of S. 564, C. P. C., is not null, and void, and can be cured by consent. (1908) 12 C W N 590 (595, 596).

——**O. 41, R. 23 (Ss. 562, 564, old Code) — Erroneous order of remand — Subsequent proceeding, if illegal — Merits of a case.**

When a Court of first appeal purporting to act under S. 562 of the Civil Procedure Code remands a case to the Court of first instance which had not decided the suit merely on a preliminary point, the order is erroneous, but it cannot be said that the subsequent proceedings before the lower Courts are void merely because of such error. If, in consequence of such erroneous remand, there has been a wrong decision affecting the merits of the case, then and then only, will the subsequent proceedings, be set aside.

Where the Court of first instance originally decreed the plaintiff's suit but after an erroneous remand dismissed it.

Held, that the reversal of the former judgment was not a wrong decision affecting the merits of the case. (1907) 5 CLJ 71 (77) (DB).

(d) Improper order of remand.

(i) General.

(ii) Effect.

(i) General.

——**O. 41, R. 23 — Grounds — Evidence not led in spite of notice of issue — Remand to make up deficiency is not proper.**

Where a party concerned chooses to lead no evidence though notice of the issue involved had been given to them, it is of little use to argue that they may now be given a fresh opportunity by remanding the suit. AIR (Vol 38) 1951 Ajmer 93.

——**O. 41, R. 23 and O. 20, R. 5 — Appellate Court's power to order remand — When to be exercised — Remand on the ground of defect in form of judgment — If justified.**

Any order passed under O. 41, R. 23 of the Code remanding a suit is an appealable order; and the question that the High Court has to consider in appeal from an order under O. 41, R. 23 is whether the lower appellate Court has given proper reason for remanding the suit. Under the rule, the appellate Court can remand the suit if in reversing or setting aside the decree it considers it necessary in the interests of justice to do so. But it cannot do so without considering the facts. It is only where the appellate Court finds it necessary to reverse or set aside the decree that it is entitled to remand the suit.

Where the judgment of the trial Court contains its findings on all material questions of law and fact, but is defective in that it did not discuss separately under the heading of the individual issues the evidence bearing on each issue and it recorded its findings on the several issues without giving any summary of the evidence relating to the various issues, an order by the lower appellate Court remanding the suit for fresh disposal on the sole ground that the judgment contravened the provisions of O. 20, R. 5, C. P. Code and without discussing the evidence at all, is improper and has to be set aside.

The objection to the form of the judgment of the trial Court is not so much that it contravenes the provisions of O. 20, R. 5 of the Code, which does not seem to require anything more than that reasons should be given for the findings under the individual issues, but rather that if it tends to loose thinking. A I R (Vol 35) 1948 Mad 488 : (1948) 1 M L J 427 : 61 L W 407 : 1948 M W N 428.

——**O. 41, R. 23 — Remand by Appellate Court — Higher Appellate Court modifying remand without notice to opposite party.**

Ordinarily when a higher Court intends in any way to modify the order of remand of a lower Appellate Court, it would not do so without first issuing notice to the opposite party and giving him an opportunity to put his case before that Court. But if the remand order has been modified without notice to other party, the order modifying the remand order though irregular is not ultra vires and without jurisdiction. A I R (Vol 19) 1932 All 16 : (1931) A L J 858 : 135 Ind Cas 558 (DB).

——**O. 41, R. 23 — Grounds for remand — Improper remand — Decision not on preliminary point.**

Where the trial Court does not decide a case on a preliminary point, a remand under O. 41, R. 23, cannot be made. A I R (Vol 17) 1930 Lah 639.

——**O. 41, R. 23 — Insufficient grounds.**

Suit in Court of Second Class Sub-Judge returned for proper presentation — First Class Sub-Judge rejecting plaint — Appeal from order returning plaint — Rejection not brought to notice — Case remanded to Second Class Sub-Judge — No plaint being in existence remand was void. A I R (Vol 16) 1929 Bom 202 : 118 Ind Cas 252 : 31 Bom L R 357 (DB).

——**O. 41, R. 23 — Questions of law.**

If the decision of the lower Court is clearly right in law, there is no need to send the case back because it may have been based upon a debatable point of law. A I R (Vol 16) 1929 Mad 718 : 119 Ind Cas 43 : 30 M L W 230 : 1929 M W N 74.

——O. 41, R. 23 — Where the trial Court gave findings on all the issues except one but without reasons and the appellate Court remanded the case under R. 23.

Held, that the order was irregular and ought to be set aside and that the fact that the appellant would be prejudiced is not being able to raise an objection as to its jurisdiction in the appellate Court is no ground for refusing to set aside the remand. A I R (Vol 12) 1925 Mad 171 : 79 Ind Cas 857 (DB).

——O. 41, Rr. 23 and 27 — Grounds for remand — Insufficiency of evidence.

An Appellate Court could not set aside the decision of the trial court in plff.'s favour on the ground that the evidence adduced by the deft. in support of his plea was not satisfactory and sufficient. If the suit was decided on the merits and not erroneously disposed of, upon a preliminary point by the trial Court, the Appellate Court should have come to a decision itself and should not have allowed the parties to adduce additional evidence as no case was made out under O. 41, R. 27, C. P. C. A I R (Vol 4) 1917 Cal 711 : 25 C L J 473 : 39 Ind Cas 886 (DB).

——O. 41, R. 23, S. 99 (Ss. 562, 578 Old Code) — Irregularity — Powers of lower Court on remand — Full case open.

Where an order of remand by the lower appellate Court was not strictly in accordance with the provisions of S. 562, C. P. C.

Held, that this amounted to an irregularity such as was covered by the provisions of S. 578.

Held also, that the first Court was competent to go into the question of res judicata, especially when the point had not been raised and tried by the Court of first instance at the previous trial and had been raised in the appellate Court and disposed of only incidentally for the purposes of the remand only. (1907) 11 C W N 380 (386) (DB).

——O. 41, R. 23, S. 99 (Ss. 562, 578 Old Code) — Order of remand, irregular — Breach of contract, suit upon — Tort, suit upon — Parties — Obstruction, suit to remove.

When a case was remanded for fresh trial apparently under S. 562, C. P. C., on the ground that the deposition of the witnesses recorded in the first court did not bear the usual certificate, such remand was irregular, because it was not authorised by any provision of the Civil Procedure Code; such an irregularity is cured by S. 578, C. P. C., and does not ipso facto vitiate all proceedings taken after the remand. In a suit based upon a breach of contract all parties who are damnified by the breach must join.

A suit, however, in which relief is claimed on the basis of a tort, may be maintained by any of the persons injured thereby, even though the tort is a damage done to land owned by plaintiff jointly with otner persons who are not parties to the suit. When injury is caused by obstruction to the exercise of the right of irrigation which affects the productive powers of the land and endangers the receipt of rent from the tenant, not merely the tenant in actual occupation but also his landlord may sue for declaration of the right and the removal of the obstruction. (1904) 2 C L J 496 (497, 498) (DB).

(ii) Effect

——O. 41, R. 23 — Though an order of remand should properly be under R. 25 but if it is actually made under R. 23, an appeal does lie, from such an order. A I R (Vol 15) 1928 Lah 753 : 110 Ind Cas 748.

——O. 41, R. 23 — An order of remand by an appellate Court which is such in form and in substance, though it be irregular is an order under R. 23 and is appealable. A I R (Vol 12) 1925 Cal 1258 : 89 Ind Cas 744 : 42 CLJ 22 : 30 CWN 41 (DB).

——O. 41, R. 23 — Where the trial Court decides the suit on merits, it is not open to the appellate Court to remand, the case under R. 23 of O. 41, as though the suit had been decided on a preliminary point. The appellate Court should take the course indicated in R. 24 or the course indicated in R. 25. A I R (Vol 10) 1923 Cal 323 : 66 Ind Cas 922 (DB).

——O. 41, R. 23 — Decision not on preliminary point — Further investigation.

An order made by the lower Appellate Court purporting to be and being in form and substance an order under O. 41, R. 23 is appealable though the Court ought not to have remanded the case under the provisions of that rule. Where the Lower Appellate Court thinks that the investigation is wrong and that there should be further investigation or that it is necessary to take additional evidence in order to enable it to pronounce judgment it might direct such investigation or take such additional evidence, retaining the appeals on its file but should not make an order under R. 23. A I R (Vol 7) 1920 Cal 124 : 24 C W N 708 : 31 C L J 360 : 56 Ind Cas 516 (DB).

——O. 41, R. 23 — Remand for fresh decision on further evidence.

An appellate Court cannot remand a case, not disposed of on a preliminary point, for a fresh decision on taking further evidence. It should not exercise its inherent power of remand except for the ends of justice. A I R (Vol 6) 1919 Cal 1017 : 27 C L J 596 : 46 Ind Cas 333 (DB).

——O. 41, R. 23, O. 43, (1) (a), O. 45, R. 4 — Remand — Preliminary point — Irregular remand — Punjab Courts Act (XVIII of 1884), as amended, S. 70 (a) (b) — Revision — Civil cases — Appeal — Material irregularity.

The original Court framed an issue, among others, whether the parties were governed by custom or Hindu Law and decided the suit placing the onus on the plaintiff. On appeal the Divisional judge being of opinion that the onus should have been on the defendant remanded the suit for fresh trial under O. 41, R. 23, of the C. P. C.

On further appeal; held, that the order was not appealable — Vide Rule 43 (1) (a).

Held, also, that revision under clause (1) (b) S. 70, of the Punjab Courts Act did not lie for the order passed by the Divisional Court did not amount to a "decree"; that the order must be revised under clause (1) (a) of S. 70 for the form of order was bad, the original Court not having determined the suit on a preliminary point and the Divisional Court not having reversed any decision of the original Court.

Held further, that O. 45, R. 4, does not apply to appeals preferred to the Chief Court but only to appeals to the King-in-Council. (1910) 1910 P L R No. 17 p. 41 : 6 Ind Cas 491 (491, 492) : 1910 P W R 123.

——O. 41, R. 23 (Ss. 562, 564 Old Code) — Illegal order of remand — Validity — Waiver — Appeal from final decree — Objection to remand — Appeal from order of remand after final decree.

An erroneous order of remand does not affect the jurisdiction of a Court and consequently may be cured by consent. A party who has consented to an erroneous order of remand is not entitled to treat it as void and incapable of being validated by consent or waiver. No appeal can be filed against the order of remand after final decree. When an order of remand has been made, its validity may be challenged directly and immediately by an appeal under S. 588, Cl. (28), or indirectly under S. 591 when an appeal is preferred against the final decree in the suit.

The party affected by the order of remand should make his election. He may, if he chooses, prefer an appeal against the order of remand and obtain a stay of proceedings during the pendency of the appeal; he may, on the other hand, carry out the order of remand, take the chance of a successful termination of the suit in his favour, and, in the event of defeat prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand. (1907) 6 C L J 547 (550).

(e) Must mention provision on remand.

——O. 41, R. 23 — The Court of appeal when it remands a suit to the trial Court for fresh disposal should make it quite clear whether the order of remand is made under O. 41, R. 23, or independently of that provision. A I R (Vol 16) 1929 Mad 205 : 119 Ind Cas 705 (DB).

(f) Procedure and rights of the parties on remand.

——O. 41, R. 23 — Where a case is remanded for re-trial, the parties are not entitled to notice of the receipt of records by the lower Court. A I R (Vol 20) 1933 Cal 83 : 36 C W N 693 : 141 Ind Cas 877 (DB).

——O. 41, R. 23 — When a reference is made to the District Judge under the Land Acquisition Act and objections are taken by various parties to the Collector's award and one person does not take part in the proceedings before District Judge, he and those who have not appealed from order of District Judge cannot intervene as objectors on remand of the case from High Court to District Judge. A I R (Vol 20) 1933 Lah 948 : 35 P L R 221 : 147 Ind Cas 953 (DB).

——O. 41, R. 23 — Appeal against remand order — Maintainability of.

When once a Court has disposed of a case either on a preliminary point or on the merits, it has no jurisdiction to re-hear it except by way of a review. Its jurisdiction to re-hear the case on remand depends upon the remand order. Therefore, when a party not only does not object to the exercise of the jurisdiction by the Court, but also takes part in the proceeding hoping to win the case ultimately he should not be allowed to repudiate the whole proceeding as being null and void when he loses the case. On the other hand, if he protests against the order of remand and refuses to take part in the proceeding subsequent to the order of remand, he should not be deprived of the right to appeal from the order of remand within the time allowed by law even if the case has in the meantime been disposed of by the Court of first instance. A I R (Vol 20) 1933 Rang 413 : 149 Ind Cas 1120.

——O. 41, R. 23 — Remand for impleading new party.

A Court of Appeal while sending a case to the trial Judge for the purpose of having a necessary party brought before the Court should not proceed, before the new party has been joined or heard and without considering what defences may be available against him, to indicate the order which the trial Judge should make when he tries the case in the presence of proper parties. AIR (V 19) 1932 PC 146 : 36 MLW 135 : 63 MLJ 369 : 136 Ind Cas 632.

——O. 41, R. 23 — Direction that party should pay costs within certain period after receipt of order by trial Court — Trial Court, whether bound to give notice to party.

Where a case is remanded with a direction for re-trial on condition that the plaintiff pays the costs of the previous suit within a certain number of days of the receipt of the order of remand by the trial Court, the trial Court is not bound to serve the plaintiff with notice of the receipt of the record by it. It is the duty of the plaintiff to take necessary steps to find out when the record was received by the trial Court. (1932) 136 Ind Cas 251 : 8 O W N (CC) 1235 : 16 R D 9.

——O. 41, R. 23 — New plea after remand.

Where an order of remand in a suit for ejectment of a raiyat left it open to the Subordinate Judge to deal with all questions that might arise in the suit, and after remand, in support of his defence that he was an occupancy-raiyat, the defendant put forward an additional and new reason based on Sub-S. (1-A) of S. 20 of the Ben. Ten. Act which was then the law.

Held, that he was entitled to do so and the Subordinate Judge was right in considering it. A I R (Vol 18) 1931 Cal 321 : 52 C L J 597 : 35 C W N 125 : 58 Cal 817 : 131 Ind Cas 398 (DB).

——O. 41, R. 23 — No notice of remand is given in C. P.

Obiter :—Where a case is remanded for retrial by the First Court no notice is given to the parties of the date fixed for the re-hearing according to the practice of the Courts in the Central Provinces. A I R (Vol 12) 1925 Nag 31 : 76 Ind Cas 46.

——O. 41, R. 23, O. 45 R. 1 (Ss. 562, 594 Old Code) — Order of remand — Maintainability.

When an order of remand has been made its validity may be challenged directly or indirectly by an appeal under S. 588, Cl. (28) or indirectly under S. 591, when an appeal is preferred against the final decree in the suit.

The party affected must, however, make his election. He cannot after having taken the full benefit of the order, turn round and prefer an appeal against the order of remand without an appeal against the final decree after the trial. (1908) 6 C L J 547 : 12 C W N 590 (597) (DB).

(g) Remand on question of custom.

——O. 41, R. 23 — Pre-emption — Custom pleaded in the first Court — Contract, pleading of, in the appellate Court — Latter Court should not decide the point but allow amendment and remand case. A I R (Vol 9) 1922 All 281 : 66 Ind Cas 572 : 44 All 571 : 20 A L J 464 (DB).

——O. 41, R. 23 — Order of remand on question of custom.

An appeal from an order of an appellate Court under O. 41, R. 23 does lie in all cases except where absolutely no right of second appeal is given in the body of the Code or by any other law. The Legislature intended to put orders of remand on exactly on the same footing as an appellate decree and to make them appealable on precisely the same grounds. If a mistake in deciding the question of custom can be corrected in an appeal from an appellate decree it is reasonable to hold that it can and ought to be corrected in an appeal from an order of remand also. A I R (Vol 9) 1922 Lah 178 : 68 Ind Cas 849 : 3 Lah 218 : 4 LLJ 359 (FB).

(h) Refund of court-fees on remand.

——O. 41, R. 23 and S. 13, Court Fees Act.

Suit — Defence struck of — Ex parte decree — Appeal — Remand.

Held, that the remand being under O. 41, R. 23, the applicants were entitled to the refund of their court-fee. (1942) I L R (1942) All 84 : 1941 R D 983 : (1941) A L J 604.

——O. 41, R. 23 — When a case is remanded for re-hearing and re-decision in accordance with law, the court-fee paid in second appeal shall be refunded. (1940) 42 P L R 275.

——O. 41, R. 23 — A refund of court-fee may be ordered when an improper judgment is set aside and a remand for proper trial is made. (1940) 42 P L R 136.

——O. 41, R. 23 — Even though the Appellate Court has purported to remand the suit under S. 151, Civil P. C., if as a matter of fact a remand can be deemed to have been made on any of the grounds mentioned in O. 41, R. 23, Civil P. C., the appellant is entitled to a refund certificate under S. 13 of the Court Fees Act. A I R (Vol 21) 1934 Mad 643 : 40 M L W 372 : (1934) M W N 1070 : 151 Ind Cas 721 (2).

——O. 41, R. 23 — When a Court of second appeal remands a case to lower Appellate Court under O. 41, R. 23, the appellant is entitled to under S. 13, Court Fees Act, refund of court-fee paid on memorandum of appeal. A I R (Vol 19) 1932 All 641 : (1932) A L J 745 : 54 All 1081 : 140 Ind Cas 56 (SB).

——O. 41, R. 23 — A Court remanding a case under S. 151, is competent to order a refund of court-fee paid on the memorandum of appeal. A I R (Vol 19) 1932 Lah 219 : 33 P L R 54 : 136 Ind Cas 559.

——O. 41, R. 23 — Order under.

Mere omission to pass order for refund of Court-fees does not make an order one as passed under any other law. A I R (Vol 16) 1929 Lah 175 : 118 Ind Cas 393.

——O. 41, R. 23 — Trial Court dismissing suit without entering into merits on ground of defect in description of defendant-Appellate Court directing amendment of plaint and remanding the case — Court-fee on appeal ordered to be refunded — Appellate Court's order was held one of remand and open to appeal. A I R (Vol 12) 1925 Cal 716 : 90 Ind Cas 426 : 52 Cal 783 : 29 C W N 614 (DB).

——O. 41, R. 23 — Inherent power — Refund of Court-fee — Court-fees Act, S. 13.

Under the new Code a first Appellate Court can order a remand for retrial though the decision of the Court of First instance was not on a preliminary point but it cannot order a refund of Court fees unless the decision of the Court of First Instance was on a preliminary point. A I R (Vol 5) 1918 Nag 271 : 42 Ind Cas 304.

——O. 41, R. 23 — Inherent power — Court-fees Act, S. 13 — S. 562 of the Code of 1882, compared — Remand only under R. 23.

Only O. 41, R. 23 expressly allows a Court of first appeal to remand a case for a second decision by the original Court. Only when a remand is made under this rule, S. 13 of the Court Fees Act, 1870 permits and directs a refund of the Court fee paid on the memo. of appeal. Except under O. 41, R. 23, no case shall be remanded for a second decision which can disposed of finally by the first Appellate Court. AIR (Vol 3) 1916 Nag 17: 12 NLR 126: 36 Ind Cas 241.

(i) Remand when justified.

——O. 41, Rr. 23 and 25 — Remand for decision of question of law — If justified.

There is no justification for an appellate Court to sent back for the decision of the trial Court a question which is entirely a question of law. A I R (Vol 37) 1950 Cal 510 : 85 C L J 270.

——O. 41, R. 23 — Remand when justified — No material before appellate Court for concluding that decree was wrong — Remand to make the trial Court to think over a matter once again — If justified.

In a suit certain allegations were made against the present appellant that he had fabricated some secondary evidence. The trial Court dismissed the contention. There was an appeal which was dismissed and a second appeal against it to the High Court was pending. Meanwhile the respondent filed an application requesting the Court under S. 476, Criminal Procedure Code, to file a complaint against appellant. The Court refused the request.

On appeal under S. 476-B of the Criminal Procedure Code the District Judge finding the lower court's enquiry somewhat inadequate remanded the matter with a direction that the then presiding Subordinate Judge (the successor to the Judge who had passed the prior order) should make such enquiry as he deemed fit and hear and decide whether a prosecution was necessary in the interests of justice.

Held, the remand under the circumstances was improper. Under O. 41, R. 23, Civil Procedure Code, a remand can be ordered only where the appellate Court finds it necessary to set aside a decree and that can be done only if the Court has material for concluding that the decree was wrong.

An appellate Court cannot direct the trial Court to think over a matter once again and give fresh findings on the same issue giving some vague and general directions to make further inquiry. The District Judge could have himself suo motu enquired into the matter if he wished but he could not direct the Subordinate Court under the circumstances to make another inquiry. (1950) 1950-2 MLJ 370.

——O. 41, Rr. 23 and 31 — Remand when justified — Absence of discussion of evidence by first appellate Court and finding on important issue.

Where a lower appellate Court has neither discussed the oral or documentary evidence nor given any finding on the point necessary for the decision of the case but allowed the appeal the case has to be remanded to that Court for fresh disposal after discussing the evidence and arriving at the findings on the points arising. 1949 R D 406 (DB).

——O. 41, Rr. 23 and 27 — Remand — Grounds — Additional evidence tendered to appellate Court — Remand on that ground — Legality — Duty of appellate Court.

The mere fact that evidence was tendered before the appellate Court would not justify any remand of the case. The powers of the appellate Court to admit additional evidence in appeal are contained in O. 41, R. 27 of the Code. Under that rule whenever additional evidence is allowed to be produced by an appellate Court, it is bound to record its reasons for its admission. Further, the Cls. (a), (b) and (c) of R. (1) must be considered to find out whether a case is made out for admitting additional evidence. A I R (Vol 35) 1948 Mad 348 : 61 L W 330 : 1948 M W N 313 : (1948) 1 M L J 336.

——O. 41, R. 23 — Lower Court's decision vitiated by misdirection as regards onus.

Where the decision of the lower Court is obviously vitiated by misdirection as regards onus and the determination of the dispute involves question of fact as well as law and an appeal lies only on a

question of law, the Appellate Court should order a new trial. A I R (Vol 28) 1941 P C 99 : 8 B R 184 : 1941 A W R (HC) Rev 747 : 197 Ind Cas 48 (PC).

——O. 41, R. 23 — No ground — Respondent shifting liability on other co-defendant not made party.

If a plaintiff whose suit has been dismissed choses to implead in his appeal only one of two co-defendants against whom an alternative claim was made, he has only himself to blame if the respondent in the appeal succeeds in shifting the liability on to the defendant who has not been impleaded in the appeal. It is not either necessary or desirable in the interest of justice in such a case, merely because a wrong decree passed against one who was no longer a party has been challenged in revision, to direct the appeal to be re-heard and to allow the plaintiff to do that which he should have done in the first instance, namely implead both the defendants. A I R (Vol 27) 1940 Mad 609 : 51 M L W 615 : (1940) M W N 422 : 191 Ind Cas 891.

——O. 41, R. 23 — Remand — General rule.

As a general rule, it is undesirable to remand a case merely in order to give an opportunity to both parties to adduce evidence which might and ought to have been put before the trial Court; and there is a clear danger that such a remand order may in effect be an invitation to perjury.

But where the Appellate Court found that the concubine of a deceased Hindu was entitled to maintenance and having regard to the fact that she had got a decree in a connected suit for a certain debt due from the estate of the deceased and that there was another claim for maintenance the same estate brought by a widow of the deceased which had been remanded for taking further evidence as to the quantum of the assets and liabilities of the estate remanded the case of the concubine for further evidence on the same point, the evidence in both suits to be taken in common, the remand was held justified and proper. A I R (Vol 27) 1940 Mad 511 : (1940) 1 MLJ 60 : 51 MLW 113 : (1940) MWN 109 : 191 Ind Cas 383.

——O. 41, R. 23 — Remand — It is undesirable to send case back to first Court for new trial and at same time to decide some of issues.

It is undesirable to send a case back to the first Court for a new trial and at the same time decide some of the issues. If it should be necessary in some extraordinary circumstances to have a fresh trial then the Appellate Court should be careful not to pre-judge some of the issues. A I R (Vol 27) 1940 Nag 349 : 1940 N L J 350 : I L R (1940) Nag 531 : 191 Ind Cas 566 (DB).

——O. 41, R 23 — No ground — Plaintiff having opportunity to produce evidence in trial Court.

On the pleadings, the Court framed issues which arose and noted that the burden of proof was on the plaintiff. The plaintiff had every opportunity of producing evidence on such issues.

Held, that it would not be fair to the defendant to send the case back to the trial Court in order to give an additional opportunity to the plaintiff for producing further evidence. A I R (Vol 23) 1936 All 78 : 1935 A W R (HC) 1135 : 160 Ind Cas 912.

——O. 41, R. 23 — No ground — Small discrepancy in finding as to amount due.

Where there is a small discrepancy in the finding of amount due, a remand by the second Appellate Court will not be justified. A I R (Vol 23) 1936 Pat 539 : 3 B R 59 : 15 Pat 709 : 18 P L T 79 : 165 Ind Cas 593 (DB).

——O. 41, R. 23 — No ground — Adducing of all evidence — Remand — Propriety of.

Where evidence had been adduced by the parties with regard to all the issues which had been framed and there was no complaint before the Judge nor was there any complaint before the High Court that any evidence was shut out, an order of remand by the Court of first appeal is not proper but that Court should dispose of the case on the evidence already on record. A I R (Vol 21) 1934 Cal 433 : 38 C W N 133 : 151 Ind Cas 458 (2) (DB).

——O. 41, R. 23 — Suit to set aside alienation — Trial Court finding land to be non-ancestral — Decree — Appeal — Finding that plaint did not attack alienations on ground of incompetency of vendors — Remand — Necessity of.

The plaintiffs as reversioners filed a suit to set aside alienations which they alleged had been made either by two persons A and B asserting that the property belonged to them or as guardians of the real owner who was of unsound mind. It afterwards transpired that they were made by A alone and he did not profess to act as guardian of the real owner. The trial Court found that the land was not ancestral but considering that the suit was also in the alternative to set aside the sale on the ground of the incompetency of the alleged vendors, he decreed the suit. On appeal the District Judge accepted the contention that it was an ordinary suit by a reversioner to set aside an alienation of ancestral land brought under the Customary Law of Punjab and on the finding that the land alienated was not ancestral, the suit should have been dismissed, and accepted the appeal.

Held, that if the District Judge considered that the plaint did not expressly profess to attack the alienations on the ground of incompetency of the so-called alienors, then he should have under the circumstances of the case allowed an amendment of the plaint and remanded the suit for re-trial as he had found that the defendants had been taken unawares as to the nature of the suit as found by the trial Judge, and this order he should have passed specially in view of the fact that the trial Judge understood the suit to be of that description and the plaintiffs asserted it to be such. A I R (Vol 21) 1934 Lah 196 (2) : 147 Ind Cas 491.

——O. 41, R. 23 — Admission as to untruth of allegations in plaint — Dismissal of suit — Alternative prayer on facts contradictory to allegations in plaint — Prayer for remand.

Held, that the remand should not be allowed and the appeal should be dismissed. A I R (Vol 20) 1933 Lah 1045 : 149 Ind Cas 922 (DB).

—— O. 41, R. 23 —— No ground.

If certain points are urged before the Appellate Court to support the trial Court's order and are omitted to be noticed in the appellate judgment then the case should be sent down for re-hearing and disposal. If it was due to non mention of the points by the Pleader then the presumption will be that those points had been abandoned and in that case, there would be no justification for a remand. A I R (Vol 20) 1933 Mad 179 : 145 Ind Cas 394

——O. 41, R. 23 — Appellate Court unable to dispose of suit on merits.

Where it is clearly apparent that the appellate Court cannot itself dispose of a suit, on the merits by the adoption of the specific procedure mentioned in Rr. 24-29 of O. 41, a remand for retrial is not only permissible but obviously incumbent

on the Court. 101 Ind Cas 281 : A I R (Vol 14) 1927 Nag. 192.

——O. 41, R. 23 ——Where the suit had not been disposed of by the trial Court on a preliminary point but it had been decided on the merits after the entire evidence produced by both the parties had been recorded and proper issues had been framed by the trial Court and evidence had been given by both the parties,

Held, that remand under O. 41, R. 23, was not justified. (1926) 96 Ind Cas 786 (Lah.).

——O. 41, R. 23 —— Trial Court deciding three points and dismissing suit— Appellate Court deciding only one point and remitting case is not justified. A I R (Vol 12) 1925 Cal 716 : 90 Ind Cas 426 : 52 Cal 783 : 29 C W N 614 (DB).

——O. 41, R. 23 — Remand should not be made where necessities of case are specifically provided for by the Code. A I R (Vol 12) 1925 Cal 274 : 82 Ind Cas 663 (DB).

——O. 41, R. 23 — Where the judgment of the lower Court is based on inadmissible evidence, remand would be proper but where apart from the inadmissible evidence the Court is mainly influenced by the absence of evidence on behalf of the defendant and the positive evidence of plaintiff's witnesses, it will serve no useful purpose to remand the case for a reconsideration of the evidence. A I R (Vol 11) 1924 Cal 370 : 71 Ind Cas 300.

——O. 41, R. 23 — Omission to consider facts and actual bringing them to notice must be proved to justify remand. A I R (Vol 11) 1924 Nag 65 : 71 Ind Cas 43.

——O. 41, R. 23 — Where the Court of first hearing appears to have decided every issue, the fact that its decision on a preliminary point covered the decision on the remaining points does not justify its being held that the decision was only on a preliminary point. A I R (Vol 11) 1924 Oudh 97 : 74 Ind Cas 582.

——O. 41, R. 23 — Where pleading of gross negligence is not distinct but issue framed is wide enough to cover gross negligence and evidence is produced to prove it, finding as to gross negligence is necessary, and remand is justifiable. A I R (Vol 10) 1923 Mad 718 : 45 M L J 324 : 74 Ind Cas 218 : 18 MLW 49 : 1923 MWN 452 : 33 MLT 46 (DB).

——O. 41, R. 23 — Order under inherent powers to be made only where justice demands it — C. P. Code, S. 151.

Held, that an appeal lies from the order. To say that, there is no appeal where the Court acts in contravention of the rule and reverses the judgment of the trial Court and remands the case where the order of remand is erroneous. An appellate Court has inherent powers to order a remand which can, however, be made only where the justice of the case demands it. A I R (Vol 9) 1922 Cal 279 : 80 Ind Cas 172 (DB).

——O. 41, R. 23 (S. 562 Old Code) — Remand — Arbitration — Appeal from decree based on award — Further reference to arbitration — Bad award.

On appeal from a decree based upon an award the parties agreed to refer the matters in dispute again to arbitration. The second arbitration, however, proved infructuous, the court holding that the award could not be sustained.

Held, that the lower appellate court was right under these circumstances in remanding the case to the court of first instance under S. 562 for disposal on the merits. (1905) 1905 A W N 164 : 2 A L J 477 (479) (DB).

20. Scope and applicability.

——O. 41, R. 23 — O. 41, R. 23-A (Lahore Amendment) — Scope — Appeal — Order rejecting plaint under O. 7, R. 11 — Appeal — Reversal and remand — Second appeal — Competency.

Where the trial Court rejects a plaint under O. 7, R. 11, C. P. Code, for non-payment of additional court-fee demanded, and the appellate Court in appeal from such rejection reverses and remands the case, the order of remand is competant in view of the addition of R. 23-A to O. 41, C. P. Code, by the Lahore High Court Amendment. AIR (Vol 35) 1948 EP 9 : 50 PLR 14.

——O. 41, R. 23 — Remand under inherent power of Court — Appealability.

O. 41, R. 23, C. P. Code, applies only when a case has been determined by the trial Court on a preliminary point. It can have no application to cases where all the issues framed have been determined and findings recorded thereon. If there is a remand in such a case it must be taken to have been made under S. 151, C. P. Code, in the exercise of the inherent powers of the Court. The result would be that in the latter case no appeal would ordinarily lie. The question as to whether an order falls under R. 23 of O. 41 or not has to be determined with reference to the order itself and any expression of opinion in regard to it by the Judge who passed the order cannot affect the decision of that question. AIR (Vol 35) 1948 Oudh 220: 1948 OWN 117: 1948 AWR (CC) 37: (1948) OA (CC) 37.

——O. 41, R. 23 — O. 41, R. 23-A and O. 43, R. 1 (u) (Lah) O. 41, Rr. 25, 27, Ss. 96, 122 — Conditions which every rule framed by High Court must satisfy — O. 41, R. 23-A and O. 43, R. 1 (u) are intra vires of Lahore High Court.

It is essential for the validity of every rule framed by the High Court to satisfy the following conditions; (i) the delegated power of legislation conferred on the High Court in Part 10 of the Code is limited to annulling, or altering or adding to the rules in Sch. I, of the Code; (ii) the rules framed must relate to matters regulating the procedure of the High Court or Subordinate Courts; and (iii) such rules must not be inconsistent with any provision in the body of the Code. Rule 23-A of O. 41, as amended, does not offend against S. 128; it is not in any way inconsistent with S. 151 or any other provision in the body of the Code. If S. 151, empowers an Appellate Court to remand a case (not covered by R. 23, or R. 25), under its inherent power "in the interest of justice", R. 23-A of O. 41, really makes explicit provision for such a remand order: it, therefore, far from being inconsistent, with S. 151, really gives effect to it.

Section 104, Civil P. C., permits appeals not only from orders mentioned in R. 1 of O. 43, as originally enacted but also from rules as might thereafter be added by the High Court under S. 122, after following the procedure laid down in Part X. Accordingly, if the High Court adds a rule to O. 43, as R. 23-A, making an order appealable, which was not appealable formerly, such rule is automatically covered by S. 104. Both O. 43, R. 1 (u) and O. 41, R. 23-A as amended, are, therefore, intra vires of the Lahore High Court. AIR (Vol 29) 1942 Lah 201: 44 PLR 253: ILR (1943) Lah 569: 201 Ind Cas 667 (DB).

——O. 41, R. 23 — Provisions of S. 107 as elucidated by O. 41, R. 23, are not intended to allow unsuccessful litigant in lower Court to patch up weak parts in a case and fill up omission. AIR (Vol 28) 1941 Pesh 28 : 1941 Pesh LJ 23 : 193 Ind Cas 871 (DB).

——O. 41, R. 23 — An order of remand would fall under R. 23 only when it is necessitated by some question arising in the case not having been decided but where the remand has been ordered because the

entire trial of case was considered unsatisfactory and pleadings of parties were found to be vague and indefinite, it is clearly a remand under inherent powers of Court and not one falling under R. 23. (1940) 186 Ind Cas 558: 1940 OWN (CC) 185 : 1940 AWR(CC) 97: 15 Luck 448.

——O. 41, R. 23 — Order 41, R. 23, applies only if the suit has been disposed of on a preliminary point. AIR (Vol 25) 1938 Nag 144: ILR (1940) Nag 517: 173 Ind Cas 266.

——O. 41, Rr. 23, 25 — Power of remand, if limited to Rr. 23 and 25.

An Appellate Court's powers of remand are not circumscribed within the limits of O. 41, Rr. 23 and 25. AIR (Vol 24) 1937 Oudh 338: 1937 OWN (C C) 377 : 13 Luck 209: 167 Ind Cas 922 (DB).

——O. 41, R. 23 — Case dismissed by Court under O. 17, R. 3.

Order 41, R. 23 only applies when a Court has decided the case on a preliminary point. It does not apply to a case where the plaintiff's suit has been dismissed by the Court proceeding under O. 17, R. 3. AIR (Vol 22) 1935 Rang 123.

——O. 41, R. 23 — Suit not decided on preliminary point.

Where a suit is not decided on the preliminary point, it is not open to the Appellate Court to send back the suit for determination to the Court of first instance as O. 41, R. 23 does not apply. AIR (Vol 20) 1933 Cal 632 : 37 CWN 504: 66 Cal 733: 146 Ind Cas 671 (DB).

——O. 41, R. 23 — To determine the applicability or otherwise of an order of remand, regard must be had to under what provision of law the remand was made and not to whether the remand ought to have been made under a particular provision of law. AIR (Vol 19) 1932 Lah 311 : 33 PLR 285: 138 Ind Cas 202.

——O. 41, R. 23 — Inherent powers — Scope.

Even where O. 41, R. 23, does not apply, the suit not having been disposed of on a preliminary issue, the Appellate Court has inherent power to make an order of remand under S. 151. AIR (Vol 17) 1930 Mad 72: 119 Ind Cas 466.

——O. 41, R. 23 — The provision in S. 105 (2) confines the scope of the appeal from an order of remand under O. 41, R. 23 to the question of the correctness of the order of remand which may be impeached either on the ground that the remand itself was illegal as the decision of the first Court was not on a preliminary point or on the ground that the decision of the preliminary point by the appellate Court is erroneous. No other questions can be raised in such appeal, whatever bearing they may have upon the merits of the appellants' case. However neither party will be precluded from raising any other question which may be legitimately open to him, if and when the case comes before the High Court subsequently. AIR (Vol 15) 1928 Mad 430 : 109 Ind Cas 130: 27 MLW 483 (DB).

——O. 41, R. 23 — Rule applies if whole suit is remanded.

R. 23, applies only to cases where the whole suit has been determined upon a preliminary point, and not to cases where a portion only of the suit has been so decided and reversed on appeal. Where, therefore, a case is remanded not for the whole claim but only as to a portion, the remand is not one under R. 23, and is not appealable. AIR (Vol 13) 1926 Pat 514: 8 PLT 9: 1926 PHCC 279: 97 Ind Cas 1 (DB).

——O. 41, R. 23 — Non-joinder.

O. 43, R. 1 (u) gives right of appeal against an order under O. 41, R. 23, but that rule applies only when the trial Court has disposed of the suit on a preliminary point. Where the Appellate Court set aside the trial Court's decree on the ground of non-joinder of a necessary party and remanded the case for a fresh trial with the addition of such party.

Held, that this is not disposing of the suit on a preliminary point, and so neither O. 41, R. 23, nor O. 43, R. 1 (u) applied. AIR (Vol 12) 1925 Rang 320 : 92 Ind Cas 368: 4 Bur LJ 159 : 3 Rang 490 (DB).

——O. 41, R. 23 — Remand meaning.

The word remand should be used only when a case is returned for decision. It is used in this sense in the C. P. Code and is not used there in the provisions for return of a case for findings. AIR (Vol 12) 1925 Rang 303 : 92 Ind Cas 370: 4 Bur LJ 135.

——O. 41, R. 23 — Findings of fact not to be questioned.

The Lower Appellate Court made an order of remand under O. 41, R. 23, Civil Procedure Code, remanding the case to the Original Court for the decision of the remaining questions arising in the case. An appeal was preferred to the High Court.

Held, the policy of the legislature being not to allow a second appeal on facts, it is difficult to see how the appellant coming in appeal under O. 43, R. 1 (u) can question findings of fact in this Court. AIR (Vol 9) 1922 Lah 97 (2) : 59 Ind Cas 715 : 2 Lah 25: 31 PWR 1921 (DB).

——O. 41, R. 23 — If the order is simply an order of remand, not falling within O. 41, R. 23, it is not appealable under O. 43, as sub-cl. (u) only refers to an order under R. 23 of O. 41 remanding a case. The powers conferred by O. 41, R. 23 are not exhaustive. AIR (Vol 9) 1922 Mad 112 : 42 MLJ 372: 68 Ind Cas 869: 45 Mad 449: 1922 MWN 269: 15 MLW 537 : 30 MLT 217 (DB).

——O. 41, R. 23 — Remand.

The power of the appellate Court as regards remand are thus not restricted to the case specified in O. 41, R. 23, but the Court may make such orders as are necessary for the interests of justice and the inherent power extends to orders for remand outside O. 41, R. 23, C. P. C. 1920 Pat HCC 222: 58 Ind Cas 444: AIR (Vol 7) 1920 Pat 686: 2 UPLR (Pat) 48 (DB).

——O. 41, R. 23 (S. 562 old Code) — Remand order—Jurisdiction of appellate Court.

The Court of Appeal has no power under S. 566 of the Code of Civil Procedure to frame issues for trial and refer them to the lower Court when the latter has rightly or wrongly determined the question of fact arising for determination. The power can be exercised when the lower Court has omitted to determine an essential question of fact. The appellate Court can call for further evidence under S. 568 of the Code and deal with that evidence when laid before it. (1909) 9 CLJ 464: 4 Ind Cas 168 (169) (DB).

——O. 41, R. 23 (S. 562 old Code) — Partial remand — Bad.

S. 562, C. P. C., authorises remand only where the entire suit and not merely a portion of it has been disposed of on a preliminary point (1904) 1 ALJ 503: 1904 AWN 202: 27 A 163 (165) (DB).

——O. 41, R. 23 (S. 562 old Code) — Suit by a co-sharer landlord for his share of the rent — Agreement to pay in shares set up — Dismissal of suit on non-proof of agreement — Appeal — Remand order on amendment as a suit for the whole rent — Applicability of S. 562.

Where the plaintiff brought a suit for his share of rent due from a tenant and the suit was dismissed as the agreement to pay in separate shares was not proved, an appellate court which does not find the agreement set up to be true, but only allows the suit

to be amended as a suit for the whole of the rent, has no power to remand it for trial under S. 562. (1902) 6 CWN 326 (327) (DB).

——O. 41, R. 24.

——O. 41, Rr. 24 and 33 and O. 42, R. 1 — Power of second appellate Court to decide point not decided by lower appellate Court.

Under R. 24 of O. 41, C. P. Code, the appellate Court may determine a point finally if the evidence on record is sufficient for the purpose and under R. 33 of the same order, the appellate Court may make an order which ought to have been passed by the lower Court. Both these rules are applicable to second appeals under R. 1 of O. 42. Hence where a question has been fully dealt with in the lower Court but not decided the second appellate Court can decide the point on the materials on record and need not remand the case to the lower Court. 1948 RD 257: 1948 AWR (Rev.) 237.

——O. 41, R. 24 — Trial Court recording evidence but deciding case without considering some evidence as inadmissible — Appellate Court holding evidence admissible and without remanding case affirming decree on facts after considering whole evidence under O. 41, R. 24:

Held, that the procedure of the Appellate Court was justified under O 41, R. 24 and there was ground for second appeal under S. 100. AIR (Vol 20) 1933 Rang 35 : 142 Ind Cas 829 (2).

——O. 41, R. 24 — Relevancy of documents.

Question of relevancy of a document, though not raised in trial Court can be considered by first appellate Court. AIR (Vol 15) 1928 Cal 512 : 109 Ind Cas 25.

——O. 41, R. 24 — Appeal from order returning plaint — Decision on merits — Ultra vires.

Where an appeal is filed from an appealable order, the appellate Court cannot take up other grounds which have not been decided by the Court of first instance. Therefore, where the trial Court returns a plaint for want of jurisdiction, in appeal the appellate Court can only try the issue of jurisdiction and if it considers the lower Court's order to be wrong, it should simply direct that Court to try the suit. Decision by the appellate Court on the merits is ultra vires. AIR (Vol 14) 1927 Oudh 218 : 1 LC 24 : 102 Ind Cas 467.

——O. 41, R. 24 — Power of Court — Decision on the evidence on record — Amendment of pleadings — Title and possession — Adverse possession.

When an alternative case is pleaded in the Appellate Court, it will not act under this rule, unless the case arises on the facts stated in the plaint and defendant is not taken by surprise. AIR (Vol 4) 1917 Cal 469 : 20 CWN 773 : 36 Ind Cas 890 (DB).

——O. 41, Rr. 24 and 25 — Framing new issue.

Where the Court of first instance had an issue "have the plaintiffs, their alleged right of way by necessity, grant or prescription", to which the Lower Appellate Court added the issue. Has the plaintiff acquired the right of user by custom" and then purporting to act under O. 41, R. 24, C. P. C., dealt with the case on the evidence as it stood without taking evidence or remanding the case for fresh evidence. Held, that the Judge acted wrongly in that he was not re-settling the issues but framed an entirely new issue and that he should have proceeded under O. 41, R. 25, C. P. C. AIR (Vol 4) 1917 Cal 196 : 25 CLJ 527 : 40 Ind Cas 411 (DB).

——O. 41, R. 24 — Second appeal — High Court — Decision on merits.

When a judgment is reversed in second appeal on a point of law the High Court is competent to decide the case on the merits under O. 41, R. 24 and O. 42, R. 1, C. P. C. AIR (Vol 1) 1914 Lah 68 : 108 PWR 1914 : 202 PLR 1914 : 25 Ind Cas 144.

——O. 41, R. 24 — Pleadings — No specific issue raised — Disposal by Appellate Court.

The absence of a specific issue on a point does not debar an Appellate Court from disposing of the appeal on a finding on that point where it is raised in the pleadings and no prejudice is caused to the other side thereby. (1913) 6 Bur LT 134 : 17 LBR 79 : 20 Ind Cas 674.

——O. 41, R. 24 — Second Appeal — High Court — Power of.

The High Court has jurisdiction to record its finding in the second appeal on a question of fact left undetermined by the lower Court, though it arises from the admitted facts. (1911) 36 Bom LR 183 : 13 Bom LR 1183 : 12 Ind Cas 925 : 36 Bom 183 (DB).

——O. 41, R. 24 — Powers of appellate Court.

An Appellate Court has full power to decide with respect to evidence on record the issues left undetermined by the Lower Court without sending the case to Lower Court, under O. 41, R. 24. (1911) 10 Ind Cas 225 (All).

——O. 41, R. 24 — Refusal of Court of first instance to examine all the plaintiff's witnesses — Appeal by defendant — Decree — Remand.

Owing to the direction of the Court of first instance only a portion of the evidence available in support of the plaintiff's case was recorded by that Court, which decreed the plaintiff's suit. On appeal, however, the lower appellate Court took a different view of the plaintiff's evidence and dismissed the suit. Held, that the plaintiff should be given an opportunity of producing the evidence which had not been recorded owing to the attitude taken up by the Court of first instance. 1908 AWN 140 : 30 A 367 (368) : 5 ALJ 468 (DB).

——O. 41, R. 25.

See also Civil P. C., S. 109 and O. 41, R. 23.

1. **Appeal.**
   See also Civil P. C., Ss. 104 and 151, O. 41, R. 23 and O. 43, R. 1.
2. **Court to which remand should be made.**
3. **Discretion.**
4. **Issue not decided in Lower Court.**
5. **Legality of remand.**
6. **New issues raised before Appellate Court.**
7. **Power of Appellate Court after return of findings.**
8. **Power and duty of Court to which issues are remitted.**
9. **Retrial.**
10. **Remand if open for consideration by Appellate Court after return of findings.**
    See also Civil P. C., S. 109 and O. 41, R. 23.
11. **Remand under inherent power.**
    See Note 17.
12. **Remand under Rule 23.**
    See Note 17.
13. **Remand when necessary and can be made.**
14. **Revision.**
15. **Scope.**

1. Appeal.

See also Civil P. C., Ss. 104 and 151, O. 41, R. 23 and O. 43, R. 1.

——O. 41, R. 25 — Appeal — Party admitting certain points in trial Court should not be compelled to give evidence on questions on which no issue was framed by contesting party.

It will not be fair to the parties who admitted certain points in the Court below that they should in appeal be compelled to give evidence on questions on which no issue was raised in the Court below by the contesting parties. AIR (Vol 27) 1940

All 24 : (1939) ALJ 983 : ILR (1939) All 901 : 1939 AWR (HC) 848 : 186 Ind Cas 689 (DB).

——O. 41, R. 25, O. 43, R. 1(a) — Appellate Court remitting issues to trial Court and awaiting findings thereon while retaining seisin of case — Order whether one of remand — Appeal from such order, if competent.

Order 43, R. 1(a), allows an appeal from every order of "remand" whether it be under O. 41, R. 23, S. 107 or S. 151, Civil P. C., but the order must be one of remand, which implies that the case, so far as the Appellate Court is concerned, is finally disposed of and it is sent back to the trial Court for final disposal. Where the Court retains seisin of the case and remits issues to the trial Court whose findings on such issues are awaited, the order is in no sense an order of "remand" but one under O. 41, R. 25, Civil P. C.

An appeal from such order is incompetent under O. 43, R. 1(a). AIR (Vol 24) 1937 All 580 : (1937) ALJ 797 : 1937 AWR (HC) 674 (2) : 171 Ind Cas 224.

——O. 41, R. 25 — An order merely remitting issue to the trial Court is not appealable. AIR (Vol 22) 1935 All 140 : 4 AWR (HC) 1120.

——O. 41, R. 25 — An interlocutory order sending down an issue to the lower Court cannct be put on the same footing as a decree confirming a preliminary decree for accounts. AIR (Vol 20) 1933 Bom 251 : 35 Bom LR 415 : 145 Ind Cas 258 (DB).

——O. 41, R. 25 — Remand to determine certain issues of fact and to return the proceedings with the trial Court's finding — Appellate Court stating its view upon some issues but not purporting to decide rights of parties:

Held, that the order was not a "final order" within the meaning of S. 109. AIR (Vol 19) 1932 Rang 137: 10 Rang 335: 140 Ind Cas 420.

——O. 41, R. 25 — Appellate Court framing additional issue and remanding the case reversing the decree, instead of calling for a finding retaining the case on its file — Order of remand is not appealable either under O. 43, R. 1 or under S. 100, as it is not a decree within C. P. Code, S. 2. 103 Ind Cas 864: 55 Cal 219: 47 C. L. J. 69: AIR (Vol 14) 1927 Cal 850 (DB).

——O. 41, R. 25 — Where trial Court has completely decided a case, but in appeal that decision is reversed and additional issues are remitted to the trial Court the remand is not a remand on a preliminary point and hence is not appealable under O. 41, R. 23. 95 Ind Cas 325 : 23 MLW 540 : AIR (Vol 13) 1926 Mad 695.

——O. 41, R. 25 — Order under.

Where an order of remand is merely a partial one, no appeal lies from it under O. 41, R. 25. 76 Ind Cas 816: 2 Bur LJ 216: AIR (Vol 11) 1924 Rang 131.

——O. 41, R. 25 — An order remanding issues under Rule 25 is not a final order. No appeal lies against it. The responsibility for the decree ultimately passed is entirely that of the Court before which the case comes after remand. 74 Ind Cas 1014: AIR (Vol 10) 1923 All 384.

——O. 41, R. 25 — Second appeal — Findings on issues referred to Lower Appellate Court — High Court, interference by.

Findings on issues referred to a Lower Appellate Court are findings of fact and cannot be disturbed by the High Court in second appeal. 40 Ind Cas 128: AIR (Vol 4) 1917 All 112 (DB).

——O. 41, R. 25 — Second appeal — Questions of fact — High Court's powers.

When there has been a remand from the High Court to the Lower Appellate Court, the High Court in considering the finding returned by the Lower Appellate Court cannot go into questions of fact. (1910) 13 OC 352: 8 Ind Cas 878.

2. Court to which remand should be made.

——O. 41, Rr. 25, 5 and S. 24 — Transfer of case by District Judge after remand by Additional District Judge.

Additional District Judge remanding case to Subordinate Judge under O. 41, R. 25 — District Judge has power to transfer proceedings from Subordinate Judge to another Subordinate Judge of equal and competent jurisdiction. AIR (Vol 20) 1933 Lah 29: 33 PLR 1015: 13 Lah 806: 140 Ind Cas 238.

——O. 41, R. 25 — Remand of case remanded.

Where under O. 41, R. 25, a case is remanded by the High Court to the lower appellate Court for recording further evidence and for its findings thereon, it is not open to the lower appellate Court, in the absence of a discretion, to further remand the case to the trial Court for recording evidence and submitting its findings. AIR (Vol 14) 1927 Lah 769: 102 Ind Cas 273.

——O. 41, R. 25 — Procedure after remand.

Court to which issues are remanded can take further evidence even after once writing decision on issues, if opportunity has not been given to any party to produce evidence. AIR (Vol 8) 1921 All 127 : 62 Ind Cas 447: 19 ALJ 79.

——O. 41, R. 25 and O. 42, R. 1 — Additional evidence — Remand — Lower Appellate Court — Additional — Evidence.

Where a case is remanded, under O. 41, R. 25 to the Lower Appellate Court for findings upon an issue, without any direction as to the taking of additional evidence, the Court does not err in law in assuming that the order of remand does not contemplate its taking additional evidence. Where there are sufficient materials on the record to enable the Lower Appellate Court to give a finding on the issue, it would be wrong to allow the parties to give more evidence. (1913) 20 Ind Cas 35 (Cal) (DB).

——O. 41, R. 25 — Order calling for findings—Jurisdiction — Change during pendency of suit.

During the pendency of an appeal to High Court the Lower Appellate Court lost its jurisdiction over the area in dispute because of a re-distribution. The High Court directed the Lower Court to submit some findings; Held, that the Lower Appellate Court should be considered to have retained the jurisdiction as regards pending suits and the direction by High Court should be considered as a transfer of the case. (1910) MWN 477: 8 MLT 299 : 7 Ind Cas 864 (DB).

——O. 41, R. 25 (S. 99, 566, 578 Old Code) — Return to remand to be made by the Court originally seized of the case — Jurisdiction.

Held, that when issues are remitted for trial under S. 566 of the Code such issues are triable only by the Court which was originally seized of the case. The trial by another Court is not a mere irregularity and cannot be cured by S. 578. (1907) AWN 209: 4 ALJ 603 (604) : 29 A 660 (DB).

3. Discretion.

——O. 41, R. 25 — Discretion of High Court — Interference by Privy Council.

If the High Court on appeal thinks it more convenient to remand the issues for trial in the Court of first instance rather than to decide the issues itself on the material before it, it is a matter of discretion with which the Board will not interfere. AIR (Vol 37) 1950 PC 80.

——O. 41, R. 25 — Trial Court not deciding a point, being unnecessary in its view — Appellate Court need not remand the case — It can come to its own finding thereon. AIR (Vol 15) 1928 Mad 635 : 110 Ind Cas 548 (DB).

——O. 41, R. 25 — Whether the Appellate Court should remand a case to the first Court for a further decision, is a matter which is within the discretion of the Appellate Court. AIR (Vol 10) 1923 Cal 291: 67 Ind Cas 244 (DB).

——O. 41, R. 25 — Fresh evidence — Direction to take further evidence, if necessary or discretionary.

It is discretionary with the Appellate Court not to direct the Lower Court to take further evidence when it remands a case for a finding on a specific issue on a consideration of the evidence in the case. (1912) 15 Ind Cas 670 (All).

4. Issue not decided in lower Court.

——O. 41, R. 25 — If the lower appellate Court had failed to determine the issues, the proper course would be to remand the case to that Court for determining according to law. AIR (V 6) 1929 Pat 98 : 115 Ind Cas 674 : 10 PLT 10 (DB).

——O. 41, R. 25 — Necessary issue not clearly raised by lower Court — Parties not prejudiced by omission — Case will not be remanded. AIR (Vol 14) 1927 All 410: 100 Ind Cas 650.

——O. 41, R. 25 — Unless the omitted issue, it decided is likely to affect the final result of the suit, the suit should not be remanded. AIR (Vol 12) 1925 Oudh 97: 80 Ind Cas 591: 27 OC 383.

——O. 41, R. 25 — Power to remit fresh issues.

If the Lower Appellate Court has omitted to determine a question of fact essential to the right decision of the suit on merits, the High Court can frame the necessary issues and refer them for trial. AIR (Vol 7) 1920 PC 67: 38 MLJ 476: 43 Mad 567: 47 IA 76: 18 ALJ 707: 27 MLT 102: 11 LW 399: 22 Bom LR 578: (1920) MWN 61: 56 Ind Cas 117. (On appeal from 24 MLJ 571: 13 MLT 450: (1913) MWN 434:20 Ind Cas 374).

5. Legality of remand.

——O. 41, R. 25 — Failure of lower Appellate Court to consider important evidence and circumstances — Remand, legality of.

Where the lower Appellate Court has failed to discuss an important piece of evidence and has overlooked important circumstances in deciding the appeal, a remand of the appeal to be re-heard is proper. AIR (Vol 20) 1933 Pat 472: 14 PLT 683: 146 Ind Cas 375.

——O. 41, R. 25 — Remand when improper.

Under the provisions of O. 41. when the appellate Court is of opinion that certain findings of fact are necessary for the proper disposal of an appeal, and that evidence should be led on these points the proper procedure is under R. 25, by which the appellate Court may frame issues and refer them for trial to the Court whose decree is appealed from.

It cannot act partly under R. 23, which only applies to the case of a suit which has been decided on a preliminary point and partly under R. 25 by calling for further findings. An order remanding a case for giving parties an opportunity to adduce evidence on a certain point and disposal and at the same time setting aside the trial Court's decree dismissing the suit is technically wrong. AIR (Vol 16) 1929 Bom 175: 118 Ind Cas 790: 53 Bom 335: 31 Bom LR 208 (DB).

——O. 41, R. 25 — Remand — First Court's finding on all issues — Reversing the finding on one issue and remanding the suit for fresh disposal is not legal. AIR (Vol 10) 1923 Mad 227: 76 Ind Cas 1041: 16 MLW 979: 1923 MWN 11 (DB).

——O. 41, Rr. 25 and 27 — Additional evidence — Record of right published subsequent to decision — — Consideration of.

A second appeal cannot be remanded for hearing in order that a record of right published after the decision of the first court may be taken into consideration. Where the judgment of the lower appellate Court shows that the Court applied its mind to the case and understood the evidence regarding the points in the suit a remand is unjustifiable. AIR (Vol 4) 1917 Pat 139: 2 Pat LJ 564: 43 Ind Cas 750 (DB).

——O. 41, R. 25 (S. 566, old Code) — Point on which further finding was called covered by issue already raised — Legality of remand.

Where, although a point on which a further finding was called for by an appellate court was already covered by an issue raised by the first court, yet it was clear that the point was not present to the court's mind.

Held, that the order calling for a fresh finding was legal. (1902) 4 Bom LR 818 (820) (DB).

6. New issues raised before appellate court.

——O. 41, R. 25 — Framing of fresh issue — Procedure — Powers of appellate Court.

Where an appellate Court finds it necessary that a particular issue should be framed and tried, it should proceed under the provisions of O. 41, R. 25, C. P. Code, to frame the issue and refer it for trial to the lower Court. It is not proper for the appellate Court to set aside the judgment of the trial Court and send back the case to that Court for deciding it by framing an issue which the appellate Court considers necessary for the decision of the case. It cannot be doubted that an appellate Court has inherent power to remand a case even where O. 41, R. 23 or O. 41, R. 25 does not apply provided that the interests of justice require it, but the Court should not discard the procedure prescribed by C. P. Code and adopt a different one unless it is necessary to do so. AIR (Vol 37) 1950 Pepsu 49.

——O. 41, Rr. 25, 27 — Plaintiff asserting throughout that property was non-ancestral — Issue framed, evidence led and Court finding property to be non-ancestral — At later stage in appeal plaintiff seeking to amend plaint by stating that property was ancestral — Amendment held could not be allowed — Even if it was allowed case held could not be remanded for further enquiry as O. 41, Rr. 25 and 27 did not apply. Nor could S. 151 be invoked on the facts of the case. AIR (Vol 29) 1942 Lah 1: 43 PLR 737: ILR (1942) Lah 59: 198 Ind Cas 340.

——O. 41, R. 25 — New case propounded by Appellate Court — Remand on newly framed issue on the new point — Legality of.

It is not open to the Appellate Court to make a new case for a party and direct a remand of the suit for trial of a newly framed issue on the new case. AIR (V 20) 1933 All 829 : 17 RD 775 : 146 Ind Cas 981.

——O. 41, R. 25 — Where the trial Court has disposed of all the issues before it and the appellate Court frames additional issues and remands the case the remand order is not open to appeal. AIR 1923 Mad 227 and AIR 1923 Mad 311, Not Foll. AIR (V 15) 1928 Mad 984 : 112 Ind Cas 710 (DB).

——O. 41, R. 25 — Issue not raised.

Even if an appellate Court be deemed competent to remit a case for rehearing on an issue not raised in the pleadings nor even suggested in the Trial Court. This ought only to be done in exceptional cases,

for good cause shown, and on payment of all costs thrown away. AIR (Vol 8) 1921 Cal 569: 66 Ind Cas 640: 34 CLJ 319 (DB).

——**O. 41, R. 25 — Powers of High Court.**

The High Court can on second appeal remand a case for findings even on the points not taken in the grounds of appeal. The finding of the lower appellate Court on a question of fact which has not been put in issue can be contested in second appeal. AIR (Vol 8) 1921 Lah 256: 85 Ind Cas 92: 5 LLJ 49 (DB).

——**O. 41, R. 25 — Issue not raised below — Question of fact involving evidence — Proper Procedure.**

In a suit for possession on declaration of the plff's title the plff did definitely set up the case of adverse possession but no issue was framed or evidence adduced on the question.

Held, that the Appellate Court could not decide in favour of the plff's title by adverse possession without framing on issue on the question. AIR (Vol 6) 1919 Cal 157: 49 Ind Cas 475 (DB).

——**O. 41, R. 25 — New issue — Raising of.**

Where the question as to the bona fide nature of a sale was not raised in the pleadings, held, the lower appellate Court was right in framing issues on this question which though not raised in the pleadings had governed the case from the first. (1911) 4 Bur LT 118 : 10 Ind Cas 922.

7. Power of Appellate Court after return of finding.

——**O. 41, R. 25 — Court can re-open point decided before order under.**

Though parties have no right to insist upon re-opening questions that had been decided before calling for a finding, yet it is open to the Court to do so if it thinks fit and it cannot be said to act without jurisdiction if it goes back upon the position taken by it previously so long as the case is not out of its hands. AIR (Vol 13) 1926 Mad 830: 94 Ind Cas 226 (DB).

——**O. 41, R. 25 — Appellate Court can reconsider view of law on which remand was based.**

In a case of remand under O. 41, R. 25 there is no final decision and it is open to an Appellate Court, if it thinks fit, to reconsider the view of the law on which the remand was based. AIR (Vol 9) 1922 Oudh 118: 68 Ind Cas 242: 25 OC 41.

——O. 41, R. 25 — Evidence improperly excluded — Case cannot be remanded — Appellate court may itself take additional evidence or direct lower Court to take such evidence. AIR (V 8) 1921 Cal 122 : 64 Ind Cas 693 : 34 CLJ 160 : 26 CWN 1022 (DB).

——**O. 41, R. 25 — Effect of order — Entire appeal if open for consideration at the final hearing.**

Even after a remand by the High Court on certain issues and the submission of findings thereon the entire appeal was open for consideration by the High Court at the final disposal. On the evidence it was held that the first transaction was fictitious and the second real. AIR (Vol 7) 1920 Cal 93: 24 CWN 145: 30 CLJ 428: 54 Ind Cas 700 (DB).

——**O. 41, R. 25 — Partition — Decree — Remand on appeal — Effect of — Dismissal of suit, if proper.**

Where on an appeal from a decree in a partition suit the Appellate Court remanded the suit for fresh disposal as regards the appellant, the Appellate Court has no jurisdiction to dismiss the whole suit. The original decree stood between the plff. and such of the defts. as did not appeal, and cannot be held as wholly set aside. AIR (Vol 5) 1918 Lah 335: 44 PWR 1918: 22 PLR 1918: 44 Ind Cas 135 (DB).

——**O. 41, R. 25 — Effect of order — Case pending on Appellate Court's file.**

In a remand under O. 41, R. 25, the case remains pending on the Appellate Court's file and the Judge may change his mind before final judgment. AIR (Vol 5) 1918 Nag 193: 46 Ind Cas 922 (DB).

——**O. 41, R. 25 — Effect of remand — Finding called for by Judge, sitting singly — Expression of opinion — Appeal heard by two Judges.**

It is open to the Bench to consider and decide the whole appeal on the merits, if in their view the opinion of the Judge sitting singly, who called for findings, is not correct. (1913) 18 CLJ 354: 21 Ind Cas 79 (DB).

——**O. 41, R. 25 — Effect of remand — High Court — Issue sent down — Whole appeal if open for consideration.**

When an issue is sent down by the High Court and the appeal remains pending there the whole appeal could be considered on return of finding. (1913) 18 CLJ 181: 21 Ind Cas 700 (DB).

——**O. 41, R. 25 — Effect of order — Expression of opinion by Appellate Court — If binding after return of finding.**

When a case is remanded under O. 41, R. 25, it remains pending and undisposed of on the Appellate Court's file, and as the Judge recording any expression of opinion does not intend to express the same finally, he is not bound by it after return of the findings, and may change his mind at any time before he has pronounced judgment.

But the Appellate Court is not bound to reconsider after return of the findings any question which he had already dealt with and upon which a final opinion had been expressed before the remand. (1913) 17 CWN 462: 15 Ind Cas 39 (DB).

8. Power and duty of Court to which issues are remitted.

(a) General.

(b) Transfer of case.

(a) General.

——**O. 41, R. 25 — Issue framed for trial Court and Appellate Judge for opinion — Appellate Court without hearing parties sending issue to High Court saying that he agrees with opinion of trial Court.**

Where a case is remanded with an issue framed on which the trial Court and the Appellate Court have to express their opinion, the Appellate Court cannot send it on to Court saying that he agrees with the opinion of the trial Court without hearing the parties because a judicial opinion cannot be formed without hearing the parties. AIR (Vol 26) 1939 Lah 339: 41 PLR 224: 186 Ind Cas 311.

——**O. 41, R. 25 — Remittal of remitted case.**

Lower appellate Court remitting the issues, remitted to it, to the Subordinate Court — Procedure is wrong. AIR (Vol 11) 1924 Lah 354 : 71 Ind Cas 896.

——**O. 41, R. 25 — Remittal for finding.**

Case remitted for finding — Findings not objected to by party affected — Court's duty is to determine correctness of finding. AIR (Vol 10) 1923 All 417 (1) : 71 Ind Cas 444.

——**O. 41, R. 25 — If final.**

Where an appellate Court at the first hearing does not decide the case but merely remits certain specific issues, it is open to the Court before which the case ultimately comes to disregard the findings on those issues and equally to form its own opinion on the whole case irrespective of anything that is said in the remand order. AIR (Vol 10) 1923 All 384: 74 Ind Cas 1014.

(b). Transfer of case.

——**O. 41, R. 25 — Transfer of case — Delegation of authority.**

When issues are remanded to the Lower Appellate Court, then it must give its own finding though it may ask the original court to record evidence. AIR (V 3) 1916 Sind 93 : 9 SLR 148 : 32 Ind Cas 634 (DB).

——O. 41, Rr. 25 and 28 — Transfer of case — Delegation by Court — Remand.

Rule 25 does not give the Court to which a case has been remanded, power to delegate its duties or make a further remand to any other Court. Mere absence of objection does not confer jurisdiction on a Court which does not otherwise possess it. 242 PLR 1913: 144 and 215 PWR 1913: 105 PR 1913: 19 Ind Cas 970 (DB).

——O. 41, Rr. 25 and 26 — Transfer of case after remand.

A District Judge is not competent to transfer a case from his own file to his subordinate, when he remitted certain issues on appeal, to be determined by the Court of first instance, until the case is returned with its findings thereon. (1912) 10 ALJ 89: 15 Ind Cas 862.

——O. 41, R. 25 — Transfer of case — Delegation of work.

If the High Court in second appeal remands an issue for trial to the Lower Appellate Court which in its turn refers the same to the First Court, the Lower Appellate Court must record its own findings on the issue with reasons therefor unless the parties agree to be bound by the findings of the first Court. (1909) 3 SLR 120: 4 Ind Cas 605 (DB).

9. Retrial.

——O. 41, R. 25 — Appellate Court cannot while confirming some of the findings order fresh trial.

An appellate Court cannot affirm some of the findings of the trial Court and set aside the decree for a fresh trial. If he thinks necessary that a fresh local investigation should be held, he should order it himself or he should direct the lower Court to direct a local investigation to be held and to send back to him the result of such local investigation. AIR (Vol 13) 1926 Cal 912: 95 Ind Cas 170 (DB).

——O. 41, Rr. 25 and 27 — Re-trial — Issues already tried and decided upon by trial Court — Remand — Limits of.

Order 41, R. 25 of the C. P. C. does not contemplate an order by the Appellate Court directing a re-trial by the Primary Court of the issues tried and determined by that Court. If an Appellate Court considers that any question of fact essential to the right decision of the suit has not been tried and determined by the trial Court it may frame issues and direct the trial of such issues in the manner provided by O. 41, R. 15 of the Code, or it may proceed in the manner provided in O. 41, R. 27. AIR (V 6) 1919 Cal 945 : 48 Ind Cas 959 (DB).

10. Remand, if open for consideration by Appellate Court after return of findings.

——O. 41, Rr. 25 and 26 — Division Bench recording findings and remitting other issues for finding by lower Court — Findings of lower Court coming before another Division Bench — Position of second Division Bench.

A decision of a Single Judge of the High Court or of a Bench of the High Court is the decision of the Court and where a Division Bench hearing an appeal records its finding on some of the issues and remits other issues to lower Court for recording its finding thereon and on return of those findings, the appeal comes before another Division Bench the position of the second Bench is exactly the same as would have been the position of the first Bench if the appeal had come up before the same Judges again when findings on the issues were submitted by the trial Court.

The second Bench which is hearing the appeal is not bound by the findings at which the former Bench had arrived but it is entitled, in its discretion, if it so desires, not to reconsider the findings. AIR (Vol 32) 1945 All 268: 1945 OWN (HC) 251 : (1945) ALJ 316 : 1945 AWR (HC) 244 : ILR (1945) All 798: 221 Ind Cas 612 (FB).

——O. 41, R. 25 — Court can go back on the views expressed in the order of remand at the final determination of appeal.

An order of remand made under S. 41, R. 25, C. P. Code, decides nothing, and the reasons that the Court gives for its support are given merely for its own convenience for the purpose of the determination of the appeal under O. 41, R. 26, C. P. Code, and for helping the lower Court to proceed rightly in carrying out the order. The Court, either the same or differently constituted, when determining the appeal finally has ample jurisdiction to go back on the views as expressed in the order of remand passed under O. 41, R. 25, C. P. Code, and indeed it would fail in its duty if in defence to those views which are entitled to the highest respect, it persists in them, although it is satisfied that they are erroneous.

The finding or decision of a Division Bench of a High Court in remanding a case is not conclusive as between the parties to the appeal and it can be reopened at the final determination of appeal. AIR (Vol 15) 1928 Cal 186: 47 CLJ 112: 32 CWN 1233: 107 Ind Cas 730 (DB).

——O. 41, R. 25 — Issue wrongly remitted for trial—Order can be challenged in appeal from appellate decree. AIR (Vol 14) 1927 Oudh 499: 4 OWN 958 : 105 Ind Cas 410 (DB).

——O. 41, R. 25 — The findings under O. 41, R. 25 are not open to attack on the evidence in second appeal, as they are in first appeal. AIR (Vol 11) 1924 Lah 455: 78 Ind Cas 404: 5 Lah 268: 6 LLJ 145: (DB).

11. Remand under inherent power.

See Note 17.

12. Remand under Rule 23.

See Note 17.

13. Remand when necessary and can be made.

——O. 41, R. 25 — Remand — Failure to frame necessary issue.

In a suit for arrears of rent and ejectment the plaintiffs also put forward an alternative case for recovery of damages for use and occupation of the suit property. But the defendants pleaded that they are themselves proprietors of the property. The trial Court without framing an issue as to who was the owner of the property merely granted a decree for a certain amount as rent. In second appeal, it was held that as there was a failure to frame an important issue, there should be a remand for trial of that issue. AIR (Vol 37) 1950 Ajmer 63.

——O. 41, R. 25 — Where, though it was clear from the allegations in the plaint that apart from the question of fraud it was of the utmost importance to determine the exact age of the plaintiff on the date of the institution of the previous suit, no issue was framed on the point and there was no proper trial on the point:

Held, that the remand was necessary. AIR (Vol 24) 1937 Lah 903 : 171 Ind Cas 205.

——O. 41, Rr. 25, 23 — Whole case decided and not only preliminary point.

A case which has been decided by the lower Court wholly on the merits and not on any preliminary point, must be remanded under O. 41, R. 25, and not under O. 41, R. 23. AIR (V 21) 1934 Lah 576 : 36 PLR 269: 151 Ind Cas 490 (DB).

——O. 41, R. 25 — Where a party in spite of his treatment by Court with indulgence has been persistently defying the orders of the trial Court in not personally appearing and in not adducing evidence there is no reason for remanding the case for fresh trial as no litigant can be allowed to abuse the process of Court. AIR (Vol 16) 1929 Lah 444: 116 Ind Cas 180: 30 PLR 93 (DB).

——O. 41, R. 25 — Remand when proper.

The order of remand, on the ground that the lower Court wrongly decided a necessary issue on the plea of res judicata which was not raised, and without considering the evidence led, is under R. 25. AIR (Vol 16) 1929 Lah 376: 108 Ind Cas 400: 29 PLR 270.

——O. 41, R. 25 — Defendant losing sight of his having to discharge onus of rebutting plaintiff's evidence — It is not a sufficient ground for remand. AIR (Vol 14) 1927 Lah 272: 100 Ind Cas 60 : 8 Lah 123 : 27 PLR 768 (DB).

——O. 41, R. 25 — Appellate Court finding it necessary to frame and decide a particular issue — Proper course is to frame the issue and refer it for trial to lower Court. AIR (Vol 13) 1926 Cal 976: 95 Ind Cas 203: 44 CLJ 101 (DB).

——O. 41, R. 25 — Appellate Court finding certain additional issue necessary — Issue should be framed and sent for trial to lower Court — Whole case should not be remanded. AIR (Vol 13) 1926 Cal 954: 95 Ind Cas 123 (DB).

——O. 41, R. 25 — Where an issue though necessary was not framed the Court should not remand the case but should refer the issue for taking additional evidence and for returning the case to it with its findings. AIR (Vol 12) 1925 Mad 169: 78 Ind Cas 1 (DB).

——O. 41, R. 25 — No specific issue framed but evidence given — No remand is necessary. AIR (Vol 11) 1924 Bom 113 (DB).

——O. 41, R. 25 — Plaintiff's failure to produce evidence at trial — Remand cannot be granted. AIR (Vol 11) 1924 Cal 396: 71 Ind Cas 284 (DB).

——O. 41, R. 25 — Grounds for remand.

Under R. 25 remand can only be made when the Lower Court has omitted to frame or try an issue or to determine an important question of fact. (1912) 6 SLR 135 : 19 Ind Cas 368 (DB).

14. Revision.

——O. 41, R. 25 — When a case is remanded either under O. 41, R. 25, or under S. 151, High Court in revision cannot examine the evidence on which the finding is based. AIR (Vol 23) 1936 Nag 140: ILR (1936) Nag 188: 170 Ind Cas 527.

——O. 41, R. 25 — Order of remand under — If appealable — Memo. of appeal, if may be treated as revision.

An order of remand purporting to be under O. 41, R. 25, Civil P. C., is not appealable, but it is open to the High Court to treat the memorandum of appeal as an application for revision. AIR (Vol 20) 1933 Cal 496: 37 CWN 190: 145 Ind Cas 183 (DB).

——O. 41, R. 25 — Inherent power of remand, apart from power contained in O. 41, R. 23, is subject to the limitation that the power cannot be invoked in a case for which a specific provision is made in the Code, e.g., Rr. 25, 27 and 28 O. 41. Where such a remand is ordered under the inherent powers, it is a material irregularity and there can be a revision. AIR (Vol 18) 1931 Mad 791: 60 MLJ 475: (1931) MWN 710: 133 Ind Cas 205.

——O. 41, R. 25 — Where in appeal against dismissal of suit under O. 17, R. 3 the appellate Court directs further evidence to be taken by the trial Court, without expressly setting aside the decree passed by the Trial Court, it acts with material irregularity within S. 115. 79 Ind Cas 482: 1 Rang 656: AIR (Vol 11) 1924 Rang 177 (DB).

——O. 41, R. 25 — It is only in exceptional cases that revisional powers are exercised in the case of orders of an interlocutory nature and even when the order is not of an interlocutory nature the High Court should only interfere in exceptional cases where the order if not a final order such as one under O. 41, R. 25 of the C. P. C. AIR (Vol 8) 1921 Lah 370: 2 Lah LJ 662.

15. Scope.

——O. 41, R. 25 — Order 41, R. 25, refers primarily to first appeals though the rule so far as possible can be applied to second appeals. The rule as it stands allows reference only to the Court from whose decree the appeal is preferred, which in the case of the second appeals, would be the Lower Appellate Court. Therefore it does not follow in the case of second appeals that a finding from a first Court is to be treated on the same footing as finding from an Appellate Court. AIR (Vol 26) 1939 Nag 173: 1939 NLJ 315: ILR (1940) Nag 643: 182 Ind Cas 12 (DB).

——O. 41, R. 25 — Appellate Court capable of effectively dealing with matter under O. 41, R. 25 — High Court will not use its residuary powers under S. 151 and order a new trial, especially when the parties have been through a protracted trial. AIR (Vol 22) 1935 Pat 68: 1 BR 345: 154 Ind Cas 850.

——O. 41, Rr. 25, 23 — Remand for trial of issue framed by Appellate Court.

When an Appellate Court remands a case to the trial Court for fresh trial on certain issues framed by the Appellate Court, the order of remand should be under O. 41, R. 25 and not under O. 41, R. 23. AIR (Vol 20) 1933 Lah 659 (1): 145 Ind Cas 299 (1).

——O. 41, R. 25 — Appellate Courts — Order for re-trial where case can be remanded.

Appellate Courts in the 'mofussil' ought not rashly and without sufficient cause to set aside a decree of the first Court and order a re-trial in any case in which this can possibly be avoided. In other words, they should never do so in any case in which it is possible to deal with the matter effectively under O. 41, R. 25. AIR (Vol 20) 1933 Pat 706: 148 Ind Cas 167.

——O. 41, R. 25 — Remand order not under O. 41, R. 25 — It does not necessarily come under O. 41, R. 23, as there can also be a remand, under inherent powers. AIR (Vol 20) 1933 Pat 706: 148 Ind Cas 167.

——O. 41, R. 25 — Where the appellate Court is of opinion that the parties should be allowed to adduce evidence on a certain issue which the trial Court has omitted to try, the proper procedure is to make an order under O. 41, R. 25, keeping the appeals on its file and sending down the issue with directions for trial by the trial Court. (1928) 110 Ind Cas 444 (Cal) (DB).

——O. 41, R. 25 — Applicability.

Trial Court's decision not based on preliminary point — Appellate Court reversing decision on one issue — Whole case should not be remanded — Remand can be only under R. 25. 100 Ind Cas 578: 29 Bom LR 56: AIR (Vol 14) 1927 Bom 111 (DB).

——O. 41, R. 25 — Appeal from order returning plaint.

Appeal from order under O. 7, R. 10 — Issues cannot be remanded. 87 Ind Cas 172: 12 OLJ 277: 2 OWN 239: 29 OC 21: AIR (Vol 12) 1925 Oudh 393.

——O. 41, R. 25 — Where the case was remitted three times because the Judge in the first instance misunderstood the order of the High Court and in the second instance expressed himself as unable to come to a definite conclusion.

Held, the High Court had jurisdiction to remit the case a third time, though it could as well determine the issue left undetermined by the lower Court on evidence on record. 68 Ind Cas 538: 45 Mad 586: 16 MLW 102: 31 MLT 54: 49 IA 286: 1922 MWN 749: 37 CLJ 199: 27 CWN 245: AIR (Vol 9) 1922 PC 292: 43 MLJ 640.

——O. 41, R. 25 — Power of Appellate Court — Calling for particular kind of evidence.

An Appellate Court cannot remand a case for trial on issues on which the Original Court has arrived at clear findings, or define the particular kind of evidence required for their determination. AIR (Vol 1) 1914 Oudh 103: 22 Ind Cas 128.

——O. 41, Rr. 25 and 27 — Finding of fact — Remand.

Where the Lower Court has rightly or wrongly determined a question of fact the Appellate Court cannot remand the case for trial to the Lower Court but can call for further evidence under S. 568. (1909) 9 CLJ 464: 4 Ind Cas 168 (DB).

——O. 41, R. 26.

——O. 41, R. 26 — One Bench remanding case after remitting fresh issues — Appeal against decision passed after remand coming before another Bench — Powers of the subsequent Bench.

A decision of a Single Judge or of a Bench of a High Court is the decision of the Court and the position of the second Bench is exactly the same as that of the first Bench if the appeal had come up before the same Judges again when findings on the issues were submitted by the trial Court. The subsequent Bench, therefore, is not bound by the findings at which the former Bench has arrived but it is entitled, in its discretion, if it so desires, not to reconsider the findings. AIR (Vol 32) 1945 All 268: 1945 OWN (HC) 251: (1945) ALJ 316: 1945 AWR (HC) 244: ILR (1945) All 798: 221 Ind Cas 612 (FB).

——O. 41, R. 26 — One Bench setting aside decision of lower Court and remanding case after laying down law to be followed — Appeal against decision passed after remand — Another Bench of co-ordinate jurisdiction cannot go behind decision of previous Bench on point of law.

When one Bench sets aside the decision of the lower Court and remands the case after laying down the law to be followed, the decision of the Bench on the point of law is final and another Bench, a Court of co-ordinate jurisdiction, cannot go behind it in appeal against the decision passed after remand. If a Bench remands a case to the lower Court either under O. 41, R. 23 or under O. 41, R. 26 or under the inherent powers of the Court (the remand in this case comes neither under R. 23 nor under R. 25), the matters finally disposed of by the order of remand cannot, any of them, be re-opened when the case comes back from the lower Court, but if at the time of remand no final decision is given on a point though some observations only are made in respect of it, it is open to another Bench when finally determining the case to come to its own conclusion on it. AIR (Vol 26) 1939 Pat 580: 5 BR 664: 20 PLT 685: 181 Ind Cas 721 (DB).

——O. 41, R. 26 — Remand — Preliminary objections not decided by Court remanding case — Case coming not before it on appeal — Objections, if can be raised before it.

Where it cannot be held that certain preliminary objections were either explicitly or impliedly decided by the Court remanding the case at all, these objections can be raised, when the case again comes before the Court remanding it. AIR (Vol 23) 1936 Lah 564: 166 Ind Cas 575 (DB).

——O. 41, R. 26 — No court-fee is payable in respect of memorandum of objection filed under O. 41, R. 26 of Civil P. C., as it does not seek any relief from the Court and does not contain any request for any order being passed on it. AIR (Vol 23) 1936 Oudh 180 : 1936 OWN (CC) 113 : 11 Luck 704: 160 Ind Cas 38 (1) (DB).

——O. 41, R. 26 — A memorandum of objection filed under O. 41, R. 26 is neither an application nor a petition presented to Court and consequently no court-fee is chargeable on it. AIR (Vol 19) 1932 All 526: (1932) ALJ 149: 54 All 465: 140 Ind Cas 47.

——O. 41, R. 26 — Court-fee.

No Court-fee is chargeable upon the memorandum of objection filed under O. 41, R. 26. 9 PLT 19: 105 Ind Cas 108: AIR (Vol 15) 1928 Pat 85.

——O. 41, R. 26 — Order under — Court hearing appeal after remand powers of.

When an order has been made under O. 41, R. 25, the Court, called upon to determine the appeal finally under O. 41, R. 26, is not competent to treat the order as erroneously made. If the order had been made under O. 41, R. 23, its propriety could not have been challenged in an appeal against the final decree made after remand. The same principle is applicable to an order under O. 41, R. 25, subject to the obvious reservation that, as the appeal remains pending, the ultimate decision must be based upon a consideration of all the findings before and after the order under O. 41, R. 25. 74 Ind Cas 392: 37 CLJ 122: AIR (Vol 10) 1923 Cal 521 (DB).

——O. 41, R. 26 — Omission to file objections.

Omission to file objections to finding — Court may decline to hear at the hearing. 67 Ind Cas 846: 3 LLJ 230: AIR (Vol 8) 1921 Lah 225 (DB).

——O. 41, Rr. 26 and 31 — Failure to object to finding.

The omission of a party to file objections under O. 41, R. 26 of C. P. C., does not relieve an Appellate Court of the duty imposed upon it by R. 31 of the same order to give its decision on the issue. 10 SLR 203: 40 Ind Cas 405: AIR (Vol 4) 1917 Sind 71 (DB).

——O. 41, R. 26 — Power of Appellate Court to go behind finding — No objections filed.

The Appellate Court can go behind the findings submitted by a Lower Court even though no objections are filed by parties within the time limited for the purpose. 28 Ind Cas 597: AIR (Vol 2) 1915 All 177.

——O. 41, R. 26 — Omission of time for filing objections.

The omission of an Appellate Court to fix a time as required by O. 41, R. 26 for the filing of a memo. of objections, is a mere technical irregularity and may be ignored if no party is prejudiced by it. (1915) 1 OLJ 681: 26 Ind Cas 736.

——O. 41, R. 26 — Time for objections fixing of — Omission to file objections.

An Appellate Court while remanding a case, should fix the period for filing of cross-objections and it is not bound to fix it after the return of findings; it can also consider the findings of the Lower Court when no cross-objections have been filed. (1910) 6 NLR 109: 7 Ind Cas 547.

——O. 41, R. 27.

1. **Consent of party.**
2. **Defect in evidence.**
3. **Discretion of Court.**

4. Documents.
5. Estoppel.
6. Exclusion of evidence.
7. Inherent lacuna.
8. Mistake or negligence of party.
See also, Notes 21 and 22.
9. New evidence.
10. Powers and duties of Court.
11. Procedure.
See also, (i) Note 13; (ii) Civil P. C. O. 41, R. 29.
12. Rebuttal.
13. "Record the reason".
14. Remand.
See also, Civil P. C., O. 41, Rr. 23 and 25.
15. Requirements of justice.
16. Revision.
17. Scope.
18. Second appeal.
19. Subsequent events.
20. "Substantial Cause".
21. When admissible.
22. When not admissible.

1. Consent of party.

——O. 41, R. 27 — Admission of additional evidence in appeal by consent of parties — If can be objected to by any of them subsequently.

Where there is an admission of additional evidence in appeal by consent of parties, it is not open to either of them to say subsequently that it was improperly admitted. A I R (Vol 37) 1950 All 182.

——O. 41, Rr. 27, 29 — Admission of evidence by consent of party — Absent of recorded objection to admission of evidence in appeal.

Although when both parties agree that further evidence is necessary and admission of that evidence is made by consent, any failure on the part of the Judge to record in due form the reasons for the admission of that evidence is not a matter which would justify the reversal of the judgment or the rejection of the additional evidence. Yet it is not a rule that in all cases where there is no recorded objection to the admission of evidence in appeal under O. 41, R. 27, Civil P. C., the provisions of R. 27 and the procedure laid down under that rule and under R. 29 can be treated as of no importance. A I R (Vol 27) 1940 Mad 707 : (1940) M W N 511 : 194 Ind Cas 816.

——O. 41, R. 27 (1) (b) — Evidence admitted with consent of parties — Objection to admission, if can be entertained.

The mere fact that the evidence is important is not of itself a sufficient ground for admitting that evidence in appeal and the Appellate Court should state its reasons for admitting the evidence in terms which would indicate clearly that he had applied his mind to those considerations which, according to O. 41, R. 27, must govern the Court in passing such an order. But if an order admitting additional evidence is passed with the consent of both the parties, an objection to the admission of such evidence cannot be entertained at all in view of the consent before the Appellate Court. Such a consent makes it not open to argument that the admission of evidence in appeal was improper. Although the consent cannot confer jurisdiction where no jurisdiction exists, the position is somewhat different when there is jurisdiction, but that jurisdiction can only be exercised on particular grounds stated in writing. The consent of the parties may be treated as an admission by both parties that those grounds existed. This admission does not strictly absolve the Appellate Court from his requirement of satisfying himself as to the necessity for admitting such evidence, but it may to a large extent, cover the defects in the record of the reasons for the order. A I R (Vol 26) 1939 Mad 54 : 18 M L W 546 : (1938) M W N 1080 : (1938) 2 M L J 740 : 179 Ind Cas 695.

——O. 41, R. 27, (O. C. S. 568 Old Code) — Fresh evidence — Admission of by the Court of Appeal.

Where the Appellate Court, with the assent of both sides, examined three witnesses and also admitted documentary evidence and there was nothing to show that the admission was objected to at the time held:—that it was not open to a party on appeal to the Privy Council to take exception to the regularity of their procedure. (1909) 19 M L J 435 : 11 Bom L R 861 : 13 C W N 830 : 10 C L J 74 : 36 C 833 : 36 I A 221 : 3 Ind Cas 465 (465) (PC).

2. Defect in evidence.

——O. 41, R. 27 — Additional evidence required by Court for satisfactory decision of case — Question of delay or negligence of party does not arise.

Where an Appellate Court thinks that it is not satisfactory to decide a question in a case on the evidence on record and requires an additional material to call for under Cl. (b) of R. 27 (1) of O. 41 in order to clear the doubts in his mind, the question of parties' delay or negligence does not arise. A I R (Vol 34) 1947 Mad 111 : (1946) 2 M L J 257 : 59 M L W 536 (DB).

——O. 41, R. 27 — Parties failing to grasp significance of some point necessary to decide his case — Additional evidence to elucidate the point is necessary.

Further evidence is not intended to be ordered on special and preliminary application before the appeal on the merits has been heard and the evidence as it stood examined by the Court. It is no part of the duty of the Court nor is it necessary for the Court to act the part of Counsel for either of the parties, and on realizing that further evidence on a point on which evidence has already been introduced is available, to require that evidence to be adduced. Such evidence is not necessary for the Court to pronounce a decision because the Court must pronounce its decision on the evidence before it. Rule 27, O. 41, Civil P. C., is to be applied where the Court, after considering the case, finds that the parties have failed to grasp the significance of some point which is necessary for the decision of the case, but on which no evidence has been brought or which has been dealt with in a way which shows that its true significance has not been understood. In such a case the Court may well feel that it is necessary that further evidence should be adduced to elucidate the point. A I R (Vol 26) 1939 Rang 92 : 181 Ind Cas 527.

——O. 41, R. 27 — Evidence which party could have produced in lower Court should not be admitted in appeal.

Under Cl. (b), Sub R. (1), R. 27, O. 41, an Appellate Court may admit additional evidence if the Court requires the evidence to enable it to pronounce judgment, or for any other substantial cause. Additional evidence under this rule cannot be admitted until the Appellate Court has examined the evidence on the record and has, after such examination, come to the conclusion that the evidence, as it stands, is so inherently defective that the Court is unable to pronounce judgment in the case on the evidence, as it stands. It must be the Court which requires the additional evidence and the power cannot be exercised on an application by a party before the appeal is heard. The

provisions of this rule cannot be used for the purpose of allowing a party to remedy defects or gaps in the evidence which he has called in the original Court, and it should, under no circumstances, be allowed to be used for the purpose of producing, in the Appellate Court, evidence which the party was given an opportunity of producing in the original Court. A I R (Vol 22) 1935 Rang 21.

——O. 41, R. 27 — If the Court is satisfied that there has been failure of justice in the case, by reason of absence of proof on a technical aspect of the case, it would consider an application to let in additional evidence; otherwise not. A I R (Vol 12) 1925 Mad 444 : 86 Ind Cas 576 : 21 M L W 210 (DB).

——O. 41, R. 27 — Evidence improperly excluded — Case cannot be remanded — Appellate Court may itself take additional evidence or direct lower Court to take such evidence. A I R (Vol 8) 1921 Cal 122 : 34 C L J 160 : 26 C W N 1022 : 64 Ind Cas 693 (DB).

——O. 41, R. 27 — Sufficient cause — Power of Appellate Court to take — Additional evidence.

Order 41, R. 27 (b), C. P. C. does not mean that in order to enable an Appellate Court to pronounce judgment in favour of a particular party additional evidence could be admitted in appeal but it means only that where it is impossible to pronounce judgments at all on the evidence, the Court may call for witnesses. A I R (Vol 7) 1920 Pat 540 : 54 Ind Cas 666.

——O. 41, R. 27 (1) (6) — Defect in evidence.

Additional evidence should be adduced in Appellate Court not to enable the Court to pronounce judgment in favour of a particular party. But such evidence is to be given only when the original one is defective. A I R (Vol 7) 1920 Pat 235 : 57 Ind Cas 843 (DB).

——O. 41, R. 27 — Sufficient Cause — Limits of the discretion.

The object of O. 41, R. 27 of C. P. C., is not to enable the court to supplement the evidence that a party is bound to produce and it should not be used with a view to supply defects and loopholes that a vigilant litigant is required to guard against in the conduct of his case. It is strictly prohibited for an Appellate Court to admit evidence in appeal solely at the instance of a party without having satisfied itself that there is any difficulty in deciding the case upon the evidence already on the record. A I R (Vol 6) 1919 Pat 244 : 49 Ind Cas 868 (DB).

——O. 41, R. 27 — Defect in evidence — Admission on appeal.

The Appellate Court cannot admit additional evidence except to cure inherent defect in the existing evidence. A I R (Vol 5) 1918 Pat 275 : 47 Ind Cas 141 (DB).

——O. 41, R. 27 — Sufficient cause — What is.

Order 41, R. 27 of the C. P. C., does not empower the Court to pronounce the judgment in favour of a particular party and for that reason admit additional evidence on appeal. It only means that where it is not possible to pronounce judgment at all on the evidence as it stands the Court may admit additional evidence to enable it to do so. A I R (Vol 5) 1918 Pat 253 : 3 Pat L W 385 : 44 Ind Cas 670 (DB).

——O. 41, R. 27 — Sufficient cause — Defect in evidence.

An appellate Court is entitled to admit additional evidence when the evidence already on record is unintelligible without it. A I R (Vol 3) 1916 Mad 966 : 28 Ind Cas 640 (DB).

——O. 41, R. 27 — Object of — New case.

Order 41, R. 27, C. P. C. is intended to supply a defect in the existing evidence on the record but not for proving a case in appeal a second time. (1912) 9 A L J 59 : 13 Ind Cas 131 (DB).

——O. 41, R. 27 — Defect in evidence — Party not negligent — Indulgence.

An Appellate Court can admit fresh evidence under O. 41, R. 27 if the party adducing the evidence was through no fault of his unable to produce it at the trial. The rule of admitting fresh evidence is not confined to cases where the Court suo motu desires to call for fresh evidence. (1911) 14 O C 327 : 12 Ind Cas 332.

——O. 41, R. 27 — Defect in evidence — Additional evidence.

The legitimate occasion for the admission of additional evidence by an Appellate Court arises when on examining the evidence as it stands some inherent defect becomes apparent. The Court has no jurisdiction to order additional evidence when it does not consider the evidence before remanding the case. (1911) 10 Ind Cas 332 (Cal) (DB).

——O. 41, R. 27 — Appellate Court's powers to supplement.

In a matter of evidence as to custom, where there is sufficient evidence to show that such a custom exists, but its limits and incidents are not clearly before the Court it is within the discretion of the appellate Court to allow that evidence to be supplemented particularly when independent evidence of Government officers is available and no new case is made. (1907) 6 Cal L J 218 (221) (DB).

3. Discretion of Court.

——O. 41, R. 27 — Discretion of Court — Second appeal — Interference.

It cannot be laid down that it is not open to the High Court in second appeal to interfere with the discretion of the lower appellate Court in refusing to admit additional evidence under O. 41, R. 27, C. P. Code. The High Court can interfere where that Court has failed to apply its mind to the bearing that such evidence will have on the question at issue in the case. (1946) 48 P L R 329 (DB).

——O. 41, R. 27 — Evidence — Rejection of documents giving reasons.

Where the lower Appellate Court has rejected certain documents produced in appeal giving reasons for doing so, the High Court will not interfere with the discretion exercised by it. A I R (Vol 24) 1937 Lah 409 : 39 P L R 663 (1) : 173 Ind Cas 887.

——O. 41, R. 27 (1) (b) — Lower Court exercising discretion on wrong principles — High Court can interfere.

Where the lower Court has exercised its discretion and if the additional evidence has been admitted, and is admissible as relevant, the additional evidence must be heard upon its merits even if the discretion to admit it may have been exercised upon erroneous grounds, for an Appellate Court does not interfere with the discretion of a lower Court unless that discretion has been exercised upon fundamentally erroneous principles. AIR (Vol 24) 1937 Pat 584: 16 Pat 371: 18 PLT 618: 4 BR 69: 171 Ind Cas 728 (DB).

——O. 41, R. 27 — Party, if can produce additional evidence as of right.

The words 'additional evidence' in O. 41, R. 27, Civil P. C. connote that the party in default has applied its mind to the issues in the case and adduced some evidence on them which at a later

stage he finds insufficient. But if for some reason or other no evidence was produced in the trial Court and the judgment was pronounced on the record as it stood and the party aggrieved moved the Appellate Court afterwards to allow him to produce evidence in the case, different considerations would prevail in giving him the permission applied for and his case will not be governed by O. 41, R. 27.

No party is entitled as of right to fill up the gaps in his evidence under this rule. The mere negligence of a party in the trial Court is no excuse to let in evidence which it failed to produce at the proper time. This rule confers a prerogative on the Court and not on the party and it is only when the Court feels the necessity of additional evidence that it can be allowed to be produced. AIR (Vol 23) 1936 Lah 71: 37 PLR 759: 160 Ind Cas 800 (DB).

——O. 41, R. 27 — Appellate Court holding rejection of evidence improper — Trial Court's decree reversed — Evidence ordered to be admitted — It is material irregularity and the order will be set aside by the High Court in revision. The order, even if treated as one under O. 41, R. 27, is not appealable but the appeal may be treated as revision. AIR (Vol 22) 1935 Bom 222: 37 Bom LR 241: 59 Bom 430: 156 Ind Cas 662.

——O. 41, R. 27 — The question as to whether an Appellate Court can decide a case with or without taking additional evidence is a matter of discretion of that Court and the High Court cannot interfere with that discretion. AIR (V 20) 1933 Lah 1014 (1): 35 PLR 198: 147 Ind Cas 684 (1).

——O. 41, R. 27 — The Appellate Court has a discretion to admit additional evidence for substantial cause but the power given under S. 107 and O. 41, R. 27, Civil P. C., should be exercised very sparingly by the Court and grave caution should be exercised in admitting new evidence. Where there is no lacuna or defect to be filled up or remedied and no substantial cause for taking additional evidence the so-called additional evidence, as it stands, is legally inadmissible and must be left out of consideration in disposing of the case. AIR (Vol 19) 1932 Oudh 227: 8 Luck 18: 9 OWN (C C) 379: 138 Ind Cas 513 (DB).

——O. 41, R. 27 — Formal proof of documents admitted in the trial Court — Discretion of lower Court — No interference in revision.

Where the additional evidence called by the lower Appellate Court related to formal proof of certain documents which had been produced already in the trial Court but which could not be proved because a certain witness could not be served for attendance in Court on a particular date:

Held, that the matter was purely within the discretion of the Court under O. 41, R. 27, and that the exercise of such discretion will not be interfered with in revision by the High Court. (1932) 137 Ind Cas 513 (1): 33 PLR 330.

——O. 41, R. 27 — High Court should not interfere with the exercise of discretion by the lower Court in refusing fresh evidence particularly when such discretion is not exercised contrary to legal principles. AIR (Vol 16) 1929 Pat 98: 115 Ind Cas 674: 10 PLT 10 (DB).

——O. 41, R. 27 — Where a lower appellate Court refuses to admit a certain material document as additional evidence in the appeal under O. 41, R. 27, the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower appellate Court. AIR (Vol 14) 1927 Mad 1099: 38 MLT 24: 1927 MWN 63: 99 Ind Cas 669.

——O. 41, R. 27 — It is in the discretion of the trial Court to allow a party to produce a witness for giving rebuttal evidence and to give adjournments for the purpose. AIR (Vol 13) 1926 Nag 486: 96 Ind Cas 1006.

——O. 41, R. 27 — Both under the general law and under O. 41, R. 27 the Court may for a substantial cause admit additional evidence in appeal, but the question is one of discretion. AIR (Vol 12) 1925 Pat 504: 85 Ind Cas 459 (DB).

——O. 41, R. 27 — Discretion under, to allow further evidence should be cautiously exercised. AIR (Vol 10) 1923 Cal 233: 70 Ind Cas 510: 36 CLJ 345 : 50 Cal 276 (DB).

——O. 41, R. 27 — Discretion of appellate Court — Cannot be interfered with in Second appeal.

A party cannot claim admission of additional evidence, oral or documentary, as a matter of right. The rule however gives a discretion to the Court of appeal to allow the production of such evidence. Rule 27 of Order 41 lays down definite limits within which additional evidence may be produced in appellate Court. The words 'any other substantial cause' mean a cause ejusdem generis to the grounds already mentioned or, in other words, as meaning a case at least anologous to those specified previously. It is not open to a Court of second appeal to interfere with the discretion exercised by lower appellate Court. AIR (Vol 10) 1923 Oudh 109: 75 Ind Cas 331: 9 OLJ 505: 26 OC 66.

——O. 41, R. 27 — Discretion — Interference.

The Appellate Court has a discretion in the matter of admission of additional evidence. It is better for the Appellate Court to read the evidence in the Court below, in order to consider the desirability of admitting additional evidence. AIR (Vol 4) 1917 All 96: 15 ALJ 21: 38 Ind Cas 669 (DB).

——O. 41, R. 27 — Discretion — Interference by High Court.

The Appellate Court has a discretion to admit or reject additional evidence tendered for the first time before it and the High Court will interfere only if the discretion has been improperly exercised. AIR (Vol 3) 1916 Lah 100: 129 PR 1916: 83 PLR 1917: 36 Ind Cas 382 (DB).

——O. 41, R. 27 — Procedure — Rules as regards procedure to be followed.

Courts of first appeal should strictly follow the procedure laid down in O. 41, R. 27 and specially by the second clause of the said rule; but if it exercises a judicial discretion in the admission of evidence pertaining to the record of a litigation that had taken place in its own court, it is not a departure so as to justify the interference in second appeal. AIR (Vol 2) 1915 All 476: 31 Ind Cas 873.

——O. 41, R. 27 — Discretion — High Court powers — Evidence taken on remand.

A High Court is not justified in second appeal in interfering with the discretion of the lower Appellate Court in taking additional evidence after a remand by the High Court. A I R (Vol 2) 1915 All 64 : 27 Ind Cas 827.

——O. 41, R. 27 — Discretion — Additional evidence.

The admission of additional evidence is at the discretion of the Appellate Court and not as of right. (1911) 33 All 379 : 8 A L J 175 : 9 Ind Cas 265 (DB).

4. Documents.

(a) Improper form.
(b) Negligence of party.
(c) Originals.

(d) When allowed.
(e) When not allowed.

(a) Improper form.

——O. 41, R. 27 — Improperly stamped document deliberately withheld in trial Court to avoid stamp and penalty — Held, could not be admitted in appeal.

A certain document which the lower Appellate Court refused to accept under O. 41, R. 27, was not placed before the trial Court and the excuse given in the lower Appellate Court was that it had not been filed owing to oversight. Evidence was taken and the lower Appellate Court refused to accept the document, coming to the conclusion that it had deliberately been withheld by the plaintiff, in whose possession it had always been, in order to avoid the payment of the stamp duty and penalty which would clearly have been exacted had it been presented, and also to avoid a possible prosecution under the provisions of the Stamp Act, and that it was only when the plaintiff felt some apprehension that the decision of the trial Court might be upset that he attempted to file the document. It was again sought to file the document in the second appeal before the High Court, and it was urged that since the decision of the lower Appellate Court, the document had been validated by the payment of the stamp duty and the penalty and the document would go far to prove the party's case.

Held, that the fact that the document if admitted, would go far to prove the plaintiff's case could not prevail against the consideration that the document was deliberately withheld in order to avoid penalties and possible prosecution, and that false evidence was submitted in respect of the non-production of the document at an earlier stage and that, therefore, the document could not be admitted. A I R (Vol 29) 1942 Nag 92 : 1942 N L J 248 : I L R (1942) Nag 369 : 201 Ind Cas 550.

——O. 41, R. 27 — Additional evidence — Receiving duly stamped document.

Section 568 (old Code) (O. 41, R. 27, new Code) allows an Appellate Court to admit a document originally insufficiently stamped but endorsed as properly stamped subsequent to the decision of the first Court. This does not amount to admitting additional evidence, but to simply declaring that the objection to the admissibility is removed. (1911) 9 MLT 317 : 10 Ind Cas 675 (DB).

(b) Negligence of party.

——O. 41, R. 27 and S. 107 (d) — Discretion to admit additional documentary evidence in appeal — Party not diligent in getting it filed in trial Court — Discretion held should not be exercised.

In a suit for possession of certain property on the ground that it was ancestral property, the plaintiff did not produce copies of revenue records which were essential for proving the nature of the property, though he was represented by Counsel and the suit was pending there for over 10 months. In appeal the plaintiff sought to produce those documents on the ground that he was not aware of them.

Held, that the discretion to admit additional documentary evidence in appeal could not be exercised in favour of the plaintiff as he was not diligent in getting it filed in the trial Court though the suit was pending there for over 10 months, and particularly because the Court was of opinion that the documents in question could not help him in any way. A I R (Vol 33) 1946 Lah 444 (DB).

——O. 41, R. 27 — Party keeping himself ignorant of public document through his own negligence — Document not produced in trial Court — Document cannot be admitted in appeal.

Admission of additional evidence in appeal is not the rule. On the other hand under O. 41, R. 27 parties to an appeal are not entitled to produce additional evidence, whether oral or documentary in the Appellate Court, except in the circumstances specified in that rule. Where a party has through his own negligence kept himself ignorant of a document and wants to produce it in the Appellate Court, he cannot claim the benefit of O. 41, R. 27. Where a document forms part of a public record, the allegation that the document was not within the knowledge of a party during the trial of a suit is no ground for admitting it in the Appellate Court. A I R (Vol 33) 1946 Oudh 163 (DB).

(c) Originals.

——O. 41, R. 27 — Originals of documents should be allowed.

An Appellate Court is always entitled to allow the production of evidence. It can allow the original documents the copies of which were produced in the lower Court, to be summoned before it. AIR (Vol 30) 1943 All 183: (1943) ALJ 93: 1943 AWR (HC) 52: 206 Ind Cas 415 (DB).

(d) When allowed.

——O. 41, R. 27 — Fresh evidence — When to be admitted in appeal.

Without indicating that he was of opinion that the defendant, notwithstanding the exercise of due diligence, could not produce the document at the trial it is not open to an appellate judge to admit such document as material for the purpose of deciding the defence of the defendant. AIR (Vol 36) 1949 Mad 394: (1948) 2 MLJ 413 : 61 LW 711 : 1948 MWN 728.

——O. 41, R. 27 — Wazib-ul-arz — Refusal to admit document though admissible to conradict witness — Appellate Court can admit such document.

Where the witnesses depose about a certain custom of adoption which they have learnt from their ancestors, the wazib-ul-arz dictated by the ancestors in which no mention is made about the alleged custom is admissible in evidence to contradict the statement of the witnesses and if the trial Court has refused admission of such document the Appellate Court can admit such document under O. 41, R. 27 (a). AIR (Vol 33) 1946 Oudh 163: 1946 OWN (CC) 26: 21 Luck 1 : 223 Ind Cas 373 (DB).

——O. 41, R. 27, O. 3, R. 10 — Additional documentary evidence — When allowed to be produced.

In order to entitle the appellant to produce additional evidence in the appeal, the essential conditions required by R. 27 of O. 41, Civil P. C., must be satisfied. Where no attempt was made to produce the documents in lower Courts when they could have been produced and they are not required by the Court to enable it to pronounce judgment or for any other substantial cause, such additional documentary evidence cannot be admitted in appeal. AIR (Vol 28) 1941 Oudh 341: 1941 OWN (CC) 643 : 194 Ind Cas 195 (DB).

——O. 41, R. 27 — Documentary additional evidence.

Appellate Court has ample power, under O. 41, R. 27, Civil P. C., to admit additional documentary evidence at appellate stage, if it finds it necessary. AIR (Vol 23) 1936 Pat 600: 17 PLT 709 : 3 BR 147 : 166 Ind Cas 262.

——O. 41, R. 27 (1) (b) — Material additional evidence for first time in appeal, if admissible.

Under O. 41, R. 27 (1) (b), Civil P. C. it is only where the Appellate Court 'requires' it (i. e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party pleases to adduce fresh evidence, but that on examining the evidence as it stands, some inherent lacuna or defect becomes apparent.

Where the plaintiff's suit under S. 128, T. P. Act on money bonds, against the alleged universal donee of the executant's property was decreed against them and in appeal the donees produced an agreement for the first time to prove that there was consideration for the alleged gift:

Held, that the document was rightly admitted as the Court required it to enable it to pronounce judgment, under the provisions of O. 41, R. 27 (1) (b), Civil P. C. AIR (Vol 21) 1934 All 948 : 4 AWR (HC) 127: 153 Ind Cas 674.

——O. 41, R. 27 — Production of additional evidence in Appellate Court — Whether should be admitted.

The appellant on the ground that he was unable to pay his debts and that his liabilities exceeded his assets applied for being adjudicated an insolvent. The application was dismissed by the District Judge on April 4, 1932, on the ground that the appellant had failed to prove that he was unable to pay his debts and that the squares which were part of his assets were worth much more than what the appellant had represented them to be and that he had made no attempt to sell them or to obtain the permission of the Deputy Commissioner. He appealed to the High Court and along with the memorandum of appeal filed a copy of an order of the Deputy Commissioner dated June 2, 1933, rejecting his application for permission to sell the squares for a certain price. The respondents objected to the copy of the Deputy Commissioner's order being admitted in evidence at this stage:

Held, that this was a fit case in which the High Court should exercise its powers under O. 41, R. 27, and admit the copy of the order of the Deputy Commissioner. AIR (Vol 20) 1933 Lah 823 : 147 Ind Cas 190.

——O. 41, R. 27 — Certified copy of a document not offered in evidence at the primary Court on account of the point not having been disputed — Such document should be admitted in appeal. AIR (Vol 15) 1928 Cal 265 (DB).

——O. 41, R. 27 — Where pending an appeal from a decree in a rent suit, a decree is passed in favour of the appellant in a title suit, the appellate Court should receive the decree in evidence and act upon it. AIR (Vol 7) 1920 Low Bur 816: 64 Ind Cas 721 (DB).

——O. 41, R. 27 (b) — Sufficient cause — Addition of evidence.

Order 41, R. 27 (b) authorises an appellate Court to call for a document only in the extreme case of the judgment being impossible on the evidence before it, and does not require additional evidence to be admitted in appeal for the purpose of pronouncing decision in favour of any particular party. AIR (V 5) 1918 Pat 253 : 1 Pat LJ 435 : 37 Ind Cas 1008 (DB).

——O. 41, R. 27 — Discovery of evidence — Admissibility of document.

If the plff. subsequently got the document of which he gave secondary evidence as being lost it can be admitted in appeal. AIR (Vol 4) 1917 Mad 189 : 32 Ind Cas 711 (DB).

——O. 41, R. 27 — Mistake — Power of admitting evidence omitted by misake — Documents.

The Appellate Court has power to allow additional evidence to be taken where the omission is due to inadvertance or mistake, especially when it consists of documents the genuineness of which cannot be impeached of. AIR (Vol 3) 1916 Lah 208: 14 PR 1916 : 195 PWR 1915: 33 Ind Cas 813 (DB).

(e) When not allowed.

——O. 41, R. 27 (1) (b) — Requirement for fresh evidence must be of Court and not of party.

Rule 27 (1) (b) of O. 41, Civil P. C., comes into operation only when the Court requires fresh evidence. The requirement must be of the Court and not of the party to the litigation. When the Court is of opinion that without fresh evidence it cannot pronounce judgment or that without fresh evidence it finds it difficult to perform its functions, then and then only will the Court admit fresh evidence under O. 41, R. 27 (1) (b). The rule is not intended to assist a party who through a negligence or over-confidence fails to produce sufficient evidence to prove his case in the Court below. If the Court upon the evidence on the record is able to pronounce judgment or perform its functions it has no jurisdiction to admit further evidence.

In a mortgage suit, the defendant at the very outset challenged the validity of the mortgage, stating that no consideration had been paid. The parties went to the trial on the issue regarding consideration. The plaintiff did not produce any bond to prove that there was a valid consideration. He contended himself with producing other evidence which the lower Court disbelieved. In the Appellate Court the plaintiff produced the bond to prove consideration which was admitted by the Court. Defendant filed second appeal:

Held, that in these circumstances it could not be said that the Appellate Court 'required' this additional evidence for the proper disposal of the appeal. The lower Appellate Court was wrong in admitting the bond. AIR (Vol 28) 1941 Cal 378: 45 CWN 498: ILR (1941) 1 Cal 580: 74 CLJ 121: 196 Ind Cas 193.

——O. 41, R. 27 — Additional documentary evidence merely for corroboration of oral evidence disbelieved by trial Court, cannot be admitted.

Where the admission of the documents by the Appellate Court was not for the purpose of remedying some inherent lacuna or defect but for the purpose of providing corroboration for oral testimony which had been disbelieved by the trial judge and the oral evidence was complete had it been believed, the additional evidence not being necessary for the Court to appreciate a party's case or to pronounce judgment on it, is not admissible under O. 41, R. 27, Civil P. C. AIR (Vol 27) 1940 Mad 911: (1940) MWN 863: (1940) 2 MLJ 287: 52 MLW 326: 192 Ind Cas 355 (DB).

——O. 41, R. 27 and O. 13, R. 2 — Appellate Court, if can admit additional evidence when satisfied with reasons of its non-production at initial stage — Discretion under O. 13, R. 2, exercise of.

The scope and requirement of O. 41, R. 27, are different from those of O. 13, R. 2. Order 13, R. 2 refers to production of documents only, and that in the trial Court, while O. 41, R. 27, deals with the taking of additional evidence, oral as well as documentary in the Appellate Court. In the one case the question is one of condoning delay in the production of documents on which a party relies in the other, of admitting evidence which the Court requires, either of its own motion or at the

instance of a party for the disposal of the case. It is not to be supposed that an Appellate Court should admit additional evidence merely because it is satisfied that there was sufficient ground for its non-production at the initial stage in the trial Court.

The fact of a document being of unimpeachable authenticity is no doubt very material in considering whether the Court should or should not exercise its discretion in favour of a party under O. 13, R. 2, but in determining whether or not an order should be made under O. 41, R. 27, considerations of a materially different character arise. AIR (Vol 24) 1937 Cal 537: ILR (1937) 2 Cal 661: 67 CLJ 488: 176 Ind Cas 429 (DB).

——O. 41, R. 27 — Appeal in execution — Appellate Court refusing to consider document filed in previous execution but not before it.

In execution of a decree passed against the estate of a father, a house was attached and the son raised an objection that he was the owner of the house and not the father. The objection being dismissed, he filed an appeal. In appeal the son placed reliance on a document of mutation in favour of the son which was claimed to include the house in dispute and which had been placed on the record in previous proceedings relating to the execution of the decree but was not before the executing Court in the present execution. The lower Appellate Court declined to look into this document:

Held, that the refusal of the lower Appellate Court to consider the effect of the mutation on the present dispute was not justified. AIR (Vol 24) 1937 Lah 263: 174 Ind Cas 320.

——O. 41, R. 27 — Additional documentary evidence in appeal.

The application for the reception of additional evidence in appeal cannot be allowed where the document sought to be brought on the record was not produced before the Court below and it cannot be said that that Court rejected a piece of evidence which it should have accepted, nor can it be said that the Appellate Court requires the document for the purpose of pronouncing judgment nor again can it be said that the said document was not within the knowledge of the applicant. AIR (Vol 23) 1936 All 239: (1936) ALJ 350: 1935 AWR (HC) 1432: 58 All 505: 161 Ind Cas 903 (DB).

——O. 41, R. 27 — Admission of documentary evidence.

Documents cannot be admitted in evidence either under Cl. (a) of O. 41, R. 27, Civil P. C. or under Cl. (b), when there is nothing to show that the Munsif refused to receive them in evidence and there is no inherent lacuna or defect in the evidence as it stood. (1936) 163 Ind Cas 745: 39 CWN 668: 62 CLJ 251.

——O. 41, R. 27 — Evidence to fortify party's case.

Appellate Court cannot call for documents to be produced to fortify respondent's case when dismissal of appeal is decided on other grounds.

The word 'requires' in O. 41, R. 27 means finds it needful. (1936) 1936 MWN 1262.

——O. 41, R. 27 — Copy of sale-deed not thirty years old — Admissibility.

A document not thirty years old but purporting to be a recently made copy of a sale-deed cannot be admitted in evidence when no ground for admitting secondary evidence is proved and the evidence is not necessary for judgment. Order 41, R. 27, Civil P. C. should be strictly interpreted. AIR (Vol 21) 1934 Lah 529: 148 Ind Cas 820 (DB).

——O. 41, R. 27 — Public documents — Judgment — Admission of evidence in appeal.

It is not proper to admit as evidence in appeal, a judgment which is not inter partes, not conclusive, and is simply an addition of a disputable point to the already existing evidence. AIR (Vol 6) 1919 Cal 287: 23 CWN 242: 50 Ind Cas 119 (DB).

——O. 41, R. 27 — Procedure — Admission of documents — Documents filed with memorandum of appeal — Admission of.

An Appellate Court is not entitled to admit and consider additional documentary evidence in contention of O. 41, R. 27, C. P. C. the provisions of which are mandatory. An appellant attached certain documents to his memorandum of appeal and the appellate Court passed an order that they should remain in the record.

Held, that the Court erred in admitting this evidence and its findings being passed on evidence wrongly admitted were liable to be set aside. AIR (Vol 5) 1918 Lah 120: 150 PWR 1918: 47 Ind Cas 12 (DB).

——O. 41, R. 27 — Public documents — Settlement papers — Appellate Court.

Settlement papers cannot be admitted by the Appellate Court after the first Court's decision in the case. AIR (Vol 2) 1915 Cal 801: 29 Ind Cas 219 (DB).

5. Estoppel.

——O. 41, R. 27 — Admission of additional evidence — Party in possession of document failing to produce it even after being given an opportunity to produce it.

Where a party had been given an opportunity by the trial Court to produce a document which was admittedly in his possession but fails to produce it, an appellate Court would not be justified in allowing such a party to produce that as additional evidence in appeal. 1950 RD 66.

——O. 41 R. 27 — Additional evidence not objected to in lower Appellate Court — No objection in further appeal.

Where one party to an appeal has without raising any objection at the time, consented to the additional evidence being taken on request of the other party, it is not open to the former to object in the next Appellate Court to the admission of additional evidence. AIR (Vol 31) 1944 Oudh 220: 1944 OWN (CC) 131: 1944 AWR (CC) 100: 19 Luck 583: 218 Ind Cas 314 (DB).

——O. 41, R. 27 — Party keeping back evidence in trial Court.

Powers given by O. 41, R. 27 are to be used sparingly and caution is to be exercised in admitting new evidence. Order 41, R. 27 cannot be reasonably invoked in a case in which a party has kept back evidence which he should have produced at the proper time. AIR (V 31) 1944 Sind 73 : ILR (1943) Kar 429 : 214 Ind Cas 256 (DB).

——O. 41, R. 27 — Party having every opportunity of producing evidence and failing to prove his case.

In a case in which a party had had every opportunity of producing his evidence in the trial Court and had failed to prove his case, the Appellate Court is not entitled to order further inquiry at large, permitting the whole case to be re-opened and further evidence adduced. AIR (Vol 31) 1944 Sind 61: ILR (1943) Kar 420: 212 Ind Cas 561 (DB).

——O. 41, R. 27 — No additional documentary evidence can be allowed in appeal on the ground that they were brought to the notice of the party seeking to produce them after the decision of the case but which were referred by the opposite party in its original petition and there was no reason

why they were not produced earlier. AIR (Vol 24) 1937 Lah 786: 40 PLR 82: 176 Ind Cas 262 (DB).

——O. 41, R. 27 — The appellant cannot in second appeal complain that additional evidence received in the lower appellate Court giving the appellant an opportunity of establishing by production of further evidence that the dakhilas given by the landlord were genuine, was wrongly received by that Court. AIR (Vol 16) 1929 Cal 492: 49 CLJ 473: 120 Ind Cas 460.

——O. 41, R. 27 — Omission to prove case — Additional evidence — Opportunity.

In a mortgagee suit, a person claiming to be a prior mortgagee, must prove his claim in the suit and if he fails to do so he cannot ask for a fresh opportunity to prove it on appeal. AIR (Vol 6) 1919 Oudh 216: 50 Ind Cas 933 (1).

——O. 41, R. 27 (Old Code, S. 568) — Waiver of objections — Admission by the Court of appeal of fresh evidence.

The appellate court, with the consent of both sides, examined three witnesses and also admitted documentary evidence and reversed the judgment of the trial Judge. There was nothing to show that the admission was objected to at the time.

Held, that it was not open to a party on appeal to the Privy Council to take objection to the regularity of the procedure. 36 Cal 833: 13 CWN 830: 10 CLJ 74: 6 MLT 7: 11 Bom LR 861: 19 MLJ 435 : 36 IA 221 : (1909) 3 Ind Cas 465 (PC).

——O. 41, R. 27 — Evidence admitted in appeal without objection — Such evidence cannot be objected to in second appeal.

Where fresh evidence is admitted on appeal without objection, it cannot be objected in second appeal even though the lower appellate Court did not act according to S. 568, C. P. C., record its reasons admitting it. (1901) 23 All 331 (337): 1901 AWN 91 (DB).

6. Exclusion of evidence.

——O. 41, R. 27 — Evidence which is rejected by the trial Court can be admitted in the appellate Court.

The District Judge admitted certain evidence in appeal, which was rejected by the trial Court. That evidence consisted of a deposition in which a certain admission regarding relationship was made by a woman who was dead and whose property the appellants were claiming.

(Held), that though the evidence is not admissible under O. 41, R. 27 (b), sub-Cl. (1), it is admissible under R. 27 (a), Sub-Cl. (1). AIR (Vol 15) 1928 Pat 113: 7 Pat 90: 105 Ind Cas 26: 9 PLT 180 (DB).

——O. 41, R. 27 — Evidence shut out by lower Court — Appellate Court can ask lower Court to take that evidence and call for fresh findings. AIR (Vol 14) 1927 Mad 1065: 39 MLT 399 : 106 Ind Cas 498.

——O. 41, R. 27 — Exclusion of evidence — Consideration of.

Where a trial Court refuses to admit documents tendered to it in evidence it is open to the Appellate Court to admit them after proof. Such admission does not amount to receiving additional evidence. AIR (Vol 6) 1919 Cal 780: 52 Ind Cas 327 (DB).

——O. 41, R. 27 — Exclusion of evidence — Party not applying for admission on appeal — Effect.

Where on objection taken by a party, certain documents were excluded as being inadmissible and no application was made to the Appellate Court to admit the document or to take fresh evidence as to its admissibility.

Held, that the action of the Lower Court in refusing to consider the document is not illegal. AIR (Vol 3) 1916 Mad 535: 28 MLJ 115: 28 Ind Cas 378 (DB).

——O. 41, R. 27 — Exclusion of evidence — Appellate Court — Discretion of.

Where the Lower Court ought to have received the documents tendered by deft. in order to dispose of, completely the matter in dispute they were admitted in the Appellate Court under O. 41, R. 27, C. P. C. AIR (V 2) 1915 Oudh 14 : 2 OLJ 27 : 27 Ind Cas 516 (DB).

7. Inherent lacuna.

——O. 41, R. 27 (1) (b) — Principles.

Under O. 41, R. 27 (1) (b) it is only where the Appellate Court "requires" (i. e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna becomes apparent." Where the Court does not find any inherent lacuna or does not require it to pronounce the judgment, the additional evidence cannot be allowed. (1941) 193 Ind Cas 129: 7 BR 583.

——O. 41, R. 27 — The legitimate occasion for the exercise of the power under R. 27 of O. 41, Civil P. C. is when the Appellate Court finds "some inherent lacuna or defect apparent on the record", the mere fact that a party has made a discovery of fresh evidence outside the Court will not justify the Court in allowing such evidence to be imported into the case. Rule 27 exacts very strict conditions so as to prevent litigants being negligent and enjoins the Court to require the facts as to the absence of negligence to be strictly proved. AIR (Vol 26) 1939 Lah 265: 41 PLR 338: 184 Ind Cas 164.

——O. 41, R. 27 — Inherent lacuna or defect.

The legitimate occasion for the exercise of the discretion to allow additional evidence is not whenever before the appeal is heard, a party applies to adduce fresh evidence but when on examining the evidence as it stands, some inherent lacuna or defect became apparent. AIR (Vol 25) 1938 Lah 114: 40 PLR 198: 177 Ind Cas 305.

——O. 41, R. 27 — Admitting additional evidence in appeal before appeal itself is heard — Procedure.

The legitimate occasion for the exercise of the discretion of admitting additional evidence in appeal is not whenever before the appeal is heard a party applies to adduce fresh evidence but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. Hence an order admitting a certain document in appeal as additional evidence passed before the appeal itself is heard is without jurisdiction. AIR (Vol 25) 1938 Mad 957: (1938) MWN 1012: (1938) 2 MLJ 648: 48 MLW 635: 181 Ind Cas 263.

——O. 41, R. 27 (1) — When can be admitted.

The legitimate occasion for the application of O. 41, R. 27 (1) is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made outside the Court of fresh evidence and the application is made to import it. AIR (Vol 24) 1937 Cal 537: ILR (1937) 2 Cal 661: 67 CLJ 488: 176 Ind Cas 429.

——O. 41, R. 27 — Provisions of R. 27, whether meant to patch up weak parts of case and fill up omissions in appeal.

The legitimate occasion for the exercise of discretion to allow additional evidence is not whenever

before the appeal is heard a party applied to adduce fresh evidence but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent. The provisions of S. 107, Civil P. C., as elucidated by O. 41, R. 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of Appeal. AIR (Vol 24) 1937 Lah 285: 174 Ind Cas 543 (DB).

——O. 41, R. 27 (1) (b) — Principles of.

Under O. 41, R. 27 (1) (b), Civil P. C., it is only where the Appellate Court "requires" it (i. e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard, a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands,' some inherent lacuna or defect becomes 'apparent'. It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. AIR (Vol 23) 1936 Lah 37: 38 PLR 748: 165 Ind Cas 626 (DB).

——O. 41, R. 27 — Rules as to reception — Discretion of Court.

Additional evidence can be admitted in appeal only when the Appellate Court requires it and the legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. Whenever, the Court adopts this procedure and allows such evidence to be produced, the Court shall record its reason for so doing. But the weight of the objection against reception of such evidence is considerably weakened when at the hearing the opposite party has not objected to such reception. It is also weakened when the papers admitted being public documents their admission is not objectionable. AIR (Vol 23) 1936 Pat 57: 2 BR 86: 159 Ind Cas 460.

——O. 41, R. 27 — Trial Court deciding case without expert evidence Appellate Court can admit such evidence.

An Appellate Court has no jurisdiction to require additional evidence unless there is a definite lacuna in the evidence already before it. Where the trial Court had decided a case without expert evidence and on the view it took of the evidence of the parties it is the duty of the Appellate Court, without calling expert evidence to form its opinion on the evidence already before it and the procedure of the Appellate Court in admitting expert evidence is irregular. AIR (Vol 21) 1934 Pat 60: 150 Ind Cas 788.

——O. 41, R. 27 — Per Kincaid, J. C. — The legitimate occasion for the application of O. 41, R. 27 is, when, on examining the evidence, as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court of fresh evidence and the application is made to import it. AIR (Vol 17) 1930 Sind 105 : 24 SLR 15 : (FB).

——O. 41, R. 27 — Discovery of fresh evidence is no ground for admission of it.

The legitimate occasion for the applicaion for the rule allowing the production of additional evidence is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. AIR (Vol 14) 1927 Lah 11: 97 Ind Cas 369 (DB).

——O. 41, R. 27 — There is no jurisdiction in the Appellate Court to admit additional evidence unless on examining the evidence as it stands some inherent lacuna or defect becomes apparent. AIR (Vol 10) 1923 Pat 446: 71 Ind Cas 881: 4 PLT 418 (DB).

——O. 41, R. 27 — As pointed out by the Privy Council in 31 Bom 381 (P. C.) the legitimate occasion for the admission of additional evidence by the appellate Court under O. 41, R. 27, C. P. Code, is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent or where a discovery is made outside the Court of fresh evidence, and an application is made to import it. (1922) 66 Ind Cas 370 (Lah) (DB).

——O. 41, R. 27 — Where the further evidence was ordered after the appeal on the merits had been heard and the evidence as it stood had been examined by the Judge and the defect or inherent lacuna that became apparent on examining the evidence as it stood was that the parties had not grasped the questions arising out of the pleadings.

Held, that the circumstances justified the taking of additional evidence. AIR (Vol 8) 1921 Sind 155: 66 Ind Cas 833: 16 SLR 17 (DB).

——O. 41, R. 27 — Discovery of fresh evidence — Admission when proper.

Evidence not tendered before the Primary Court ought not to be admitted by the Appellate Court unless on examining the evidence as it stands some lacuna or inherent defect becomes apparent and not merely a discovery is made outside the Court of fresh evidence and the application is made to import it. AIR (Vol 6) 1919 Cal 596 : 53 I. C. 567.

——O. 41, R. 27 — Sufficient cause — Additional evidence — Admission of, when justified.

Order 41, R. 27, C. P. C. does not provide that in order to enable the Appellate Court, to pronounce judgment in favour of a particular party additional evidence may be admitted in appeal. The legitimate occasion for the use of the power conferred by O. 41, R. 27, C. P. C. on an Appellate Court is, when on examining the evidence as it stands, an inherent as defect or lacuna becomes apparent. AIR (V 6) 1919 Pat 341 : 20 Cr LJ 826 : 53 Ind Cas 826.

——O. 41, R. 27 — Procedure — Admission of — Additional evidence — Appellate Court — Powers of.

A preliminary application to admit fresh evidence before the appeal is heard is not warranted by the language of R. 27. The rule does not authorise an Appellate Court to admit fresh evidence, documentary or oral and whether or not it was in existence at the time of judgment of the Lower Court or at the time the appeal was preferred, unless the Appellate Court after examining the evidence on record comes to the conclusion that additional evidence is required in order to enable it to pronounce judgment, namely that there is a lacuna in the evidence on record. AIR (Vol 2) 1915 Cal 407 : 42 Cal 675 : 19 CWN 401: 28 Ind Cas 865 (DB).

——O. 41, R. 27—Sufficient cause—Inherent defect.

Under R. 27 the appellate Court will not allow the respondent to adduce fresh evidence except for some substantial cause. The rule refers primarily to some inherent lacuna or defect in the evidence before the Court. 6 SLR 135 : (1913) 19 Ind Cas 368 (DB).

8. Mistake or negligence of party.

See also Notes 21 and 22.

——O. 41, R. 27 (1) (b) — Additional evidence — When permitted in appeal — Discretion of Court — Grounds for exercise of.

Under O. 41, R. 21 (1) (b), C. P. Code, it is only when the appellate Court requires it that addi-

tional evidence can be admitted. The legitimate occasion for the exercise of discretion under the rule is when the Court finds it needful to examine additional evidence to enable it to pronounce judgment or for any other substantial cause. The rule is not intended to enable a litigant who has been unsuccessful in the trial Court to patch up the weak parts in his case and to fill up the omissions in the Court of Appeal. In the absence of satisfactory reasons for the non-production of evidence in the trial Court, additional evidence ought not to be admitted in appeal, as a party guilty of remissness in the trial Court is not entitled to the indulgence of being permitted to give further or additional evidence under O. 41, R. 27 (1) (b), C. P. Code. AIR (V 38) 1951 Punj 305 (DB).

——O. 41, R. 27 (1) (b) — Court requiring additional evidence for satisfactory decision of case — Delay or negligence of party concerned — Relevancy.

When an appellate Court thinks that the question arising in the case cannot be decided satisfactorily on the materials on record and that additional material is required in order to clear the doubt of the Court, it can call for such evidence under R. 27 (1) (b) O. 41 of the C. P. Code and in such case the question of the delay or negligence of a party does not arise. I L R (1947) Mad 393 : AIR (Vol 34) 1947 Mad 111 : 231 Ind Cas 273 : 1946 I T R 722 : 1946 M W N 654 : 59 L W 536 : (1946) 2 M L J 257 (DB).

——O. 41, R. 27 — Benefit of — If can be claimed on ground of ignorance of existence of the public document in question.

An admission of additional evidence in appeal is not the rule. On the other hand under R. 27 of O. 41 of the C. P. Code, parties to an appeal are not entitled to produce additional evidence, whether oral or documentary, in the appellate Court, except in specified circumstances. Where a party has through his own negligence kept himself ignorant of a public document, and wants to produce it in the appellate Court, he cannot claim the benefit of O. 41, R. 27. 21 Luck 1 : 223 Ind Cas 373 : 1946 O A (CC) 32 : 1946 O W N 26 : 1946 ALW (CC) 26 : 1946 AWR (CC) 32 : AIR (Vol 33) 1946 Oudh 163 (DB).

——O. 41, R. 27 (1) (b) — Applicability.

It is only where an Appellate Court requires additional evidence to enable it to pronounce judgment or for any other sufficient cause that O. 41, R. 27 (1) (b) applies.

(Where the document was one on which the defendant relied and which he could have put in evidence in lower Court, it was held by their Lordships that no case arose for admitting the document in appeal.) (1945) 1945 MWN 592 : (1945) 2 MLJ 519 : 58 MLW 670 (2) : 50 CWN 2 (PC).

——O. 41, R. 27 — Party deliberately not bringing his evidence before trial Court — Appellate Court should not allow such evidence if it is able to give judgment on record as it stands.

The words of O. 41, R. 27, Civil P. C., are wide, but they should be strictly interpreted; they should be interpreted in accordance with the spirit and intention of the rule. It cannot be said that O. 41, R. 27, excludes any application by the party under O. 41, R. 27, for the application by the party may bring to the notice of the Court an inherent lacuna or defect, which would justify the admission of additional evidence under the provisions of Cl. (b). But it must be the Appellate Court which requires the additional evidence. The Appellate Court must not, however, require it because the plaintiff asks for it, nor for the easing of a tender conscience, nor because the Court requires this further evidence to make good a gap, however wide, in the plaintiff's case, which the plaintiff, of set purpose and design, kept open for his own advantage. Clause (b) contemplates a case, where upon the record as it stands, the Court perceives such lacuna or such defect as will disable it from giving a proper judgment upon the merits. Hence where the plaintiff has deliberately not brought certain evidence before the trial Court it is not open to the Appellate Court to allow such evidence if there is ample material on the record on which it can give judgment. AIR (Vol 31) 1944 Sind 57: ILR (1943) Kar 415: 212 Ind Cas 4 (DB).

——O. 41, R. 27 — Negligence or inadvertence — Fresh opportunity to supply defect should not be given.

Where a party has not proved certain things on account of either negligence or inadvertence a fresh opportunity to supply the defect in the record should not be given in the appeal. AIR (Vol 30) 1943 Bom 397: 45 Bom LR 773: 210 Ind Cas 618 (DB).

——O. 41, R. 27 — Party objecting in trial Court that no notice was served but adducing no evidence to substantiate his allegation.

The powers of the Appellate Court to admit additional evidence are very limited and if a party deliberately chooses not to lead evidence at a time when he could have done so, he has only himself to thank for the consequences. Hence when a party raises an objection in the trial Court that no notice was served on him but fails to adduce evidence to substantiate his allegation he cannot be allowed to adduce evidence in support of that objection in the Appellate Court. AIR (Vol 30) 1943 Lah 166: 45 PLR 173: 209 Ind Cas 609.

——O. 41, R. 27 — Party on advice of Counsel deciding to call no witness on point — Whether can re-open matter in appeal on establishing that Counsel's view as to legal position was erroneous.

Where a litigant on the advice of his Counsel as to the legal position decides to call no evidence on a particular point, he should not be allowed to have the matter re-opened in appeal on establishing that the view previously taken by his Counsel was erroneous. AIR (V 29) 1942 Oudh 122 : 1941 OWN (C C) 1309: 1941 AWR (C C) 1114: 1941 RD 1156: 17 Luck 441: 197 Ind Cas 791 (DB).

——O. 41, R. 27 (1) (b) — Non-production due to negligence.

Where the non-production of the documents sought to be produced under O. 41, R. 27 (1) (b) is due to the negligence of the appellant of his Counsel, it is neither desirable nor proper to allow the appellant to fill up the lacuna in the evidence produced in the Court below and to patch up the weak points of the case. AIR (Vol 28) 1941 Oudh 429: 1941 OWN (C C) 648: 1941 AWR (C C) 395: 194 Ind Cas 161 (DB).

——O. 41, R. 27 — Evidence to fill up lacuna caused by negligence of party.

Evidence to fill up a lacuna in evidence which lacuna is the result of the party's own negligence cannot be admitted in appeal. AIR (Vol 28) 1941 Oudh 77: 1940 OWN (C C) 999: 1940 AWR (C C) 428: 16 Luck 230: 191 Ind Cas 166.

——O. 41, R. 27 — Party's failure.

Plaintiff's failure to produce account books — Suit dismissed on adverse inference — Plaintiff cannot be allowed to produce them after conclusion of arguments in appeal against dismissal of suit. AIR (Vol 28) 1941 Pat 433: 20 Pat 130: 8 BR 8: 196 Ind Cas 220 (DB).

——O. 41, R. 27 — Plaintiff choosing to rely on certain evidence though objection is raised to its admissibility — Plaintiff, if should be given further opportunity to produce additional evidence.

The plaintiff choose to rely on such evidence as was produced before the trial Court, in spite of the objections taken by the opposite party as to the admissibility of that evidence. Even in the Appellate Court that evidence had been argued to be sufficient to prove what the plaintiff had to prove. The Appellate Court held this evidence to be inadmissible whereupon the plaintiff asked for further opportunity to produce additional evidence:

Held, that the plaintiff had ample opportunity of giving that necessary evidence in the trial Court, but he elected not to do so. He knew clearly what he had to prove and choose to prove it in a particular manner and took the chance of a judgment in his favour on that evidence. He would not therefore be allowed to give the evidence which he could have given before. AIR (Vol 28) 1941 Rang 344: 198 Ind Cas 564 (DB).

——O. 41, Rr. 27, 29 — Failure to examine material witness though available.

When an essential piece of evidence, obviously necessary for the proof of a party's case and available to that party, has not been adduced in the trial Court, the Appellate Court will not ordinarily allow the production of the missing evidence in appeal, merely because the trial Court has commented adversely on the failure of the party to prove his case or completely as was obviously necessary.

The failure of a party to examine a material witness when that witness is available and the consequent existence of a gap in his case is not ordinarily a sufficient reason for examining that witness in appeal, though there may possibly be circumstances in which such a procedure would be justified, as, for instance, if the whole case was in such a muddle that the Judge was unable to pronounce a satisfactory judgment without further materials. AIR (Vol 27) 1940 Mad 707: (1940) MWN 511: 194 Ind Cas 816.

——O. 41, R. 27 — Negligence of Counsel.

No additional evidence can be admitted under O. 41, R. 27, Cl. (1) (b) to permit the appellant to fill a lacuna in his case, a lacuna which is undoubtedly due to the negligence of his legal advisers who conducted the trial in the Court below. AIR (Vol 25) 1938 Mad 583: (1938) MWN 280: 182 Ind Cas 767 (DB).

——O. 41, R. 27 — Principles.

It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial. (1936) 164 Ind Cas 90: 39 CWN 322.

——O. 41, R. 27 — Grounds for admission — Negligence of a pleader.

The negligence of a pleader in not producing the evidence which ought to have been produced in the lower Court does not amount to substantial cause within the meaning of O. 41, R. 27. AIR (Vol 17) 1930 Bom 272: 32 Bom LR 608 (DB).

——O. 41, R. 27 — Negligence — Negligence of pleaders if a ground for.

The negligence of pleaders in not tendering evidence at the proper time does not entitle the parties to an indulgence to have it admitted in the appellate court. AIR (Vol 17) 1930 Sind 318: 125 Ind Cas 33 (DB).

——O. 41, R. 27 — Negligence of guardian is a sufficient cause. AIR (Vol 16) 1929 Lah 91: 110 Ind Cas 447.

——O. 41, R. 27 — Party wishing to produce additional evidence under O. 41, R. 27 must show that even with due diligence he could not produce it at the trial although the rule contains no such wording. AIR (Vol 16) 1929 Pat 98: 10 PLT 10: 115 Ind Cas 674 (DB).

——O. 41, R. 27 — Appellant not diligent — Opportunity to produce additional evidence should not be given. AIR (Vol 14) 1927 Nag 398: 102 Ind Cas 27.

——O. 41, R. 27 — Appellate Court can allow additional evidence even at the instance of a party— But opponent must be given opportunity to rebut — Where party allowed to give additional evidence had been negligent, High Court ordered him to pay costs though allowed to give additional evidence. AIR (Vol 12) 1925 Mad 181: 85 Ind Cas 385: 20 MLW 840: 48 MLJ 32.

——O. 41, R. 27 — Negligence — Additional evidence — Indulgence.

A litigant is not entitled to the indulgence of being allowed to adduce additional evidence if he was remiss, in spite of objections to the defect in the record in the Courts below. AIR (Vol 7) 1920 PC 81: 47 Cal 662: 47 IA 11: 38 MLJ 424: (1920) MWN 308: 11 LW 518: 22 Bom LR 557: 18 ALJ 401: 55 Ind Cas 959.

——O. 41, R. 27 — Negligence — Additional evidence — Power to take.

An Appellate Court has no power to call for evidence which could have been produced by the party if he had been more diligent. AIR (Vol 7) 1920 Pat 266: 1 Pat LT 701 (DB).

——O. 41, R. 27 (b) — Negligence — Additional evidence — Grounds for.

An appellate Court has no power to call for fresh evidence when a party has deliberately declared in the Lower Court that he has no evidence. AIR (Vol 2) 1915 Mad 68: 16 MLT 301: 25 Ind Cas 587 (DB).

9. New evidence.

——O. 41, R. 27 — Additional evidence created pending appeal — Application for allowing after arguments and before judgment — Maintainability.

O. 41, R. 27, C. P. Code, was not intended to enable a party to patch up the weak parts of his case; there is no justification for receiving an additional piece of evidence after arguments are concluded and judgment reserved in an appeal, more especially when such additional evidence was brought into existence during the pendency of the appeal itself. AIR (Vol 39) 1952 Cal 368 (DB).

——O. 41, R. 27 (1) (b) — Additional evidence not available during trial — Admission at appellate stage — Permissibility.

Evidence which has got an important bearing on a crucial point in the case and which could not be produced by a party during the trial of the case in the Original Court even after the exercise of due diligence, can be allowed to be taken at the appellate stage, and there is nothing in the language of O. 41, R 27 (1) (b), C. P. Code, which prohibits such a course. AIR (Vol 34) 1947 Pesh 45 (DB).

——O. 41, R. 27 — Additional evidence can be admitted only when Appellate Court itself requires it.

An Appellate Court cannot admit additional evidence unless that Court itself requires such evidence in order to be able to pronounce judgment.

A suit for possession of certain land filed by the plaintiff on the ground that he had purchased it in execution of a rent decree was dismissed. An appeal against that decree was dismissed by the Appellate Court. Subsequently the appellant made an application for review to that Court on the ground that he had discovered some new evidence.

The Lower Appellate Court dismissed that application in limine. In second appeal to the High Court the appellant made an application for the reception of the above mentioned new evidence:

Held, that the High Court had jurisdiction in second appeal to entertain the application. On the rejection of the application the decree as passed by the lower Appellate Court remained as it was and when that decree came to be dealt with by High Court in second appeal it was impossible to say that an application for admission of additional evidence would not lie as a matter of law, because such an application, made in the form of an application for review, had been rejected by the lower Appellate Court. AIR (Vol 33) 1946 Cal 518.

——O. 41, R. 27 — There is no justification for admitting additional evidence, when there is nothing to show that such evidence was not in the possession of the party when the question was being tried. AIR (Vol 29) 1942 Bom 227: 44 Bom LR 415: 202 Ind Cas 392 (DB).

——O. 41, R. 27 — Production strengthening party's case whether good and sound.

Additional evidence cannot be allowed on a ground that its production and proof would strengthen the defendant's case. Order 41, R. 27, Civil P. C., is not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of Appeal. AIR (Vol 27) 1940 Nag 80 : 1939 NLJ 594 : 186 Ind Cas 89.

——O. 41, R. 27 — Issue of commission by Appellate Court — Commissioner's report dealing with matters not already in evidence — Admissibility.

Order 41, R. 27, Civil P. C. is intended to enable an Appellate Court to admit or exclude additional evidence of any nature and if a Commissioner's report deals with matters not already in evidence, it must be fresh evidence, the admission or rejection of which must be governed by principles laid down in the rule.

Where an Appellate Court issues a commission, it is not bound to except as evidence apart from O. 41, R. 27. (1937) 1937 MWN 39.

——O. 41, R. 27 (b) — Admission merely to enable Court to pronounce judgment in favour of particular party.

The provision of O. 41, R. 27(b), Civil P. C. which permits the Appellate Court to admit additional evidence if it requires it to enable it to pronounce judgment does not mean that additional evidence should be admitted in appeal in order to enable the Appellate Court to pronounce judgment in favour of a particular party and it is not within the power of an Appellate Court to admit evidence which might have been adduced by a party in support of his contention in the lower Court, merely because the lower Court has drawn an adverse inference from the non-production of this evidence, more especially where there are no special circumstances which excuse the party for not producing that evidence at the proper time. AIR (V 23) 1936 Mad 273 : 42 MLW 658 : (1935) MWN 1255 : 69 MLJ 707 : 159 Ind Cas 191.

——O. 41, R. 27 — Power given to the Appellate Courts for admission of additional evidence should be sparingly exercised. (1936) 1936 OWN (CC) 722.

——O. 41, R. 27 — An appellant cannot be allowed to adduce fresh evidence to patch up the weak parts of his case and fill up omissions. AIR (Vol 19) 1932 Mad 148: 34 MLW 663: 135 Ind Cas 532.

——O. 41, R. 27 — Additional evidence.

Admission of a second copy of a deposition when the first is incorrect, is not additional evidence. AIR (Vol 15) 1928 Pat 64: 105 Ind Cas 83: 9 PLT 215 (DB).

——O. 41, R. 27 — Court can admit additional evidence on the application of a party. AIR (Vol 13) 1926 Lah 80 : 89 Ind Cas 997.

——O. 41, R. 27 — Appellate Court can admit additional evidence even on the application of a party. AIR (Vol 13) 1926 Lah 20: 89 Ind Cas 721 (DB).

——O. 41, R. 27 — Additional evidence cannot be admitted merely because the evidence is such as to justify grant of review. AIR (Vol 12) 1925 All 808: 88 Ind Cas 586: 6 LRA Civ. 393.

——O. 41, R. 27 — There is no precedent for allowing an appellant to lead evidence, which could have been led in the Court below, in appeal. AIR (V 9) 1922 Bom 147 : 77 Ind Cas 515 (DB).

——O. 41, R. 27 — Limits the power of the appellate Court to admit further evidence. AIR (Vol 8) 1921 Lah 279: 4 LLJ 371 (DB).

——O 41, R. 27 — Sufficient cause — Additional evidence — Appellate Court when entitled to admit.

Where a point is sufficiently covered by the issues framed by the Court of first instance and the parties had every opportunity of producing evidence upon that point, the Appellate Court must refuse to admit fresh evidence when the appeal comes before it. AIR (Vol 6) 1919 Oudh 379: 5 OLJ 768: 49 Ind Cas 115 (DB).

——O 41, R. 27 — Sufficient cause — Further evidence — Appellate Court.

A party cannot advance further evidence on appeal unless he has been prevented by the action of the court from adducing all the evidence he could. AIR (Vol 1) 1914 Mad 473: 37 Mad 455: 11 MLT 69: 22 MLJ 217 : (1912) MWN 117 and 530 : 14 Ind Cas 394 (DB).

——O. 41, R. 27 — Shifting of onus—Additional evidence — Onus shifted on appeal.

A party to whom the onus is shifted on by an Appellate Court is not entitled to adduce fresh evidence, if he is not taken by surprise or put to disadvantage thereby. AIR (Vol 1) 1914 Oudh 44: 1 OLJ 366: 25 Ind Cas 648 (DB).

——O. 41, R. 27 and O. 42 — Second Appeal — Additional evidence.

The power of permitting fresh evidence in appeal is to be used sparingly and only when it is shown that the person is misled by the action of the other party, or by some mistake of the Lower Court, or by some other cause, independent of his action. (1910) 5 Ind Cas 666 (All).

——O. 41, R. 27 (S. 568 Old Code) — Admission of additional evidence in appeal.

An appellate Court has power under S. 568, C. P. C., to admit additional evidence, but the power must be sparingly exercised. (1901) 1 CLJ 550 (554, 555) (DB).

10. Powers and duties of Court.

——O. 41, R. 27 — Duty of appellate Court under. See AIR (V 35) 1948 Mad 348 : (1948) 1 MLJ 336.

——O. 41, R. 27 — Although an appeal from an order of a Subordinate Judge, dismissing an application under S. 476, Cr. P. C. itself is one which is allowed by the Criminal P. C., the appeal must be heard by the District Judge to whom the Judge is subordinate, i. e. by an Appellate Court exercising Civil Appellate Jurisdiction, The procedure governing the appeal of this description is one which is to be sought for within the four corners of the Civil P. C. The Additional District Judge has therefore power conferred on him by O. 41 of the Civil P. C., and under R. 27 of that order, he is entitled to take further evidence if he requires that evidence in order to enable him to decide the case. AIR (V 24) 1937 Nag 91: ILR (1938) Nag 298 : 169 Ind Cas 816.

——O. 41, R. 27 — Under S. 107, Civil P. C., an Appellate Court has power to issue a commission for local investigation. Order 41, R. 27, Civil P. C. is not applicable to such a case, and the Court is not, therefore, bound to record its reasons. AIR (V 19) 1932 All 270 : 135 Ind Cas 243.

——O. 41, R. 27 — So long as there are distinct provisions in the Code it is not open to the Court to invoke its inherent powers. Where a local enquiry is necessary at an appellate stage for the proper decision of a case the appellate Court can order a fresh local enquiry itself or send the case to the first Court to have a fresh local enquiry made and decide the appeal after considering the result of such fresh local enquiry. AIR (V 13) 1926 Cal 897: 94 Ind Cas 393 (DB).

——O. 41, R. 27 — Attestation — Proof of — Additional evidence — Obiter.

An Appellate Court is not competent to examine an attesting witness who by inadvertence has not been called in the first Court. AIR (V 7) 1920 Pat 266: 5 Pat LJ 263 : 56 Ind Cas 983 (DB).

——O. 41, R. 27 — Sufficient cause — Examination of parties.

An Appellate Court is competent to examine any of the parties if, for the sake of doing justice and for the purpose of ascertaining facts, it considers it necessary to do so. AIR (V 6) 1919 All 49 : 42 All 48 : 17 ALJ 945 : 52 Ind Cas 289 (1) (DB).

——O. 41, R. 27 — Late stage — Admission of document — After closing of the case.

It is illegal for a Court to admit documents after the case has been closed without giving opportunity to the opposite party to rebut or without assigning any reason for admission. AIR (V 4) 1917 Cal 201: 24 CLJ 457 : 35 Ind Cas 698 (DB).

——O. 41, R. 27 — Evidence on record — Statements referred to by trial Court.

An Appellate Court can refer to statements not on record but referred to by the trial Court and continued in the record of a connected case. AIR (V 3) 1916 Lah 205 : 193 PLR 1915 : 140 PWR 1915 : 32 Ind Cas 312.

——O. 41, R. 27 — New plea — Additional evidence.

The Appellate Court can admit new evidence in appeal if necessary, but it cannot set up a new case, not justified by the pleading. (1910) 6 Ind Cas 196 (Cal).

11. Procedure.

See also (i) Note 13; (ii) Civil P. C. O. 41, R. 29.

——O. 41, R. 27 and S. 99 — Additional evidence — Irregularity in admission of — Curability.

Where though the procedure in regard to admission of additional evidence in appeal was not complied with strictly according to the requirements of R. 27 of O. 41, C. P. Code, yet there was an irregular compliance with it, and such irregularity has not affected the decision of the case upon merits, the defect can be cured by resort to S. 99, C. P. Code. AIR (Vol 36) 1949 All 173: 1948 ALW 274: 1948 OWN 279.

——O. 41, R. 27 (c) (Mad) and R. 29 — Summoning of Court witness by appellate Court — Failure of Court to give reasons or specify the points to which the evidence was to be confined — Legality of procedure.

Where a Judge of an appellate Court examined a person as a Court witness and did not at that time pass any order giving reasons for the course he was taking but later on in the judgment of the case stated that he felt that the evidence of record was not sufficient to enable him to come to a conclusion on the point involved in the controversy and that it was necessary to record the evidence of the witness concerned, on a question as to the legality and propriety of the procedure followed by the appellate judge,

Held that the procedure indicated in O. 41, R. 29 of the C. P. Code was not followed as he had not specified the points to which the evidence was to be confined before the examination took place. The fact that a Court uses words which are to be found in the enactment which gives it power to do a particular act or follow a particular procedure will not ipso facto be sufficient justification for its act or order. The reasons given by the judge do not amount to a fulfilment of the conditions imposed on the Court by O. 41, R. 27 (c). Apart from the irregularity, in the circumstances, the lower appellate Court was not justified in using the extraordinary power conferred on it which must be resorted to only in special circumstances and with adequate safeguards. AIR (Vol 33) 1946 Mad 203: 59 LW 19: 1946 MWN 68: (1946) 1 MLJ 82.

——O. 41, Rr. 27 and 29 — Additional evidence admitted not necessary to decide appeal — No definite reason given — No proper opportunity given to opposite side to adduce evidence on its side — Irregularity prejudices opposite party — Appellate order cannot be sustained.

The word "requires" in O. 41, R. 27 (2), Civil P. C. means 'finds it needful'.

Rule 29 of O. 41, Civil P. C. serves a very useful purpose, namely, it ensures that the Appellate Court will consider exactly on what points there is a lacuna which requires to be rectified, and also that an opportunity will be given to both sides to adduce additional evidence on the particular points on which additional evidence is allowed to be taken in appeal.

Where in a case it does not appear that the additional evidence that was actually admitted was necessary for the determination of the appeal or for any other substantial cause and the reason given by the Appellate Court for admitting it is not definite and the documents which were put forward by the appellants were admitted at the end of the hearing of the appeal, and the other side had no opportunity whatever to adduce any evidence of their own on the points to which the admitted documents related, there is an irregularity of procedure which must prejudice the opposite party and the order of the Appellate Court cannot be allowed to stand. AIR (Vol 25) 1938 Mad 372: 48 MLW 797: (1938) 1 MLJ 50: (1938) MWN 1147: 182 Ind Cas 868.

——O. 41, Rr. 27 (2), 29 — Court not saying it found a lacuna — No application by any party inviting Court to fill up gap — Reason for admitting fresh evidence not recorded — Judge of his

own motion sending for registers — Procedure, if proper.

The legitimate occasion for the exercise of discretion in allowing additional evidence to be produced is not whenever before the appeal is heard, a party applies to adduce fresh evidence, but when on examining the evidence, as it stands, some inherent lacuna or defect becomes apparent.

Where the Court did not say that it found a lacuna after an examination of the evidence on the record and there was no application by any party inviting the attention of the Court to fill up any gap in the evidence on the record, and the Court had not recorded any reasons whatsoever for admitting fresh evidence as required by O. 41, R. 27 (2) or fulfil the requirements of O. 41, R. 29 Civil P. C., and the Judge of his own motion sent for the Municipal registers for 20 years in order to ascertain who had been paying the Municipal taxes in respect of the house in dispute :

Held, that under these circumstances, the additional evidence supplied by the Municipal registers must be taken to have been admitted contrary to law and must be discarded.

Held, also that it would be open to the Court after examining the record of the case at the hearing and in the presence of the Pleader for the parties to send for these registers after fully complying with the requirements of law :

Held, further that if the Judge decides to admit fresh evidence after following the correct procedure, he should give the opposite party the fullest opportunity of rebutting the evidence supplied by the registers by producing such evidence as they may think relevant and proper. If a party relies upon any document, it should obtain a proper and certified copy of the same and tender it in Court. It is not the correct procedure to send for the records from other departments or offices wholesale as evidence in the case. AIR (Vol 23) 1936 Lah 933: 38 PLR 511: 162 Ind Cas 152 (DB).

——O. 41, R. 27 — Admission without considering whether requirements laid down in R. 27 exist — Legality.

It is only when the conditions laid down in O. 41, R. 27, Civil P. C., are found to exist that a Judge is entitled to call for additional evidence.

The loose practice of admitting additional evidence without coming to any conclusion without considering whether the conditions laid down exist in the particular case, condemned. AIR (Vol 20) 1933 Lah 547: 14 Lah 152: 34 PLR 378: 138 Ind Cas 253 (DB).

——O. 41, R. 27 — Additional evidence in appeal to High Court.

The requirements of O. 41, Rr. 27 and 29, Civil P. C., are so carefully framed as to ensure that such exceptional procedure shall be resorted to only in special circumstances and with adequate safeguards.

The High Court examined a witness at the hearing of an appeal but there was no record of the order, if any requiring the examination of that witness, no record of the reason for the admission of his evidence and no specification of the points to which his evidence was to be confined. Further the witness was called at the outset of the hearing in the High Court and not after the Court had satisfied itself on examining the evidence taken in the lower Court that there were matters to which his evidence was essential to enable them to do justice between the parties :

Held, that the introduction of the evidence was under the circumstances highly irregular and it must be entirely discarded. AIR (Vol 18) 1931 PC 175: 1931 ALJ 550: 35 CWN 925: 34 MLW 7: 8 OWN (C C) 936: (1931) MWN 931: 33 Bom LR 1251: 134 Ind Cas 669.

——O. 41, R. 27 — Practice.

Courts should, refrain from sending for the records in an informal manner for the purpose of looking into documents which had never been legally tendered in evidence. AIR (Vol 17) 1930 Lah 750.

——O. 41, R. 27 — Proceedings as regards taking additional evidence under the direction of the appellate Court, pending in lower Court — One of the respondents dying — Application for substitution of names can be entertained by the appellate Court and not by the lower Court. AIR (Vol 16) 1929 All 319: 115 Ind Cas 610 (DB).

——O. 41, R. 27 — Rate production.

The lower appellate Court refused to allow certain document holding that they were produced too late in the trial Court and that it could not accept them unless it was proved that the lower Court should have granted a review on them.

Held, that the only function of a Court of facts is to do complete justice between the parties; and the Court should not reject documents as to the genuineness of which there could be no possible room for doubt, on technical grounds as has been assigned by him. AIR (V 16) 1929 Pat 324 : 120 Ind Cas 291 : 10 PLT 356 (DB).

——O. 41, R. 27 — It is not proper for a Court to take additional evidence without duly recording it in accordance with law. (1929) 118 Ind Cas 315 (Pat) (DB).

——O. 41, R. 27 — Decision on merit wrongly refusing evidence of party — Proper course on appeal is to admit such evidence or cause it to be admitted by lower Court with evidence in rebuttal of it and pass judgment upon it. AIR (Vol 16) 1929 Sind 159: 116 Ind Cas 586 (DB).

——O. 41, R. 27 — Unsatisfactory investigation by the trial Court — Procedure to be adopted by the appellate Court laid down. AIR (Vol 15) 1928 Cal 749: 110 Ind Cas 427 (DB).

——O. 41, R. 27 — Where the trial Court has accepted a certain local investigation made by a Commissioner, but the appellate Court is dissatisfied with it, the latter has no power to reverse the judgment of the former and send it for retrial. The proper procedure for the appellate Court is to issue a commission or direct the trial Court to take evidence as provided by O. 41, Rr. 27, 28 and 29. AIR (Vol 15) 1928 Cal 748: 110 Ind Cas 448 (DB).

——O. 41, R. 27 — Per Cuming, J.—Additional evidence can be admitted by an appellate Court either under the general principles of law or under the specific provision of O. 41, R. 27. A party cannot be allowed to supplement his evidence in appeal unless some very good reason is given, and the question whether additional evidence is to be admitted or not in appeal has to be determined at the time when the appeal is actually heard. AIR (Vol 14) 1927 Cal 140: 98 Ind Cas 129 (DB).

——O. 41, R. 27 — Where an appeal has been preferred, a review is out of question and the party's proper course is to apply to the appellate Court, which is in possession of the case, to admit the additional evidence either under the general principles of law or under the specific provisions of R. 27, which lays down that the appellate Court may for any other substantial cause, viz., other than those particularly specified allow such evidence or documents to be produced or witnesss to be examined. Rules of procedure are not made for the purpose of hindering justice. AIR (Vol 10),

1923 PC 128: 21 ALJ 554: 4 PLT 447: 1 PLR 345: 2 Pat 676: 50 IA 183: 25 Bom LR 1259: 28 CWN 277: 33 MLT 233: 18 MLW 728: 4 LRPC 123: 74 Ind Cas 747: 5 LRPC 8: 39 CLJ 318: 3 PLR 1924: 45 MLJ 578.

——O. 41, R. 27 — Where additional evidence is ordered in a case not covered by O. 41, R. 27 but the ordering of additional evidence does not produce error or defect in the decision of the case upon the merits, the irregularity is covered by S. 99. AIR (V 8) 1921 Sind 155 : 60 Ind Cas 833 : 16 SLR 17 (DB).

——O. 41, R. 27 and O. 47, R. 1 — Discovery of fresh evidence — Judgment subsequently delivered in connected suit.

A suit for rent in which the rate of rent was in dispute was decided by the Lower Appellate Court, in ignorance of a judgment in a former suit between the same parties delivered by the High Court on the day previous.

Held, that the proper course for the plff. was to apply to the Judge of the Lower Appellate Court for a review of his judgment on the ground of discovery of new and important matter but that he could not have the whole proceedings set aside and get additional evidence of the High Court's judgment admitted in second appeal. AIR (Vol 6) 1919 Cal 46: 29 CLJ 313: 51 Ind Cas 652 (DB).

——O. 41, R. 27 — Expert evidence — Appellate Court — Acting on opinion taken by it from expert.

Where in a suit on a promissory-note the Appellate Court being unable to believe evidence on either side acted upon the report of the thumb impression bureau to whom the document was sent, Held, that the procedure was unwarranted by law. AIR (Vol 2) 1915 All 112: 28 Ind Cas 132.

——O. 41, R. 27 — Documents — Admission of — Oral evidence.

Where a Court permits the adducing of documentory evidence under O. 41, R. 27, it shou'd also permit oral evidence to be adduced in order to prove those documents as otherwise the documents will be of no value at all as evidence. (1913) 20 Ind Cas 542 (Oudh).

——O. 41, R. 27, S. 114 (Ss. 568, 643 Old Code) — Fresh evidence on appeal — When to be taken.

The legitimate occasion for S. 568 is when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent and not when a discovery is made, outside the Court, of fresh evidence and the application is made to import it, in which case it is the subject of S. 623. In this case the appellate Court received in evidence a document purporting to be a sale deed and alleged to have been found by the defence in a redemption suit after a decree for redemption by the Munsif. The High Court held the procedure erroneous. (1908) 31 M 114 (115, 116): 3 MLT 308 (DB).

——O. 41, R. 27 (S. 568 Cl. (b) Old Code) — Additional evidence, production of — "Requires" — Order for production before hearing bad.

The word "requires" in Cl. (b) of S. 568 means "needs" or "needful." The legitimate occasion for ordering production of additional evidence under S. 568, C. P. C., is when on examining the evidence as it stands some inherent lacuna or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and the application is made to import it, which is the subject of the separate enactment in S. 623.

Held further that an order for production of further evidence before the commencement of the hearing on a preliminary application for the purpose is bad. (1907) 17 MLJ 347: 11 CWN 721: 9 Bom LR 671: 31 B 381 (390): 4 ALJ 461: 6 CLJ 5: 34 IA 115 (PC).

——O. 41, R. 27 (S. 568 Old Code) — Additional evidence in appeal — Procedure — Reasons to be recorded — Marking as exhibit.

When the appellate Court admits new evidence, it must be marked as an exhibit or otherwise brought on the record. The appellate Court must record its reasons for admitting new evidence. (1902) 6 CWN 31 (32) (DB).

12. Rebuttal.

——O. 41, R. 27 — Opposite party should be given opportunity to meet new situation.

Where in appeal the Court admits an additional evidence, it should give an opportunity to the opposite party to meet the new situation arising out of such admission. AIR (Vol 25) 1938 Pat 11: 4 BR 221: 173 Ind Cas 137.

——O. 41, R. 27 — If a Judge decides to admit fresh evidence, he should give the opposite party fullest opportunity of rebutting the evidence. If a party relies upon any document it should obtain a certified copy of the same and tender it in Court. It is not the correct procedure to send for the records from other departments or offices wholesale as evidence in the case. AIR (Vol 23) 1936 Lah 933: 38 PLR 511: 162 Ind Cas 152.

——O. 41, R. 27 — Where a document was produced by one of the parties in appeal after completion of arguments and in the absence of the opposite party :

Held, that it was necessary that the opposite party should have been given notice of the same and opportunity to produce evidence in rebuttal and in the absence of such procedure, the document could not be deemed to have been properly received in evidence. AIR (Vol 23) 1936 Lah 138: 37 PLR 563: 160 Ind Cas 855.

——O. 41, R. 27 — Riwaj-i-am in support — Opposite party, should be given opportunity to rebut the presumption.

Where for the first time in appeal a party pleads a custom in his favour and relies upon documentary evidence or riwaj-i-am, then before he can be allowed to do so, the other party should be given an opportunity of rebutting the presumption raised by it in favour of the party so relying. A I R (Vol 21) 1934 Lah 462 : 154 Ind Cas 733 (DB).

——O. 41, R. 27 — Reasons for admission to be recorded — Opportunity to rebut the additional evidence, whether should be given.

Under O. 41, R. 27, Civil P. C., wherever additional evidence is allowed to be produced in the Appellate Court, the Court must record the reason for its admission but there is no provision that the Court must give an opportunity to the plaintiff to rebut the evidence so allowed. A I R (Vol 20) 1933 Cal 319 : 56 C L J 246 : 143 Ind Cas 507.

——O. 41, R. 27 — Suit on hand note.

Plea of alteration — Appellate Court obtaining written opinion from an expert as to date of stamp — Person giving opinion not examined.

Held, that inasmuch as the opinion was not formally proved and plaintiff was not given an opportunity to cross-examine the person who gave the opinion it ought not to have been taken in evidence. A I R (Vol 19) 1932 Pat 352 : 11 Pat 782 : 140 Ind Cas 895 (DB).

——O. 41, R. 27 — Additional evidence on points not in issue in Trial Court cannot be admitted in appeal and if it is allowed opposite party should be given proper opportunity to meet it. A I R (Vol 17) 1930 All 220.

——O. 41, R. 27 — An appellate Court may accept a document, the genuineness of which is beyond question in order to enable it to pronounce judgment, provided that the other party are afforded an opportunity of adducing a rebutting evidence. A I R (Vol 17) 1930 Pat 105 : 11 P L T 470 (DB).

——O. 41, R. 27 — Documents received in trial Court without proof — Objection raised for the first time in appeal — Duty of Court to allow opportunity to party to tender formal proof. (1929) 30 Punj L R 693.

——O. 41, R. 27 — One party adducing additional evidence — Other party should be allowed to rebut it. A I R (Vol 14) 1927 Cal 140 : 98 Ind Cas 129 (DB).

——O. 41, R. 27 — New evidence admitted — Reasons must be recorded — Defendant allowed to give new evidence — Plaintiff also must be allowed. A I R (Vol 12) 1925 Cal 671 : 86 Ind Cas 646 : 41 C L J 194 (DB).

——O. 41, R. 27 — Where documents are filed in appellate Court after arguments are finished and judgment reserved they ought not to be admitted in evidence, unless an opportunity is given to the opposite party to raise objections if any to the admissibility of such documents. A I R (Vol 11) 1924 Cal 403 : 73 Ind Cas 96 (DB).

——O. 41, R. 27 — The power of the Court to admit evidence in appeal is restricted, and can be exercised only under the provisions of R. 27 of O. 41, C. P. Code. Where evidence has been admitted in contravention of the provisions of O. 41, R. 27, it is not for the Court of Appeal to see whether the evidence is incontrovertible or beyond doubt; it should only be seen whether it ought to have been taken at that stage or not. If the lower Appellate Court allows fresh evidence to be taken on behalf of the one party, it must also allow the other party an opportunity to produce such evidence as they think fit to rebut the additional evidence adduced by the former. A I R (Vol 10) 1923 Cal 300 : 68 Ind Cas 293.

——O. 41, R. 27 — Where an Appellate Court allows the appellant to raise a point which was not pressed in the Court below, the other side must be given opportunity of meeting the point by adducing additional evidence on appeal. A I R (Vol 10) 1923 Pat 492 : 72 Ind Cas 239 : 2 Pat 607 (DB).

——O. 41, R. 27 — Opportunity to rebut to be given to other side.

Where an Appellate Court allows one party to produce additional evidence the other party must be given an opportunity to adduce evidence in rebuttal and if such permission is refused the procedure illegal. A I R (Vol 4) 1917 Pat 13 : (1917) Pat 269 : 43 Ind Cas 320 (DB).

——O. 41, R. 27 — Additional evidence — Procedure.

When additional evidence is tendered and admitted in the Appellate Court, the Judge should, in the exercise of his discretion, have allowed an opportunity to tender rebutting evidence and failure to do so, is unsatisfactory. A I R (Vol 3) 1916 Pat 319 : 36 Ind Cas 955 (DB).

——O. 41, R. 27 — Opportunity to rebut to be given to the other side.

Additional evidence cannot be admitted by the Appellate Court contrary to O. 41, R. 27 and without giving the party against whom it is admitted an opportunity of producing rebutting evidence. A I R (Vol 2) 1915 Lah 323 : 25 P L R 1915 : 241 P W R 1915 : 28 Ind Cas 14.

——O. 41, R. 27 (1) (b) — Opportunity to rebut — Additional evidence — Admission of, by Appellate Court to contradict testimony of witness at the trial — Improper.

An Appellate Court should not allow additional evidence which impeaches the testimony of a witness examined in the Court below, at least without that witness being also called and being given an opportunity to contradict or explain the additional evidence so admitted. 36 All 93 : 1 O L J 57 : 41 I A 76 : 16 O C 386 : 12 A L J 125 : 26 M L J 153 : 15 M L T 125 : (1914) M W N 137 : 19 C L J 165 : 18 C W N 521 : 16 Bom L R 141 : 22 Ind Cas 103 (PC).

13. "Record the reason".

——O. 41, R. 27 — O. 41, Rr. 27 (c) (Mad) 29 — Reason in judgment that additional evidence was necessary to enable Appellate Court to come to conclusion not sufficient compliance — Evidence must be discarded.

The fact that a Court uses words which are to be found in the enactment which gives it power to do a particular act or follow a particular procedure will not ipso facto be sufficient justification of its act or order.

Where an Appellate Court summons an additional witness without giving any reason or without specifying the points to which the evidence is to be confined as required by O. 41, Rr. 27 and 29, but merely states in its judgment that additional evidence was necessary to enable it to come to a conclusion regarding the matter in controversy, the reasons given in the judgment cannot amount to a fulfilment of the conditions imposed on the Court by O. 41, R. 27 (c) and such evidence must be discarded. A I R (Vol 33) 1946 Mad 203 : 59 M L W 19 : 1946 M W N 68.

——O. 41, R. 27 — Appeal — Admission of document as additional evidence — Procedure.

On a question of admitting a document as a further piece of evidence the normal course for the Appellate Court would be to deal with the matter in the course of the delivery of judgment but if it decides to pass a separate order for admission (apart from its judgment) it should write an order giving reasons for admission. A I R (Vol 31) 1944 Nag 14 : 1943 N L J 563 : 210 Ind Cas 405.

——O. 41, R. 27 — Formal order giving reasons for not taking in documents, if necessary.

No formal order giving reasons need be recorded by the Appellate Court for not taking in certain document but the law requires such an order only when documents rejected by the trial Court are received in evidence by the Appellate Court.

The acceptance of the documents under O. 41, R. 27, is a matter of discretion. Where a large number of spurious documents have been produced on behalf of the defendant and the defendant's agents had no scruples in tampering with the evidence it cannot be said that the discretion has not been rightly exercised by the Appellate Court in not accepting them in evidence. A I R (Vol 29) 1942 Cal 498 : 47 C W N 9 : 202 Ind Cas 551 (SB).

——O. 41, R. 27 — Under O. 41, R. 27 (2), Civil P.C. Appellate Court has to record reason for admission of additional evidence allowed to be produced. AIR (Vol 29) 1942 Oudh 485: 1942 OWN (CC) 596: 1942 AWR (CC) 310 (2): 18 Luck 464: 204 Ind Cas 204 (DB) ; (1940) 42 PLR 261; 3 LW 163: 32 Ind Cas 826 (1) : AIR (Vol 4) 1917 Mad 158 (DB); 49 Ind Cas 510: AIR (Vol 6) 1919 Cal 170 (DB). (Omission makes order without jurisdiction — Consent does not validate); 22 PLR 1919 50 Ind Cas 805: AIR (Vol 6) 1919 Lah 123 ; 68 Ind

Cas 719 (Cal) (DB); 80 Ind Cas 530: 6 LLJ 234 : AIR (Vol 11) 1924 Lah 638 (DB); 81 IC 999 : 39 CLJ 261: AIR (Vol 12) 1925 Cal 98 (DB); AIR (Vol 18) 1931 PC 143: 33 Bom LR 1015 : (1931) ALJ 513 : 35 CWN 786 : 34 MLW 76 : 54 CLJ 1 : 12 PLT 683 : (1931) MWN 929: 10 Pat 654: 61 MLJ 489: 58 IA 254: 132 Ind Cas 721.

——O. 41, Rr. 27 and 29 — Reasons for admission of additional evidence and points to which it is to be confined should be recorded in separate order.

The reasons for admission of additional evidence and to points to which the evidenec is to be confined should be recorded in a separate order before evidence is allowed so that the other side would know on what points, the additional evidence is going to be led and whether any evidence in rebuttal should be adduced. The omission to follow the procedure laid down by O. 41, Rr. 27 and 29 is a gross irregularity and if the judgment of the lower Appellate Court is based on this additional evidence or is greatly influenced by it, High Court would either reconsider the evidence adduced before the trial Court leaving out of consideration the additional evidence or would remand the case to the lower Appellate Court for a fresh decision. AIR (Vol 26) 1939 Bom 401: 41 Bom LR 841.

——O. 41, R. 27 — When the Court of Appeal exercises its power under O. 41, R. 27, Civil P. C., it is extremely desirable that it should make a direct reference to the rule, giving its reasons in such a form that there is no room for doubt that the Court has realised the exceptional nature of the powers that it is exercising. AIR (Vol 19) 1932 Bom 230: 34 Bom LR 372: 138 Ind Cas 204.

——O. 41, R. 27 — Power, should be exercised very sparingly.

The power given to an Appellate Court under O. 41, R. 27, Civil P. C., must be exercised very sparingly and the Appellate Court must record its reasons for the admission of additional evidence. AIR (Vol 20) 1933 Lah 1024: 149 Ind Cas 1124 (DB).

——O. 41, R. 27 — The admission of a document in appellate Court in evidence is illegal where no reasons are recorded. When no application is made for the admission of the evidence nor any reasons are shown for failure to produce the document in the lower Court, such evidence should not be admitted. AIR (Vol 17) 1930 Mad 824 (DB).

——O. 41, R. 27 — Although the Court is not bound by the specific provisions of R. 27 and is allowed to admit additional evidence also under the general principles of law, it is assumed that before admitting such evidence, an appellate Court must ascertain that it is necessary in order that justice may be done. It is specifically laid down in R. 27 that when such evidence is admitted, the Court should record the reasons for so doing. AIR (Vol 17) 1930 Oudh 110 : 6 OWN 1060 : 11 LRA Rev 28.

——O. 41, R. 27 — Record of reasons.

Mere non-recording of reasons for receiving additional evidence is nothing but a mere irregularity. AIR (V 14) 1927 Cal 126 : 98 Ind Cas 137 (DB).

——O. 41, R. 27 — Although appellate Court does not record at the time when it admits the additional evidence the reasons why it was admitting it but it does record those reasons in its judgment, there is a substantial compliance with the law. AIR (Vol 12) 1925 All 752: 85 Ind Cas 676 (DB).

——O. 41, R. 27 — Admission of additional evidence without recording of reasons is an irregularity and fresh trial was ordered in the circumstances of the case. AIR (Vol 9) 1922 Cal 148: 77 Ind Cas 556 (DB).

——O. 41, R. 27 — Admission after arguments.

An appellate Court acts improperly in admitting additional evidence after the close of the arguments in the case. Even if it does admit such evidence, it should record its reasons for so doing under O. 41, R. 27, C. P. Code. (1922) 65 Ind Cas 504 (Cal.) (DB).

——O. 41, R. 27 — The appellate Court cannot take additional evidence on its own initiative and without recording reasons. AIR (Vol 8) 1921 All 408 : 19 ALJ 407 : 63 Ind Cas 423 (DB).

——O. 41, R. 27 — Where an appellate Court admits in evidence a khatian from the Record of Right without recording reasons for the admission of such evidence, the defect is not fatal to its decision. O. 41, R. 27, C. P. Code, is only directory and not mandatory. AIR (Vol 7) 1920 Cal 813: 64 Ind Cas 238 (DB).

——O. 41, R. 27 (2) — Record of reasons — Omission — Irregularity only.

Where an appellant produced a public document to clear up doubts as to when the cause of action for the suit arose and the Appellate Court admitted the document but recorded no reasons, the Appellate Court was held to be right in admitting the additional evidence and its omission to record reasons was an irregularity cured by S. 99, C. P. C. AIR (Vol 6) 1919 Cal 311: 51 Ind Cas 50 (DB).

——O. 41, R. 27 — Record of reasons — None — Legality of.

When the Appellate Court, during the hearing of an appeal admitted fresh evidence, for some of which there was no petition and without recording reasons and disposed of the appeal on a consideration very largely of the evidence thus admitted, the decree will be set aside, being based on evidence, the admission of which was opposed to R. 27. AIR (Vol 2) 1915 Mad 588: 1 LW 771: (1914) MWN 795: 28 Ind Cas 11 (DB).

——O. 41, R. 27 — Record of reasons — Sufficient cause — Additional evidence — Admission of.

Before taking additional evidence the Appellate Court should comply with O. 41, R. 27, C.P.C. and if it thinks either with the consent of the parties or on the application of any one of them that there is sufficient ground to admit fresh evidence, the reasons for admitting it should be stated and the papers should be formally admitted in evidence. AIR (Vol 1) 1914 Bom 253: 38 Bom 665: 16 Bom LR 641: 27 Ind Cas 33 (DB).

——O. 41, R. 27 — Record of reasons — Admission of new evidence — Validity.

An Appellate Court should not admit new evidence except to supply a defect in evidence without which the suit cannot be decided. Moreover it must give reasons the peculiar circumstances of the case being no reason. (1913) 19 Ind Cas 572 (Cal.) (DB).

——O. 41, R. 27 — Record of reasons — Duty of Court.

To allow an additional evidence by a Court of appeal, it must record, separately its reasons to do so, as generally excepting in special cases additional evidence is not admissible even though it might prove an important point. (1912) 15 OC 253: 15 Ind Cas 250.

——O. 41, R. 27 —Record of reasons — Necessity for.

When the reasons for admitting additional evidence are apparent in the Judgment, they need not

be separately recorded. (Per Phillips, J.) Where on the oral evidence there are grounds to suppose that an account was open, current and mutual, but the question was not raised in the Lower Court because there was no plea of limitation, the Appellate Court should admit the evidence in appeal when there is no documentary evidence to rebut the oral evidence. 10 MLT 409: 22 MLJ 14: (1911) 2 MWN 440: 12 Ind Cas 673 (DB).

——O. 41, R. 27 — Discovery of fresh evidence — Procedure.

The section applies where on examining the evidence as it stands, a defect becomes apparent and not where fresh evidence is discovered outside the Court and the application is made to import it. Therefore order of the Appellate Court passed after admitting a fresh document into evidence without recording reasons for such admission cannot stand. (1909) 2 Ind Cas 995 (Cal.) (DB).

14. Remand.

See also Civil P. C., O. 41, Rr. 23 and 25.

——O. 41, R. 27 (1) (c) (Madras) — Appellate Court thinking evidence of one R to be necessary remanding suit for fresh disposal and instructing trial Court to treat R as Court witness.

In an appeal by the plaintiff against the dismissal of his suit on a promissory note, the Appellate Court, thinking the evidence of one R to be necessary for a proper decision of the main question in issue between the parties, admitted the appeal and remanded the suit for fresh disposal instructing the trial Court to treat R as a Court witness :

Held, that the procedure adopted by the Appellate Court was incorrect. There was no provision for the examining of Court witnesses by trial Courts, but under O. 41, R. 27(1)(c), C. P. C., the Appellate Court had two alternatives either to record the evidence itself, or to ask the trial Court to record the evidence and send it to it. The Appellate Court should not have allowed the appeal, but should have kept it pending on its file and considered the effect of the additional evidence after it was taken by it or sent to it by the trial Court. AIR (Vol 30) 1943 Mad 726: 56 MLW 498: 1943 MWN 554 (1): (1943) 2 MLJ 312: 212 Ind Cas 551.

——O. 41, R. 27 — Suit under S. 92 — Appellate Court reversing the decision of trial Court and holding that plaintiff had no interest — Advocate General allowed to be impleaded as co-plaintiff at the stage of appeal ;

Held, that the Advocate-General could not be impleaded at such late stage. Nor could it be proper to remand the case to enable the lower Court to take the statements of the plaintiffs as witnesses or to take such evidence itself as it would contravene the provisions of O. 41, R. 27. AIR (Vol 29) 1942 All 315: (1942) ALJ 334: 1942 AWR (HC) 274: 204 Ind Cas 153 (DB).

——O. 41, R. 27 — Order under, if appealable.

An order under O. 41, R. 27, Civil P. C., is not an order of remand and, therefore, not appealable. A mere use of the word "remand" does not give the order the character that it does not possess. AIR (Vol 24) 1937 Sind 233: 171 Ind Cas 258 (DB).

——O. 41, R. 27, S. 151 — Additional evidence in appeal to compare documents — Such evidence is to be eliminated.

Where there is no lacuna in the evidence as it stands on the record, the Judge should not go out of his way to summon additional evidence in the stage of appeal in order that he may be able to compare it with the documents relied upon by the plaintiff. Such a procedure is wholly erroneous and the evidence so taken should be eliminated. In such case, the High Court will remand the case, under S. 151, Civil P. C., with direction to dispose of the case after eliminating such evidence. AIR (Vol 22) 1935 Lah 555: 156 Ind Cas 253.

——O. 41, R. 27 — Inherent lacuna on the record on all important points — Appellate Court should remit case to the trial Court for further enquiry.

Where, on almost every important point, there is an inherent lacuna on the record and it is not possible to come to a satisfactory finding on the question in issue, the only proper course for the Court of Appeal is to remit the case to the trial Court for further enquiry under O. 41, R. 27, Civil P. C. AIR (Vol 21) 1934 Lah 664(2): 35 PLR 779: 155 Ind Cas 329.

——O. 41, R. 27, S. 151 — Inherent jurisdiction to direct remand — Court desiring to give facilities for adducing additional evidence — Whether justifies remand for re-trial.

The mere fact that the plaintiff might have been better advised to apply for a commission at the trial of the suit would not in itself warrant the issuing of a commission by the Appellate Court, far less could it be held to justify the Appellate Court in issuing a general order for the admission of such additional evidence as either of the parties might wish to produce.

The inherent power under S. 151, Civil P. C., may be exercised when the trial Court has not tried the case properly. When this is found by the Appellate Court, that Court has jurisdiction in remand the case, but in the absence of such a finding it cannot be held that the assumption of jurisdiction is justified or that the Court has any jurisdiction by virtue of S. 151 to order a remand, that is to say, the jurisdiction to order a remand under S. 151, only comes into existence when the special circumstances create it. It certainly cannot be said that the Appellate Court is entitled to set aside a decision and order a remand merely because the plaintiff might have been better advised to have applied for a commission, or to adduce more evidence, that is to say, where the Appellate Court ought not to give facilities to the parties for adducing further evidence the fact that the Court desires to do so cannot give it jurisdiction to set aside the decree of the Court below and the remand the case for retrial. AIR (Vol 21) 1934 Pat 284: 15 PLT 142: 148 Ind Cas 962.

——O. 41, R. 27 — Where a party had a free hand in summoning of witnesses in the Court of first instance the case cannot be remanded in appeal for giving him a further opportunity to produce evidence simply because his Counsel in appeal considers the evidence of certain witnesses to be essential. AIR (Vol 19) 1932 Lah 135: 32 PLR 874: 136 Ind Cas 17 (DB).

——O. 41, R. 27 — It is not a proper course for an appellate Court to consider additional evidence in an appeal without duly recording it in accordance with law. Where the appellate Court comes to a conclusion without recording the additional evidence it is impossible to say how far it was guided by it and the appeal should be remanded for rehearing in accordance with law. (1923) 118 Ind Cas 315 (Pat.) (DB).

——O. 41, R. 27 — Remand for reception of additional evidence — Revision.

The appellate Court has inherent powers apart from the provisions of Rr. 27 and 28 to remand a case for the reception of the evidence rejected by trial Court and for final disposal by the trial Court and therefore the order of remand is not revisable. A I R (Vol 15) 1928 Mad 991 : 112 Ind Cas 1 : 1928 M W N 164 (DB).

——O. 41, R. 27 — Where a ruling interpreting a question as to onus of proof was pronounced after a case was tried in trial Court.

Held, that the pronouncement did not create law but merely stated what the law was and is, and therefore there was no ground made out for a remand to take further evidence. A I R (Vol 13) 1926 Lah 494 : 7 Lah 297 : 27 P L R 463 : 96 Ind Cas 630 (DB).

——O. 41, R. 27 — Additional evidence — History book — Fact of its not having been referred to in Trial Court is not sufficient objection to its being used in appeal — But if party had no opportunity to rebut facts established by the book, remand is necessary. A I R (Vol 8) 1921 Cal 661 : 34 C L J 205 : 66 Ind Cas 287 (DB).

15. Requirements of justice.

——O. 41, R. 27 — Powers of appellate Court — Limits.

The power of an appellate Court to admit further evidence under O. 41, R. 27, C. P. Code, only arises where the Court requires the further evidence for one of the two causes specified. AIR (V 35) 1948 PC 36 : 52 CWN 132 : (1948) 1 MLJ 130 : 74 IA 285 : ILR (1947) Lah 727 : 29 PLT 157 : 50 PLR 21 : 50 Bom LR 539 : 1948 ALJ 20 : 1948 MWN 34 : 61 LW 76.

——O. 41, R. 27 — Powers of appellate Court — Limits.

It is now well settled that an appellate Court cannot admit additional evidence unless the Court itself requires such evidence in order to be able to pronounce judgment. AIR (V 33) 1946 Cal 518 : 229 Ind Cas 23 : 82 CLJ 62.

——O. 41, R. 27 (1) (b) — Admission of additional evidence — Essentials.

The Appellate Court is not concerned with the question whether the interests of justice require the admission of the documents at appellate stage but whether the party was unable to adduce such evidence in the trial Court notwithstanding the exercise of due diligence. AIR (V 33) 1946 Mad 168 : (1945) 2 Mad LJ 349 : 1945 MWN 633.

——O. 41, R. 27 — For pronouncing judgment.

Appellate Court may take under O. 41, R. 27 (1), Civil P. C., additional evidence when required for pronouncing judgment. AIR (V 29) 1942 Oudh 485 : 1942 AWR (H C) 310 (2) : 1942 OWN (CC) 596 : 18 Luck 464 : 204 Ind Cas 204 (DB).

(Reverses AIR (Vol 25) 1938 Oudh 135 : 1938 OWN 429 : 174 Ind Cas 894.)

——O. 41, R. 27 (1) (c) and (1) (b) — "For any substantial cause", meaning of.

It is only when the Appellate Court requires, in other words finds it needful, that additional evidence can be admitted. The words "for any other substantial cause" must be read as ejusdem generis with the previous portion of Cl. (c), namely, "the Appellate Court requires." AIR (V 28 1941 Oudh 429 : 1941 OWN (CC) 648 : 1941 AWR Rev (CC) 395 : 1941 RD 359 : 194 Ind Cas 161 (DB).

——O. 41, R. 27 — For pronouncing judgment.

Under O. 41, R. 27, production of additional evidence in Appellate Court is dependent upon whether Appellate Court requires that evidence to enable it to pronounce judgment. (1938) 67 CLJ 223.

——O. 41, R. 27 (1) (2) — Test laid down in Cl. (b), relates to state of mind of Appellate Court.

The test laid down in Cl. (b) of O. 41, R. 27, Civil P. C., "if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment", is one relating to the state of mind of the Appellate Court and not an external standard. In other words, the test is not whether any tribunal would be unable to pronounce any judgment without the production of the additional evidence in question, but, whether the mind of the appellate Judge is in such a condition on the evidence on record that he requires any document to be produced or any witness to be examined to enable him to pronounce judgment. The object appears to be to enable the apellate Judge to satisfy his own mind when he entertains a doubt; the test proposed is, therefore, not an external one, viz., whether some other mind or an average mind would require additional evidence to be produced in order to pronounce some judgment or orders. AIR (Vol 25) 1938 Lah 161 : 40 PLR 646 : 179 Ind Cas 350.

——O. 41, R. 27 (1) (b) — Evidence entitling party to obtain review, can be admitted.

Additional evidence which was not available at the time of the trial and which would entitle a party to obtain a review of the judgment, can be admitted by the Appellate Court. It is not that the additional evidence should not be admitted by Appellate Court under O. 41, R. 27 (1) (b), Civil P. C., except on the definite requirement of the Court itself and that if the new and additional evidence is produced by one of the parties, it should be ignored. AIR (Vol 24) 1937 Pat 584 : 16 Pat 371 : 18 PLT 618 : 4 BR 69 : 171 Ind Cas 728 (DB).

——O. 41, R. 27 (1) (b) added by Allahabad High Court — Evidence in appeal — When can be admitted under new sub rule.

Under sub-r. (1) (b) added to O. 41, R. 27, Civil P. C., by the Allahabad High Court, the question of admission of new evidence does not depend on the requirements of the Appellate Court and a party has a right if he satisfies the Court that he exercised due diligence and that the new evidence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made. AIR (Vol 23) 1936 All 217 : 1935 AWR (HC) 1263 : 159 Ind Cas 202.

——O. 41, R. 27 — Additional evidence necessary to decide case — Admissibility.

An Appellate Court invited to admit additional evidence on appeal under O. 41, R. 27, Civil P. C. should do so with great caution. Such additional evidence may be admitted if the Court finds it necessary to enable it to pronounce judgment. AIR (Vol 22) 1935 Pat 178 : 1 BR 646 : 16 PLT 615 : 14 Pat 595 : 156 Ind Cas 859 (DB).

——O. 41, R. 27 — Restricted nature of the power of Court.

The language of O. 41, R. 27, Civil P. C. is very strict and it is only where the Appellate Court "requires" it (finds it needful), that additional evidence can be admitted. If the Appellate Court does not require the production of additional evidence in order to enable it to pronounce judgment or for any other substantial reasons, it cannot admit it. AIR (Vol 21) 1934 All 175 : 3 AWR (HC) 198 : 147 Ind Cas 339.

——O. 41, R. 27 (1) (b), S. 100 — Requirements must be of Court.

Before a Court can admit an additional evidence it must record its reason for doing so. It

is only when the Court itself requires additional evidence, that is to say finds it needful in order to pronounce judgment or for any other substantial cause, that such evidence can be admitted. The legitimate occasion for exercise of this discretion is when on examination of the evidence as it stands, some inherent lacuna or defect becomes apparent. The defect may be pointed out by a party or a party may move the Court to supply the defect, but the requirement must be of the Court itself. AIR (Vol 21) 1934 Cal 707: 38 CWN 763: 153 Ind Cas 170 (DB).

——O. 41, R. 27 — When can be admitted.

Fresh evidence under O. 41, R. 27, Civil P. C. cannot be admitted to enable the party to patch up the weak parts of his case and fill up omissions in the Court of Appeal but should only be admitted at the requirement of the Court upon its appreciation of the evidence as it stands. AIR (Vol 19) 1932 Mad 709: 36 MLW 195: (1932) MWN 529: 139 Ind Cas 444 (DB).

——O. 41, R. 27 (b) — Requirements of Court.

Under O. 41, R. 27 (b) it is only where the Appellate Court "requires" it (i.e., finds it needful) that additional evidence can be admitted and the legitimate occasion for the exercise of the discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence but "when on examining the evidence as it stands some inherent lacuna or defect becomes apparent", the defect may be pointed out by a party or party may move Court to supply defect but the requirement must be requirement of Court upon its appreciation of the evidence as it stands. AIR (Vol 18) 1931 PC 143: 33 Bom LR 1015: (1931) ALJ 513: 35 CWN 786: 34 MLW 76: 54 CLJ 1: 12 PLT 683: (1931) MWN 929: 10 Pat 654: 61 MLJ 489: 58 IA 254: 132 Ind Cas 721.

——O. 41, R. 27 — Courts should not be too technical.

The Appellate Court shoud not take an extremely technical view of its duty to exclude further evidence in appeal. It should permit the appellant to produce such evidence if it is necessary for the ends of justice. AIR (Vol 18) 1931 Pat 181: 12 PLT 79: 132 Ind Cas 363 (DB).

——O. 41, R. 27 — Powers of Court.

The provisions of Cl. (b), sub-R. (1), R. 27 are sufficiently wide to admit of addtional evidence being taken for purpose of disposing a case justly by the appellate Court itself or directing the trial Court to do so. The discretion of an appellate Court in this connection is more or less unfettered and in such circumstances where there is an express provision of law the invoking or application of which will serve the ends of justice, resort should not be had to the provisions of S. 151. AIR (Vol 17) 1930 Lah 441: 122 Ind Cas 485.

——O. 41, R. 27 — Appellate Court can call for maps or reports in order to understand facts of a case.

O. 41, R. 27 refers to evidence, oral or documentray, which the parties could have produced at the time of the first hearing, but has no direct application to the question of a map and report of a Commissioner appointed by the appellate Court. The power of an appellate Court to require an accurate map in order to enable it to understand the facts of a case under appeal to it, cannot be questioned on the ground that this is admitting a new evidence within the meaning of R. 27. AIR (Vol 14) 1927 All 175: 98 Ind Cas 821.

——O. 41, R. 27 — The evidence was necessary to pronounce judgment is not sufficient reason to admit additional evidence. AIR (Vol 11) 1924 All 303: 71 Ind Cas 289.

——O. 41, R. 27 — Where any point is required to be cleared in the interest of justice an appellate Court has got power to take additional oral evidence. AIR (Vol 11) 1924 Cal 578: 81 Ind Cas 471 : 51 Cal 185 : 28 CWN 497 : 41 CLJ 1 (DB).

——O. 41, R. 27 — Where the appellate Court finds itself unable to decide the appeal on the record as it stands, it is perfectly justified in passing an order for the production of additional evidence. AIR (Vol 10) 1923 Lah 115: 77 Ind Cas 207: 3 Lah 382 (DB).

16. Revision.

——O. 41, R. 27 — Appellate Court allowing fresh evidence to be adduced on payment of costs to respondent — Revision against such order by respondent — Acceptance of costs by Pleader not authorised to do so by respondent — Respondent can still challenge validity of order in revision.

Where the Appellate Court has allowed the appellant to adduce fresh evidence on a condition of his paying certain amount to the respondent as costs and the respondent files a revision petition against the order to the High Court, the acceptance of costs by a Pleader not proved to have been authorised by the respondent to accept the costs, does not prevent the respondent from contending in the High Court that the order of the Appellate Court was not legal. If the order allowing fresh evidence is set aside, the respondent must refund the amount received by way of costs. AIR (Vol 30) 1943 Nag 289: 1943 NLJ 418: ILR (1943) Nag 492: 211 Ind Cas 37.

——O. 41, R. 27 — Contravention of R. 27.

Where additional evidence has been admitted in contravention of O. 41, R. 27, it constitutes material irregularity and supplies good ground for interference in revision. (1940) 42 PLR 261.

——O. 41, R. 27 — Revision — Admission of evidence.

A document if not produced before the Court below can neither be admitted in evidence for the 1st time on revision, nor can the case be remanded to the Lower Court for placing it on record, especially where the strict conditions of S. 623, C. P. C., are not fulfilled. 59 PWR 1909 : 55 PLR 1909: 4 Ind Cas 550.

17. Scope.

——O. 41, R. 27 — Scope of.

The provisions of O. 41, R. 27, C. P. Code, are not designed to permit an unsuccessful litigant to supplement weak links in the chain of his evidence. AIR (Vol 36) 1949 Oudh 48 : 23 Luck 47 : 1947 OA (CC) 268 : 1947 AWR (CC) 268 : 1947 OWN 565 (DB).

——O. 41, R. 27 (Oudh) — Scope of the power to admit additional evidence in appeal — Effect of the amendment in Oudh.

Though an appellate Court has undoubtedly the power to admit additional evidence in appeal under R. 27 of O. 41, C. P. Code, it is clear from the language of that rule that this is not the general rule. On the other hand the general rule is that parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court. This rule as amended by the Oudh Chief Court makes the fact, that the evidence sought to be adduced by a party to the appeal is evidence, which af-

ter due diligence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made, a ground to be taken into consideration in determining whether fresh evidence should or should not be permitted to be adduced in appeal. It follows from the general rule embodied in R. 27 of O. 41 that additional evidence shall be admitted only in exceptional cases where refusal to do so might result in injustice. No party to an appeal can as of right ask for admission of additional evidence. AIR (Vol 33) 1946 Oudh 129: 21 Luck 194: 1946 ALW (CC) 1: 1946 OA (CC) 12: 1946 AWR (CC) 12: 1946 OWN 1 (DB).

——**O. 41, R. 27 — Judgment of trial Court should not be set aside before additional evidence has been recorded.**

While O. 41, R. 27, Civil P. C., does permit the admission of additional evidence in appeal, it does not contemplate the setting aside of the judgment of the Court of the first instance before that additional evidence has been recorded. But it contemplates the decision of the appeal after that additional evidence has been recorded, and in the light of that additional evidence. AIR (Vol 31) 1944 Sind 57: ILR (1943) Kar 415: 212 Ind Cas 4 (DB).

——Order 41, R. 27 — Scope and requirements of O. 41, R. 27, are different from those of O. 13, R. 2. AIR (Vol 24) 1937 Cal 537: ILR (1937) 2 Cal 661: 67 CLJ 486: 176 Ind Cas 429 (DB).

——Order 41, R. 27 — Order 41, R 27, Civil P. C., cannot be used to test the evidence of a witness. It is intended to obtain additional evidence. AIR (Vol 22) 1935 Rang 39: 155 Ind Cas 511.

——**O. 41, R. 27 — Examination of one party on obscure points in dispute — Whether amounts to additional evidence.**

Where the Appellate Court only examines a party on certain particulars, regarding the execution of a document, which were obscure, it does not amount to taking additional evidence within the meaning of O. 41, R. 27, Civil P. C., and the Court need not record reasons. AIR (Vol 20) 1933 Lah 328: 34 PLR 99: 144 Ind Cas 954 (1).

——**O. 41, R. 27 — Income-tax proceedings.**

An appellant in income-tax proceedings has no higher right in adducing fresh evidence in appeal than he would have in a civil case under O. 41, R. 27, C. P. Code. AIR (Vol 17) 1930 Rang 4: 122 Ind Cas 898: 7 Rang 635 (FB).

——Order 41, R. 27 — An application to the Appeal Court for further evidence to be taken on the ground that it has recently been discovered whether it is made before the appeal is heard, or before judgment is given, does not come within the provisions of O. 41, R. 27. AIR (Vol 11) 1924 Bom 227: 25 Bom LR 310: 47 Bom 674: 84 Ind Cas 74 (DB).

——**O. 41, R. 27 — Sufficient cause — Re-examination of witnesses.**

O. 41, R. 27 is not intended for enabling appellate court to re-examine before it witness already examined and cross-examined in the court of first instance. AIR (Vol 3) 1916 All 246: 38 All 191: 14 ALJ 121: 33 Ind Cas 334 (DB).

——**O. 41, R. 27 — Applicability — Proceedings under S. 106 B. T. Act.**

The Section does not apply to proceedings under S. 106 Bengal Tenancy Act (1885). (1909) 36 Cal 510: 2 Ind Cas 572 (DB).

——**O. 41, Rr. 27, 28 (Ss. 568, 569 old Code) — Applicability — Civil Court's — Proceedings under S. 195 Cr. P. C.**

Ss. 568, 569, C. P. C., are not made applicable by S. 647, C. P. C., to proceedings before Civil Courts under S. 195, Cr. P. C. (1907) 17 MLJ 123 (125): 30 M. 311 (DB).

18. Second appeal.

(a). General.
(b). Additional evidence.
(c). Interference.

(a). General.

——**O. 41, R. 27, S. 100 — Public documents admitted in appeal without giving reasons for doing so — Opposite party not allowed to produce evidence in rebuttal but such party not insisting on such right — Error held did not produce defect in decision on merits and could not be challenged in second appeal.**

The Appellate Court admitted additional evidence filed by the appellant without giving any reasons for doing so. All that the Court did, however, was to admit certain public documents about whose genuineness there could not be the slightest doubt. The Court also made the mistake of not allowing the plaintiff to adduce evidence in rebuttal. But in this respect the respondent was just as much to blame as the Court, because he did not insist upon his right to produce evidence in rebuttal:

Held, that although there was error in not following the provisions of O. 41, R. 27, Civil P. C. it did not produce defect in the decision of the case upon merits and the decision could not be challenged in second appeal. AIR (Vol 26) 1939 All 663: 1939 AWR (HC) 491: (1939) ALJ 903: 184 Ind Cas 811.

——Order 41, R. 27 — Taking additional evidence without recording reasons and without calling upon the party to show its necessity in a substantial error in procedure and such an order of the lower appellate Court is open to second appeal. AIR (Vol 12) 1925 Cal 98: 81 Ind Cas 999: 39 C LJ 261 (DB).

(b). Additional evidence.

——**O. 41, R. 27 — Second appeal — Jurisdiction of High Court — Application for reception of fresh evidence made in form of review dismissed by lower appellate Court.**

The High Court in second appeal has jurisdiction to entertain an application for admission of additional evidence although a similar application made in the form of an application for review has been rejected by the lower appellate Court. AIR (Vol 33) 1946 Cal 518: 229 Ind Cas 23: 82 CLJ 62.

——**O. 41, R. 27 (1) (b) — Additional evidence which could have been produced earlier — Admission in second appeal — Permissibility.**

In second appeal new evidence cannot be allowed to be produced which, with ordinary diligence, could have been produced at an earlier stage of the proceedings. 1946 AWR (Rev.) 42 (1).

——**O. 41, R. 27 — Evidence all along within parties knowledge — He cannot produce it in appeal.**

Where a certain evidence was within the party's knowledge all along, and he has not explained why he did not produce it at the trial, he cannot be allowed in second appeal to fill gaps in his case by calling additional evidence. Obviously, O. 41, R. 27, does not apply to such a case. AIR (Vol 28) 1941 Lah 144: 43 PLR 41: 195 Ind Cas 244 (DB).

——**O. 41, R. 27 (1), S. 100 (1) (c) — Suit on document — Documents filed in previous suit between one of parties and third persons referred**

to all along by parties and Court — Document not produced at that stage but at close of case for judgment — Court refusing to admit them — Appellate Court also refusing to take them as additional evidence — Documents held could be produced in second appeal under S. 100 (1) (c).

In a suit certain documents filed in a former suit between one of the parties and third persons, were all along referred to by the parties and the Court, in the absence of the documents or their copies on the record. The Court allowed them to be produced even at the close of the arguments but they were not filed even then. They were produced when the case was closed for judgment. The Court refused to accept them and dismissed the suit. The Appellate Court also did not admit it as additional evidence under O. 41, R. 27 (1), Civil P. C. The plaintiff prayed in the second appeal for being allowed to produce the evidence:

Held, that this reference to the documents by the Court and the parties was perhaps irregular, and had the case been tried with strict correctness, no reference would have been allowed to these documents until copies had been produced and placed on the file. Documents which had been dealt with in this way could scarcely be described as new evidence. The papers were evidence de facto though perhaps not de jure in the trial Court, and it would be acting rather harshly in refusing to recognize the documents which were actually before the Court and referred to all through the trial; and this point might be allowed to be placed before the Court in second appeal under S. 100 (1) (c).

Order 41, R. 27 (1), Civil P. C., does not forbid the parties calling additional evidence, but states that the parties are not entitled to produce it, although the Court may in its discretion in certain circumstances allow it to be admitted. AIR (Vol 25) 1938 Rang 170: 177 Ind Cas 547.

——O. 41, R. 27 — A party to an appeal is not entitled to produce additional evidence in appeal as of right but the Court may at its discretion admit additional evidence. Where the Court has exercised this discretion and refused to admit additional evidence, it cannot be said that a substantial error or defect in procedure has taken place which affords a ground for second appeal. AIR (V 18) 1931 Lah 506 : 131 Ind Cas 228.

——O. 41, R. 27 — Scope of.

In second appeals decisions of fact cannot be impugned and hence it is futile to admit evidence which is tendered to impugn a question of fact and which herefore should be rejected. AIR (V 16) 1929 All 375: 119 Ind Cas 561.

——O. 41, R. 27 — Where the facts have been found by the lower appellate Court, and further evidence is not necessary to enable the High Court to pronounce its judgment, the High Court, sitting in second appeal, cannot admit fresh evidence. AIR (V 16) 1929 Pat 98 : 115 Ind Cas 674 : 10 PLT 10 (DB).

——O. 41, R. 27 — The Courts should be chary about admitting fresh evidence in appeal, and this rule applies a fortiori to a second appeal also. AIR (V 14) 1927 Nag 398 : 102 Ind Cas 27.

——O. 41, R. 27 Second appeal.

High Court in second appeal cannot be said to require any document to be produced or any witness to be examined to enable it to pronounce judgment on a question of fact. AIR (V 13) 1926 Cal 941 : 95 Ind Cas 300 (DB).

——O. 41, R. 27 — Additional evidence not tendered in lower appellate Court though possible, cannot be admitted in High Court in second appeal. AIR (Vol 11) 1924 All 231 : 79 Ind Cas 367 : 21 ALJ 899 : 5 LRA Rev 1.

——O. 41, R. 27 — R. 27 of O. 41, C. P. Code, does not authorise an appellate Court to allow the production of additional evidence in second appeal. AIR (V 11) 1924 Lah 444 : 80 Ind Cas 998 : 5 Lah 84 (DB).

——O. 41, R. 27 — Discovery of fresh evidence — Admission on appeal — Consent — Waiver.

The legitimate occasion for the use of the provision contained in O. 41, R. 27 C. P. C. is when on examining the evidence as it stands some inherent defect becomes apparent and not where a discovery is made outside the Court of fresh evidence and the application is made to import it. The mere fact that when one party applies for additional evidence being received, the other side also requests permission to let in additional evidence, does not amount to waiver of his right to object in second appeal, to the procedure of the Appellate Court. AIR (V 7) 1920 Pat 107 : 55 Ind Cas 226.

——O. 41, R. 27 and O. 42, R. 1 — Discovery of fresh evidence — Second appeal — Additional evidence — Admission of.

It is open to the High Court in second appeal to admit fresh evidence if necessary for the decision of the appeal.

There is no objection to the admission in second appeal of a document such as the judgment of a High Court which could not be produced earlier because it was not in existence and which requires no further evidence to explain it. AIR (V 6) 1919 Mad 17 : (1919) MWN 455 : 52 Ind Cas 625 (DB).

——O. 41, R. 27 — Second appeal — Additional evidence.

Where a party has failed to support his position in the Court of original hearing he will not be permitted to produce further evidence in second appeal. (1912) 16 Ind Cas 887 (Oudh).

——O. 41, R. 27 — Additional evidence — Admission of.

The legitimate occasion for admission of additional evidence on appeal is when on examining the record as it stands, there is an inherent lacuna or defect. If evidence is improperly admitted on appeal, the second appellate Court will not consider it. (1913) 40 Cal 402 : 17 CWN 615 : 16 Ind Cas 776 (DB).

——O. 41, R. 27, S. 108 (Ss. 568, 587 Old Code) — Production of additional evidence in second appeal — Admissibility.

Fresh evidence is not admissible in second appeal. (1908) 31 M 415 (416) (FB).

(c) Interference.

——O. 41, R. 27 — Discretion of Court — Interference.

It cannot be laid down that it is not open to the High Court in second appeal to interfere with the discretion of the lower Appellate Court if it refuses to admit additional evidence in appeal under O. 41, R. 27. The High Court can interfere where that Court has failed to apply its mind to the bearing that such evidence will have on the questions in issue. (1946) 48 PLR 329 (DB).

——O. 41, R 27 — Lower Appellate Court calling witness not called by parties — Good reasons given — Interference by High Court.

Where on its own motion the lower Appellate Court called a witness not called by the parties, in order to elucidate a point involved in the appeal and gave good grounds for taking this step:

Held, that it was not open to the High Court in second appeal to decide whether the discretion had not been rightly exercised and that there was nothing illegal in the exercise of the discretion. AIR (V 24) 1937 Lah 115 : 38 PLR 449 : 168 Ind Cas 466.

——O. 41, R. 27 — Reception of additional evidence in appeal — Right decision not affected — Interference in second appeal.

Where the reception of additional evidence in appeal does not affect the right decision of the question before the Court and does not thereby vitiate its decision the High Court will not interfere in second appeal. AIR (V 21) 1934 Cal 269: 58 CLJ 430 : 149 Ind Cas 679 (DB).

——O. 41, R. 27 — Additional evidence in appeal— Refusal to admit — Second appeal, competency of.

Where a lower Appellate Court refuses to admit a certain material document as additional evidence in an appeal under O. 41, R. 27, Civil P. C., the High Court cannot interfere in second appeal. AIR (V 19) 1932 Lah 93 : 32 PLR 813 : 136 Ind Cas 788.

——O. 41, R. 27 — Powers of High Court.

Lower appellate Court admitting documents contrary to provisions of O. 41, R. 27 — High Court should exclude them from consideration. AIR (Vol 17) 1930 Lah 750.

——O. 41, R. 27 — Appeal — Additional evidence admitted without recording reasons — Finding is not binding in second appeal. AIR (V 10) 1923 All 413 : 79 Ind Cas 408.

——O. 41, R. 27 — Additional evidence — Refusal to admit by Lower Appellate Court — High Court will not interfere. AIR (V 10) 1923 Lah 30 : 70 Ind Cas 830.

——O. 41, R. 27 — Second appeal — Additional evidence — Admission of — Refusal by Lower Appellate Court.

Where a Lower Appellate Court refuses to admit a certain material document as additional evidence under O. 41, R. 27 of the C. P. C., the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the Lower Appellate Court. It has long been the practice of the High Courts not to entertain second appeals from refusals of the Lower Appellate Court to admit fresh evidence under O. 41, R. 27 of the C. P. C. and such practice should not be departed from.

Per Sadasiva Aiyar, J., Contra — The High Court has power in second appeal to consider the propriety of the exercise of discretion by the Lower Appellate Court as regards the admission of additional evidence. AIR (V 6) 1919 Mad 1166: 42 Mad 737 : 37 MLJ 125 : 10 LW 122 : (1919) MWN 525 : 26 MLT 246 : 53 Ind Cas 274 (FB).

19. Subsequent events.

——O. 41, R. 27 — Additional evidence — Production of, in Appellate Court — General rule is that such evidence will not be allowed to be produced — Matter is to be determined by Appellate Court — Factors to be taken into consideration stated — Existence of document not known at trial stage — This will not justify its production in appeal.

No doubt an Appellate Court has under O. 41, R. 27 the power to admit additional evidence in appeal but this is not the general rule. The general rule is that parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. It follows that additional evidence shall be admitted only in exceptional cases where refusal to do so might result in injustice. No party to an appeal can as of right ask for admission of additional evidence. It is a matter to be determined by the Appellate Court whether additional evidence should or should not in the circumstances of any particular case be allowed to be produced. One of the factors which the Court should in such cases take into consideration is the bearing which the evidence sought to be adduced is likely to have on the matters in controversy in the appeal. If the evidence sought to be adduced has only a slight or remote bearing on the question in controversy, it should not be admitted. It is only in cases where it turns the scale in favour of one party, or is likely to materially affect the decision of any point arising in the appeal, that such evidence should be permitted to be adduced. The fact that the existence of a document was not known to the party to the appeal while the suit was in the trial Court will not by itself justify the Appellate Court in allowing it to be produced in appeal. AIR (V 33) 1946 Oudh 129 : 1946 OWN (C C) 1 (DB).

——O. 41, R. 27 — Further evidence which comes into existence after the decision of the case can be admitted in appeal. (1938) 40 PLR 432.

——O. 41, R. 27 — Documents not within appellant's knowledge even after exercise of due diligence — Remedy of review when possible —Whether ground for reception of additional evidence.

Order 41, R. 27, Civil P. C. enjoins that the Appellate Court would require additional evidence to be produced to enable it to pronounce judgment. Where an appellant applies for reception of certain documents in appeal, O. 41, R. 27, will not enable the Appellate Court to receive them as additional evidence even if that Court may find that notwithstanding the exercise of due diligence on the appellant's part, the documents were not within her knowledge, such a condition legitimately forming a ground for an application for review. AIR (V 23) 1936 Cal 31 : 61 CLJ 373 : 160 Ind Cas 867 (DB).

——O. 41, Rr. 27, 29 — Discovery of fresh evidence by party, whether ground for reception.

In an appeal additional evidence may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. The legitimate occasion for reception of additional evidence in the appellate stage is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent and not where a discovery is made outside the Court of fresh evidence and the application is made to import it. It may well be that the defect may be pointed out by a party or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. Wherever the Court adopts this procedure, it is bound by R. 27 (2), to record its reasons for so doing, and under R. 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. AIR (V 21) 1934 Cal 627 : 61 Cal 412 : 152 Ind Cas 130 (DB).

——O. 41, R. 27 — The Appellate Court has power to allow additional evidence which had not been produced at the trial.

Further evidence which had not been produced at the trial for the reason that it was not then in existence, could be brought on to the record and admitted under O. 41, R. 27, Civil P. C. by the High Court.

Rules of procedure are not made for hindering justice. (1931) 132 Ind Cas 6 : 31 PLR 1012.

——O. 41, R. 27 — Grounds for admission — Discovery of new and important evidence.

Admissibility of fresh evidence after the filing of the appeal is subject to the principle that this discovery of new and important evidence should have been made after the exercise of due diligence. AIR (V 17) 1930 Lah 1004 : 12 LLJ 172 (DB).

——O. 41, R. 27 — Where a piece of evidence comes into existence after the filing of the appeal it is admissible in the appellate Court. AIR (Vol 16) 1929 Pat 245 : 10 PLT 191 : 8 Pat 776 : 120 Ind Cas 626 (DB).

——O. 41, R. 27 — Statements of witness in proceedings under Lunacy Act, commenced after dismissal of suit between same parties, were admitted at appellate stage. AIR (V 14) 1927 PC 123 : 1927 MWN 456 : 101 Ind Cas 363 : 26 MLW 94 : 31 CWN 1087 : 39 MLT 155.

——O. 41, R. 27 — An unregistered document admitted to be all along in possession of a party, cannot be allowed in evidence in second appeal, merely because it is alleged that it was recently discovered. AIR (Vol 14) 1927 Lah 574: 103 Ind Cas 215.

——O. 41, R. 27 — Evidence discovered after decision of case in trial Court — Failure to produce that evidence in trial Court not due to party's negligence — Evidence allowed. AIR (Vol 13) 1926 Oudh 74: 89 Ind Cas 359.

——O. 41, R. 27 — Evidence discovered after first Court's decree is admissible.

To admit or to refuse to admit fresh evidence in appeal is a matter primarily in the discretion of the Court. Where the appellant was not aware of the existence of some evidence at the time when the case was disposed of by the first Court and he has discovered some new evidence subsequently and has preferred an appeal, the proper course open to him is to apply to the appellate Court which is in possession of the case to admit the additional evidence either under the general principles of law or under the specific provisions of O. 41, R. 27, C. P. Code, which lays down that an appellate Court may for "any other substantial Cause" allow such evidence or document to be produced or witness to be examined. AIR (Vol 12) 1925 All 288: 86 Ind Cas 761: 47 All 412: 23 ALJ 193: 6 LRA Civ. 85 (DB).

——Order 41, R. 27 — Discovery of evidence at the appellate stage — Application for its admission cannot be entertained. AIR (Vol 12) 1925 Nag 284: 86 Ind Cas 505.

——O. 41, R. 27 — Evidence not in existence at the time of suit — It may be admitted in appeal.

Where an appeal was pending and another suit was filed between the same parties and the latter went to the appellate stage when the prior appeal was decided and the decision in the previous appeal had a material bearing on the decision in the subsequent appeal.

Held, that the decision in the previous appeal should be admitted in evidence in the subsequent appeal. AIR (Vol 12) 1925 Pat 612: 88 Ind Cas 553: 3 Pat LR 174.

——O. 41, R. 27 — Record of Rights published after trial Court's decision and before decision in first appeal — But through no laches of the appellants, could not be produced before hearing of appeal — It was admitted in second appeal, being important evidence. AIR (Vol 11) 1924 Cal 1071: 82 Ind Cas 104: 28 CWN 945 (DB).

——O. 41, R. 27 — Evidence that could not be produced in trial Court — Additional evidence was allowed.

Where the record-of-rights proceedings were in progress during the pendency of the trial in the Court of first instance, but the order for final publication was not made, till the disposal of the suit and it was consequently impossible for the plaintiffs to produce the decision of the revenue authorities, and the order for final publication was made during the pendency of the appeal in the court of the District Judge; and at that stage alone it became possible for the plaintiffs to bring before the Court the decision of the revenue authorities,

Held, that the order of appellate Court directing additional evidence to be adduced was right, the order of the settlement authorities being pronounced in proceedings which are inter partes. The decision in Young v. Kershaw 81 LT 531 and Nandlal v. Panchanan, (45 Cal 60) which disapprove of the reception of additional evidence in proceedings in review, cannot be applied to the above circumstances. AIR (V 10) 1923 Cal 606 : 74 Ind Cas 1038 : 71 Ind Cas 453 : 37 CLJ 491 (DB).

——O. 41, R. 27 — Where the Lower Appellate Court disallowed presumptive evidence, though discovered subsequent to judgments by the First Court, High Court refused to interfere with the discretion exercised by the Court. Admission of evidence is largely a matter of discretion and not of right. AIR (Vol 10) 1923 Cal 285: 67 Ind Cas 770.

——Order 41, R. 27 — An appellate Court will not consider the record-of-rights published after the institution and decision of the case. AIR (Vol 9) 1922 Pat 28: 3 PLT 107: 1921 PHCC 296 (DB).

——O. 41, R. 27 — Subsequent events — Appellate Court.

Public documents coming into existence after the filing of second appeals may be admitted in evidence in the High Court. A Court cannot neglect the events that came into existence while a suit or proceeding is pending. AIR (Vol 7) 1920 Pat 559: (1920) Pat 4: 4 Pat LJ 312: 50 Ind Cas 857 (DB).

——O. 41, R. 27 (1) (2) — Subsequent events — Omission to record reasons.

Where subsequent events happen after the institution of the suit which make the reliefs granted by the first court's decree, inappropriate, the proper course, is to apply for additional evidence being given of these facts under O. 41, R. 27, C. P. C. A mere omission to comply with O. 41, R. 27 (2) C. P. C. does not render the additional evidence taken inadmissible, especially when no objection was raised at the time by the opposite party. AIR (Vol 5) 1918 Lah 10 : 111 PWR 1918 : 48 Ind Cas 137 (DB).

——O. 41, R. 27 — Discovery of fresh evidence.

Fresh evidence will not be allowed in appeal on the ground that it was discovered after the filing of the appeal. (1911) 1 MWN 136: 9 MLT 323: 12 CLJ 40: 9 Ind Cas 251 (DB).

20. "Substantial cause."

——O. 41, R. 27 (c) (as amended in Patna) — "Any other substantial cause" — Difficulty in deciding case on evidence recorded — Sufficiency.

it is not a sufficient reason for allowing additional evidence in appeal that the Court finds it difficult to arrive at a conclusion on the evidence on record. The mere fact that it is difficult to decide the matter on the evidence recorded does not excuse the Court from making the attempt. O. 41, R. 27 (c) requires something more than a mere difficulty in coming to a conclusion. AIR (Vol 36) 1949 Pat 338

——O. 41, R. 27 — Negligence of party or his Counsel, whether ground for allowing fresh evidence in appeal.

Under O. 41, R. 27 (1) (b), Civil P. C., it is only when the Appellate Court requires, in other words, finds it needful, that additional evidence can be admitted. Bona fide mistake or negligence on the part of a party or his Counsel in not examining necessary witnesses is no ground for allowing fresh evidence to be adduced at the stage of appeal. The phrase, "for any other substantial cause" in R. 27 (1) (b) does not mean any cause stated by a party : it must be read with the words preceding it. AIR (Vol 30) 1943 Nag 289 : ILR (1943) Nag 492 : 1943 NLJ 418 : 211 Ind Cas 37.

——O. 41, R. 27 — Substantial ground — Interest of justice.

The appellate Court is empowered on the application of party, for any substantial cause, to permit additional evidence to be taken under O. 41, R. 27 (1) (b). But this power should be used sparingly and on grounds which can be called "substantial." Ordinarily it would not be desirable to hear an application for further evidence under this provision until the appellate Court has heard the appeal or considered the evidence already on record with a view to see whether substantial grounds exist in the interest of justice to allow some lacuna to be filled up or some matter to be cleared up. AIR (Vol 17) 1930 Mad 343: 120 Ind Cas 746.

——O. 41, R. 27 — Lower Court refusing evidence on insufficient grounds — Appellate Court should admit. AIR (V 11) 1924 Oudh 252 : 78 Ind Cas 256: 10 OLJ 595: 27 OC 114 (DB).

——O. 41, R. 27 — Additional evidence — Ignorance of documents during case is no ground for admission in appeal.

Ignorance of certain important documents during the hearing of the case is no sufficient ground for their admission in evidence at the appellate stage. The parties' proper remedy is by an application for a review under O. 47, R. 1. AIR (Vol 10) 1923 Cal 273: 68 Ind Cas 334.

——O. 41, R. 27 — "Any substantial cause."

There is ample authority for holding that the "cause" referred to in R. 27 need not be ejusdem generis with the cause stated in the earlier part of the rule and that the expression "any other substantial cause" confers a wide discretion on the appellate Court to admit additional evidence when the ends of justice require it. AIR (V 10) 1923 Lah 584: 76 Ind Cas 474.

——O. 41, R. 27 — The words "substantial cause" used in the rule confer a wide discretion which should be sparingly exercised, otherwise it may be open a wide door to the admission of evidence in the Appellate Court. AIR (Vol 10) 1923 Sind 42: 84 Ind Cas 137 (DB).

——O. 41, R. 27 — Substantial cause — C. P. C. S. 151 — Inherent power.

During the course of a trial, plff. having reason to suppose that the execution of the deeds on which the suit was based would not be seriously challenged, refrained from adducing all available evidence. The plff. then produced formal evidence by examining a witness to prove the signature of one of the attesting witnesses to the deeds.

Held, that under these circumstances there was substantial cause to justify the Appellate Court under S. 151 and O. 41, R. 27 of the C.P.C. in permitting the plffs. to produce additional evidence as to the execution of the deeds. AIR (Vol 5) 1918 Oudh 406: 5 OLJ 745 : 48 Ind Cas 1007 (DB).

——O. 41, R. 27 — "Substantial cause" — Meaning.

The expression "substantial cause" does not include a case where the only ground assigned is that the evidence adduced by the aggrieved party is unsatisfactory and insufficient. AIR (Vol 4) 1917 Cal 711: 25 CLJ 473: 39 Ind Cas 886 (DB).

——O. 41, R. 27 — "Substantial cause" — Interpretation of — Necessity — Recitals in document whether enough.

An Appellate Court has no power to call for fresh evidence in cases where no vidence been adduced in the Lower Court in respect of any issue and where there is consequently no inherent lacuna or defect.

Per Phillips, J.— In interpreting the words, "for other substantial cause" in O. 41, R. 27 the facts of each case must be taken into account and an answer supplied accordingly, subject to the principles governing the case. AIR (Vol 4) 1917 Mad 547: 32 Ind Cas 908 (DB).

——O. 41, R. 27 — Substantial cause — Meaning of.

The word "any other substantial cause" give wide discretion to the Appellate Court and it can admit additional evidence of justice requires so to be done. AIR (Vol 3) 1916 Mad 816: 37 Mad 414: 30 Ind Cas 402 (DB).

——O. 41, Rr. 27 and 33 — Substantial cause — Meaning of.

An Appellate Court is entitled to receive additional evidence if it thinks necessary to do so in the interest of justice. The discovery of fresh evidence and inability to produce it through no fault or negligence of the party producing it in the Appellate Court, is "substantial cause" within the meaning of the rule for admission of such evidence. AIR (Vol 3) 1916 Mad 538: 17 MLT 220: 28 MLJ 334: 28 Ind Cas 694 (DB).

——O. 41, R. 27 — Substantial cause — Meaning of.

The words 'any other substantial cause' in O. 41, R. 27 of the Code should not be construed narrowly as suggested by the doctrine of Ejusdem Generis, so as to confine them to causes of the same kind as those stated in the earlier part of the section. (Per Sundara Aiyar, J.) The expression "to enable it to pronounce judgment" cannot mean pronounce some judgment whether it satisfies the mind and conscience of the court or not. Where the finding of the Lower Court is based on a doubtful or a difficult question the Appellate Court can take additional evidence. 11 MLT 241: (1912) MWN 450: 36 Mad 477: 14 Ind Cas 140 (DB).

——O. 41, R. 27 — Substantial cause — Meaning of.

Per Abdur Rahim, J. — The words "any other substantial cause" should not be construed in a wide and unrestricted sense but they refer to the same class of cases as the one specifically named; evidence should be allowed when on looking to the record as it stands, some inherent defect becomes

evident. The rule does not cover cases where the evidence on record suggests that a certain plea, which one of the parties might have relied upon, but did not is open and proceeds to take additional evidence which is not necessary to enable the Appellate Court to pronounce judgment. 10 MLT 409: 22 MLJ 14: (1911) 2 MWN 440: 12 Ind Cas 673 (DB).

21. When admissible.

——O. 41, R. 27 — Important witness to proceedings at registration of adoption deed tendered but refused by trial Court on ground of his being Counsel in case — His evidence recorded by Appellate Court under O. 41, R. 27 — Evidence, held rightly received.

An important witness to the proceedings at the time of registration of the adoption deed was a Barrister and he had been tendered as a witness at the trial but refused by the trial Judge on the ground that he was engaged as Counsel in the case. The Appellate Court recorded his evidence at the appellate stage under O. 41, R. 27, Civil P. C.:

Held, that the evidence was rightly received. There might have been good reason why the Counsel should return his brief and cease to act as Counsel in the case. but to deprive a party of the evidence of a witness was a very different matter. AIR (Vol 26) 1939 PC 152: 5 BR 631: 43 CWN 842: 1939 OWN (PC) 562: 41 Bom LR 1061: 70 CLJ 377: ILR (1939) Kar (PC) 258 Sup: 181 Ind Cas 311.

——O. 41, Rr. 27 (1) (b), 25 — Suit for damages — Appellate Court holding material date as date of repudiation of contract — Evidence of market price on such date not on record.

Under O. 41, R. 27 (1) (b), Civil P. C., it is only where the Appellate Court "requires" it (i.e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment or for any other substantial cause, but in either case it must be the Court that requires it.

The Plff. who was commission agent based his claim in a suit for damages, on the date of sale of the grain which was in his custody. The evidence produced on behalf of the plaintiff referred to the market price on the date of the sale. As the Appellate Court was of the opinion that the material date was the date on which the contract was repudiated, the plaintiff was entitled to damages on the basis of the market price of grain on that date. There was no evidence on the record to prove this fact. The Appellate Court after hearing arguments of the parties recorded its reasons for taking further evidence to establish the market price on the date of the repudiation:

Held, that the Appellate Court had full jurisdiction to admit additional evidence in the appeal. AIR (Vol 25) 1938 All 353: (1938) ALJ 449: 1938 AWR (HC) 294: 176 Ind Cas 99.

——O. 41, R. 27 — Examination of a witness, unable to attend, on commission refused on the ground of failure to produce medical certificate — Such evidence can be admitted under the rule .AIR (Vol 13) 1926 Cal 318 (2): 90 Ind Cas 630 (DB).

——O. 41, R. 27 — Attestation — Additional evidence — Proof of.

Where the only attesting witness cited to prove a mortgage document did not see the executant sign, the plaintiff was allowed a further opportunity of producing evidence to prove the mortgage, having regard to the fact that the Privy Council decision in ILR 35 M 607 as to the requisites of a valid attestation was recent. (1913) 35 All 353: 11 ALJ 371: 21 Ind Cas 619 (DB).

22. When not admissible.

——O. 41, R. 27 — Nature of evidence required, in order to obtain re-hearing of appeal for purpose of calling fresh evidence.

No doubt it is in the interest of the public generally that there should be an end to litigation. In order to obtain a new trial, for the purpose of calling fresh evidence, a litigant should show (i) that such evidence was available, and of undoubted character (ii) that the evidence was so material that its absence might cause a miscarriage of justice; (iii) that it could not, with reasonable care and diligence, have been brought forward at the time. Where, therefore, there is new evidence proposed to be put forward in the form of an affidavit of a witness and there is evidence before the Court as to the credibility of the proposed witness and that evidence shows that he is not a person whose testimony can be relied upon; or at any rate it shows that the Court ought not to presume that the evidence to be given by him is true, the party cannot be given the benefit of the re-hearing the appeal or litigation. AIR (Vol 26) 1939 Cal 42 : ILR (1938) 2 Cal 361 : 179 Ind Cas 977 (DB).

——O. 41, R. 27 — Additional evidence cannot be admitted unless Judge has applied his mind to requirements of R. 27.

The admission of additional evidence in appeal is permissible only under exceptional circumstances and this course cannot be adopted by a Court, unless the Judge has applied his mind to the requirements of O. 41, R. 27, and found justification for admitting additional evidence under the rule.

Appellate Judge is not justified in recording additional evidence on the question of the value of the property which has been released when no objection as regards registration of the deed of release had been taken in the Court below, and when there was no material on the record on question of the value of the property and when there was no justification for allowing additional evidence. AIR (Vol 26) 1939 Lah 459: 41 PLR 390.

——O. 41, R. 27 — Application under, to introduce new evidence — No reason for non-production at proper time — Evidence available on due diligence — Evidence not material — Application should not be allowed.

An application under O. 41, R. 27, Civil P. C., was made to let in new evidence in appeal. With the exercise of ordinary diligence, the party could have produced these documents had they really intended to rely on them. In the affidavit, no adequate reason was given for their non-production at the proper time. The document had no real bearing on the questions involved in the appeals:

Held, that the admission of this evidence at the appellate stage would mean introducing a new and inconsistent claim in appeal, which the defendants had no opportunity of meeting. Obviously this prayer could not be granted, and the application under O 41, R. 27, must be dismissed. AIR (Vol 24) 1937 Lah 370: 39 PLR 602: ILR (1940) Lah 363: 176 Ind Cas 65 (DB).

——O. 41, R. 27 — Plaintiff sued for mortgage-debt relying on certified copies on the ground that the mortgage-deeds were lost. The defendant pleaded

that the deeds were included in a compromise decree and torn. The trial Court decided in favour of the defendant. The defendant, on appeal by the plaintiff, produced torn pieces of the bonds in the appellate instead of in the trial Court. On the plaintiff taking objection to their admissibility.

Held, fresh evidence should not have been admitted in order to enable the Court to decide the case in favour of the defendants, who claimed the benefit of the alleged compromise. AIR (Vol 9) 1922 Nag 119: 67 Ind Cas 237.

——O. 41, R. 28

——O. 41, R. 28 — Where in a case of ejectment no question of issuing a commission arose in the trial Court at all and it was only at the appellate stage that that question arose and the Appellate Court set aside the decree of the trial Court and remanded the case for disposal, directing the trial Court to afford the plaintiff an opportunity of taking out a commission for the purpose of ascertaining whether the disputed house stood on that portion of the land which was settled with the plaintiff.

Held, that the Appellate Court should have adopted the procedure prescribed by R. 28. AIR (Vol 29) 1942 Pat 379 : 8 B R 495 : 199 Ind Cas 91.

——O. 41, R. 28 — Appointment of Commissioner — Remand for finding by lower appellate Court — Commissioner to examine witnesses.

When the issues are remanded by the Court of second appeal to the lower Appellate Court for trial the lower Appellate Court resumes its functions as the Court of first appeal, and though it is the only Court which can record a finding on the issues remanded, yet it may appoint a Commissioner for the examination of witnesses under S. 75, C P Code. A I R (Vol 12) 1925 Lah 39 : 5 Lah 252 : 81 Ind Cas 589 (DB).

——O. 41, R. 29.

——O. 41, Rr. 29, 27 — Additional evidence, admission of, in Appellate Court.

Admission in appeal of the evidence of a Commissioner directed to hear a woman sing and to report as to her skill in singing and also to her occupation in life as far as it could be deduced from her musical talents, would be in utter disregard of the provisions of O. 41, R. 29, Civil P. C. A I R (Vol 19) 1932 All 264 : (1932) A L J 117 : 139 Ind Cas 804 (DB).

——O. 41, R. 29 — Whenever Appellate Court admits additional evidence it must specify under O. 41, R. 29, the points to which the evidence is to be confined and record on its proceedings the points so specified. A I R (Vol 18) 1931 P C 143 : 33 Bom L R 1015 : (1931) A L J 513 : 35 C W N 786 : 34 M L W 76 : 54 C L J 1 : 12 P L T 683 : (1931) M W N 929 : 10 Pat 654 : 61 M L J 489 : 58 I A 254 : 132 Ind Cas 721.

——O. 41, R. 30.

——O. 41, Rr. 30 and 31 — Absence of appellant on date of hearing — It is not the duty of the Court to proceed under Rr. 30 and 31. A I R (Vol 27) 1940 All 310 : (1940) A L J 121 : 1940 A W R (C C) 156 : 190 Ind Cas 656 (DB).

——O. 41, R. 30 — Appellant not appearing and arguing case — Court, if can decide appeal on merits.

When in spite of several opportunities given to him, the appellant fails to appear and argue the appeal, the Appellate Court is not debarred from deciding the appeal on merits. This power is not taken away when a notice is issued to the respondent, and in accordance with it, he appears. AIR (Vol 25) 1933 All 548 : (1938) A L J 901 : 1938 A W R (HC) 561 : I L R (1938) All 814 : 78 Ind Cas 89 (DB).

——O. 41, Rr. 30, 31 — Appellant's Pleader unable to argue appeal — Court, if can dismiss appeal for want of prosecution.

A Court is not entitled to dismiss an appeal for "want of prosecution" only because the appellant, if he appears personally, or his Pleader, who represents him, is, for any reason, unable to argue the appeal. The Court should proceed in the manner laid down by O. 41, Rr. 30 and 31, Civil P. C., and is bound to pronounce judgment in open Court the judgment to contain points for determination, its decision thereon and the reasons for that decision.

Where a party is bound to do something and has failed to do it, Court may dismiss the appeal for want of prosecution. Where, however, the apellant does not avail himself of a right or privilege conferred by law for example the right to argue, he cannot be considered to have failed to do something which he was bound to do so as to justify the Court in dismissing the appeal for want of prosecution. The law gives an absolute right to the appellant to be heard. This right he may or may not avail himself of. It cannot be converted into a duty, so as to make his failure to argue 'want of prosecution.' A I R (Vol 24) 1937 All 284 : (1937) A L J 174 : 1937 A W R (CC) 122 : 168 Ind Cas 1001.

——O. 41, R. 30 — Finding of fact arrived at by Judge of first instance — Value of.

On an appeal against a judgment of a Judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the Judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence, the Court of Appeal will have special regard to the fact that the Judge saw the witnesses. When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. (1936) 164 I C 815 : 40 C W N 513 : 63 Cal 713.

——O. 41, Rr. 30, 31, 11 — The requirements of O. 41, Rr. 30 and 31, as to judgments refer only to regular hearing at which issues are raised in the presence of the parties with the record before the Court. A simple order of dismissal may be passed if the appeal is not admitted and it is not until after admission and after hearing that a judgment is required. AIR (Vol 21) 1934 Pat 341 : 15 P L T 293 : 13 Pat 540 : 150 Ind Cas 817 (DB).

——O. 41, R. 30 — Order 41, Rr. 30 and 31 relating to judgment and R. 35 relating to decree have no application when an appeal is dismissed under R. 11. AIR (Vol 20) 1933 Nag 117 : 142 Ind Cas 143.

——O. 41, R. 30 — Judgment in appeal — Mere approval.

A judgment of an appellate Court which is merely a judgment of approval, referring to practically no document and to no evidence, and which merely says the trial Court had done very well in deciding the suit is not a proper judgment. A I R (Vol 17) 1930 Lah 152.

——O. 41, R. 30 — Presumption — Silence as to some grounds of appeal.

Where the judgment of an appellate Court states specifically that certain points were argued before it and is silent as to other points taken in the grounds of appeal it must be presumed that those points were abandoned, more especially in the

absence of an affidavit to the contrary by the counsel who appeared before the lower appellate Court. A I R (Vol 14) 1927 Lah 768 : 9 L L J 309 : 102 Ind Cas 841 : 28 P L R 339.

——O. 41, R. 30 — Judgment without notice to parties and not in open Court — Appeal — Delay — Lim. Act S. 5.

The judgment of the lower appellate Court was not pronounced in open Court nor had any intimation been sent to the parties of any date for its pronouncement. The appellant did not discover what the decision was till after the expiry of the period prescribed for appeal.

Held, that an appeal to the Chief Court was within time being presented within 90 days after the appellant became aware of the decision of the lower appellate Court. There was also sufficient cause for excusing the delay within S. 5, of the Lim. Act. AIR (Vol 6) 1919 Lah 102: 27 PR 1919: 51 Ind Cas 239 (DB).

——O. 41, R. 30 (S. 571 Old Code) — Judgment in appeal, when pronounced — Death of appellant before argument — Legal representative not on record — Decree — After hearing deceased appellant's pleader — Legality of — Nullity of decree.

When an appellant dies before the hearing of the appeal and his representative is not placed on the record the decree passed by the appellate Court is a nullity . (1902) 4 Bom LR 23 : 26 B 317 (319) (DB).

——O. 41, R. 31.

1. **Applicability and scope.**
2. **Contents of judgment.**
3. **Duty of Court.**
4. **Judgment of affirmance.**
5. **Judgment of reversal.**
6. **Non compliance—Effect.**
7. **"Points for determination".**
8. **"Reasons for decision".**

1. Applicability and scope.

——O. 41, R. 31 — By virtue of Para. 53 of U. P. Revenue Court Manual O. 41, R. 31 (d) applies to cases under the Land Revenue Act also and therefore the Appellate Court should specify the relief which it intends to give. (1942) 1942 O W N (CC) 117 (BR).

——O. 41, Rr. 31, 11, 30 — O. 41, R. 31, if applies to appellate judgment under R. 11.

The provisions of R. 31, O. 41. Civil P. C. relate to a judgment pronounced in accordance with the provisions of R. 30. It is not necessary that judgment in the form prescribed in O. 41. R. 31, should be given when the appeal is dealt with under O. 41, R. 11. A I R (Vol 24) 1937 Sind 206 : 31 S L R 167 : 171 Ind Cas 132 (DB).

——O. 41, R. 31 — Although where the order summarily dismissing an appeal is itself subject to an appeal, the Appellate Court below must give reasons for the judgment in order to enable the second Court of Appeal to form some opinion as to whether that judgment is correct or not, it is incumbent upon the Judge to state reasons in a case which is not subject to appeal. A I R (Vol 21) 1934 Cal 26 : 59 C L J 293 : 147 Ind Cas 194 (DB).

——O. 41, R. 31 — An order dismissing an appeal summarily under O. 41, R. 11 should comply with the provisions of O. 41, R. 31. A I R (Vol 18) 1931 All 589 (1) : 53 All 528 : 132 Ind Cas 200 (DB).

——O. 41, R. 31 — Chartered High Courts.

Order 41. R. 31 and O. 20 & the rules thereunder do not apply to the Chartered High Courts as the rules relating to judgments were in force when the C. P. Code was enacted. A I R (Vol 16) 1929 All 403 : 116 Ind Cas 23 : 1929 A L J 713 (DB).

——O. 41, R. 31 — R. 31 applies to dismissal under R. 11 of O. 41.

A Judge in dismissing an appeal under R. 11 is not relieved of the necessity of writing a judgment as prescribed by R. 31. A I R (Vol 13) 1926 Cal 992 : 43 C L J 499 : 96 Ind Cas 136 (DB).

——O. 41, R. 31 — Applicability of Rule to disposal under O. 41, R. 11.

A re-arrangement of a section in a new Code does not necessarily imply a change in the law. Where the words of a section are clear and unambiguous as those of O. 41, R. 31, it is hardly permissible to curtail their plain operation on a consideration of the arrangement of the section. Nor does the arrangement of the rules in O. 41, lead to the conclusion that R. 31, does not apply to judgment pronounced under O. 41, R. 11. The duty of writing a judgment in all cases is cast upon the appellate Court, no matter in what manner the appeal is disposed of, and the provision of R. 31 of O. 41 must necessarily apply to such judgment. 30 All. 390; 36 Bom 116, Diss. from. AIR (V 13) 1926 Rang 129: 4 Rang 66: 5 Bur LJ 60: 95 Ind Cas 881.

(Overruled on another point in AIR 1936 Rang 208.)

——O. 41, R. 31 — Summary dismissal.

Order 41, R. 31 of the C. P. C. controls O. 41, R. 11 and an Appellate Court dismissing a second appeal under the latter provision must state the points for decision and the decision thereon with reasons. (1922) 65 Ind Cas 479 (Cal) (DB).

——O. 41, R. 31 — Mandatory provision.

The judgment of an Appellate Court should strictly conform to the provisions of O. 41, R. 31. (1910) 7 M L T 120 : 5 Ind Cas 829 (DB).

——O. 41, Rr. 31, 11, (Ss. 574, 551 Old Code) — Procedure — Appeal summarily dismissed — Court not bound to record a full judgment.

Held, that the provisions of S. 574, C. P. C., are not applicable in their entirety to the case of an appeal dismissed under S. 551 of the Code. 25 C 97 diss. from. 1908 A W N 115 : 5 A L J 300 : 30 A 319 (320); See also (1907) 5 CLJ 348 (348, 349) (DB).

2. Contents of judgment.

——O. 41, R. 31 — Contents of judgment of appellate Court.

A first appellate Court must give details about the points in dispute as well as the decision thereon together with the reasons on which those decisions are based. It must examine the evidence afresh and then decide the points. Treating it in a general manner and ultimately holding the trial Court had come to the right conclusion is not sufficient. 1949 R D 263 (2) (DB).

——O. 41, R. 31 — Proper judgment.

A judgment must not be based upon assumptions which are not embodied in the record. (1940) 42 P L R 136.

——O. 41, R. 31 — Judgment of Appellate Court — Essential contents of.

The judgment of the lower Appellate Court of appeal should briefly but clearly set out the allegations of the plaintiff, the pleas in defence and the findings of the Court below on the issues arising out of the pleadings, and then it shou'd give the points for determination, the decision thereon and reasons for their decision as provided in O. 41, R. 31, Civil P. C.

The judgment should be se'f-contained in every respect so as to give a clear indication to the High Court that the Judge has applied his mind to the facts of the case and has arrived at an independent decision on the matters in controversy. This is all

the more important as the findings of fact arrived at by the lower Appellate Court are binding upon the Court in second appeal. To refer merely to the trial Court for the facts of the case is a wholly erroneous procedure. A I R (Vol 21) 1934 Lah 1009 : 36 P L R 253 : 153 Ind Cas 968.

——O. 41, R. 31 — It is not incumbent upon the Appellate Court to repeat in extenso the arguments of the trial Judge which it accepts. But the party is entitled to a considered opinion of the appellate tribunal. It is not the first Court's view but that of the second Court that is final if the question is one of fact. A I R (Vol 25) 1938 Mad 253 : 47 M L W 66 : (1937) 2 M L J 916 : 174 Ind Cas 669 (DB).

——O. 41, R. 31 — What it should contain.

A mere general and sweeping statement of opinion is not a sufficient disposal of the questions with which a Court is concerned. The duty of the lower appellate Court is to deal with the matter by examining the grounds stated by the first Court and if it differs in its conclusion it must show that those grounds were not supported by evidence or that they were insufficient in themselves, or that they were overbalanced by other considerations arising out of the proved or admitted circumstances of the case. A I R (Vol 13) 1926 Nag 55 : 89 Ind Cas 763

——O. 41, R. 31 — Inconclusive statement.

A judgment which is based on an indefinite conclusion (i.e.) "there is much force in the contention" is not in accordance with law and is liable to be set aside. A I R (Vol 7) 1920 Pat 424 : 1 Pat L T 27 : 54 Ind Cas 672 (DB).

——O. 41, R. 31 — The judgment of an Appellate Court must show that the Judge has considered the evidence in the case himself and has come to a finding upon an independent consideration of the facts and circumstances and the evidence. A I R (Vol 6) 1919 Pat 162 : 49 Ind Cas 733.

——O. 41, R. 31 — A Judge should not quote the judgment of another Court and refer to that other Court's opinion as his own, but should show in the judgment his own appreciation of the evidence in the case and support his findings by giving his own reasons. A I R (Vol 4) 1917 Oudh 374 : 3 O L J 620 : 37 Ind Cas 435.

——O. 41, R. 31 — The Appellate Judgment should state the questions for determination, the nature of the evidence and should show that the evidence has been considered by the Court. A I R (Vol 4) 1917 Pat 388 : 1 Pat L W 193 : 38 Ind Cas 814 (1) (DB).

——O. 41, R. 31 — Where a judgment ran thus : "Counsel for the respondents admits that the evidence of the Naib-Tahsildar recorded in this court is the best evidence available on either side. The appeal is, therefore, decreed with costs".

Held, that the judgment does not comply with the requirements of the law as not setting forth the matters in dispute between the parties and as not recording any findings thereon. A I R (Vol 3) 1916 All 260 : 35 Ind Cas 237.

——O. 41, R. 31 — A judgment of an Appellate Court should show that the Court has considered the evidence on record and the various grounds of appeal. A I R (Vol 3) 1916 Lah 139 : 108 P L R 1916 : 132 P W R 1916 : 36 Ind Cas 6.

——O. 41, R. 31 — The judgment of the Appellate Court should set out the points for determination, its decision thereon, and its reasons for so deciding. If it is otherwise, the judgment will not be upheld. A I R (Vol 3) 1916 Mad 427 : 28 Ind Cas 354 (DB).

——O. 41, R. 31 — The judgment of an Appellate Court must conform strictly to the provisions of O. 41, R. 31 C. P. C., and must contain the points raised for determination and the reasons for its decision thereon. A I R (Vol 2) 1915 Low Bur 32 : 9 Bur L T 59 : 31 Ind Cas 896.

——O. 41, R. 31 — A first appellate judgment should contain such a statement of the case as would show that the Court has understood the real issues, tried those issues, and considered the evidence. AIR (Vol 1) 1914 Oudh 265: 1 OLJ 334: 25 Ind Cas 596.

——O. 41, R. 31 — Contents of Appellate Court's judgment.

The provision, that the Appellate Court's judgment should contain the points for determination, the decision thereon and the reasons for the decision, is imperative. (1910) 9 Ind Cas 804 (All).

——O. 41, R. 31 — The judgment of a Court of first appeal should give points for determination, the reason for the conclusion arrived at, the nature of the case and the grounds urged before it. (1910) 8 M L T 380 : 8 Ind Cas 157 (DB).

3. Duty of court.

——O. 41, R. 31 — Duty of Appellate Court to arrive at independent conclusion.

Where the law gives a right of appeal from a judgment of a trial Court on questions of fact as well as on questions of law, the Court of Appeal has to consider and weigh the judgment appealed against. It has to examine the materials on the record and to come to its own conclusions.

(The Judges held did not shirk their duty to weigh the evidence and to arrive at their own independent conclusions.) AIR (Vol 29) 1942 Cal 498: 47 CWN 9: 202 Ind Cas 551 (SB).

——O. 41, R. 31 — Duty of Court — Government action, appreciation of.

Per Gwyer, C. J. —Courts of Justice, while giving no countenance to the theory that Govts. are at liberty to break the law whenever they find it convenient to do so, ought to abstain from harsh or ungenerous criticism of measures taken in good faith by those who bear the responsibility of Govt. when suddenly faced with a serious and perhaps dangerous situation. AIR (Vol 28) 1941 FC 16: 7 BR 433: 1941 OWN (CC) 297: 72 CLJ 550: 45 CWN (FC) 27: (1941) ALJ 170: 53 MLW 397: 1941 RD 121: (1941) 1 MLJ (FC) 65 Supp: 22 PLT 578: 1941 MWN 581: (1940) FCR 110: 1941 AWR (CC) 3 and 109: ILR (1941) Kar (FC) 72 Sup: 192 Ind Cas 138.

——O. 41, R. 31 — Judgment — Lower Appellate Court, whether must look into all evidence before recording finding of fact.

There is no authority which lays down that the lower Appellate Court before recording a finding of fact shoud refer to each and every document or piece of evidence on the record while recording its finding. It may be presumed that all the relevant evidence was brought to the notice of the Judge and he had it in his mind when he delivered his judgment. AIR (Vol 23) 1936 Lah 543: 164 Ind Cas 252.

——O. 41, R. 31 — Appellate Court — Duty to decide all points.

It is the duty of all Courts to pronounce their opinion on all the important points in an appealable case as a failure to do so not infrequently necessitates a remand with the consequence of heavy additional costs. The observations of this rule is of special importance where the decision of other points depends upon the sifting of a mass of oral evidence or upon the proper significance of the language employed in a vernacular document. AIR (Vol 20) 1933 PC 33: 37 C WN 321. 64 MLJ 142: 16 NLJ 50: (1933) MWN 117 : 37 MLW 349 : 57 CLJ 51 : 35 Bom LR 230: 29 NLR 94: (1933) ALJ 486: 60 IA 49: 141 Ind Cas 520 (2).

——O. 41, R. 31 — Proper judgment.

Even in cases where the appellant personally appears to support his appeal it is the duty of the judge of the appellate Court to deliver a proper judgment. He must indicate the points for determination which are to be found invariably in the grounds of appeal, he must also give his decision on each of those points and also the reasons for his decision. AIR (Vol 15) 1928 Oudh 374: 5 OWN 689: 112 Ind Cas 845 (DB).

——O. 41, R. 31 — Not challenged in appeal.

Where a party to an appeal does not ask to be heard on a question of fact decided by the Trial Court and the legal question only is argued in appeal, the Court is justified in disregarding the question of fact. AIR (Vol 12) 1925 All 585: 89 Ind Cas 374: 47 All 929: 23 ALJ 653 (DB).

——O. 41, R. 31 — Findings on all points.

In appealable cases, with a view to enable the appellate Courts to dispose of the case finally and thus obviate any cause for remand and its attendant delay and expense, Courts should give their finding on all important points. AIR (Vol 12) 1925 Cal 316: 82 Ind Cas 318.

——O. 41, R. 31 — Rule mandatory.

The provisions of the law are mandatory and the reason is obvious. A judge is bound to give the points for decision and the reasons for the decision thereon in order to enable the Court of appeal to see that the Judge whose findings on facts are binding on this Court, has put properly before him the points at issue and has decided them. AIR (Vol 11) 1924 All 100: 74 Ind Cas 827: 21 ALJ 567: 5 LRA Civ. 21.

——O. 41, R. 31 — It is the duty of an Appellate Court to consider the evidence on the record and where this is not done, the judgment is liable to be set aside in second appeal. AIR (Vol 6) 1919 Lah 336: 51 Ind Cas 751 (DB).

——O. 41, R. 31 — Defective judgment.

It is improper for a court to dismiss a suit to contest an alienation on the ground that it referred to a small plot of useless land, and a court is not justified in refusing to administer the justice according to the law of the land. AIR (V 4) 1917 Lah 210 : 87 PLR 1917 : 83 PWR 1917 : 42 Ind Cas 244.

——O. 41, R. 31 — Issues discussed.

An Appellate Court is bound to give judgment on all issues discussed in the first Court. AIR (Vol 4) 1917 Pat 429: 2 Pat LW 181: 2 Pat LJ 701: 42 Ind Cas 838 (DB).

——O. 41, R. 31 — Duty to consider all points raised.

An Appellate Court is bound to consider and dispose of a point distinctly raised by the parties and dealt with by the Court of first instance and not abandoned at the hearing before the App. Court. (1912) 36 Bom 379: 14 Bom LR 418: 15 Ind Cas 818 (DB).

——O. 41, R. 31 — Appellate court — Finding of fact.

A Court of appeal should not arrive at a conclusion based upon facts merely suggested by the lawyer representing one of the parties but not put forward by witnesses in the court of first instance. (1907) 9 Bom LR 80: 17 MLJ 32: 29 A 29 (33) : 34 IA 1 : 5 CLJ 4 : 1 MLT 429 (PC).

——O. 41, R. 31 (S. 574 old Code) — Absence of proviso found in S. 24, C. P. C. — Jurisdiction of appellate Court to find on unnecessary issues.

The absence in S. 574 of proviso like the one found in S. 204, C. P. C., does not make it imperative on an appellate court to record its finding or decision on every point where it is really unnecessary to do so. Ch. XLI of the Code which deals with appeals from original decrees contains nothing which may be construed as expressly taking away the power of an appellate Court to record its findings on all the points argued before it, notwithstanding that by force of S. 682, S. 204 may apply to appeals. (1905) 9 CWN 60 (67) (FB).

——O. 41, R. 31 — Appellate court's duty — Decision on all issues of fact.

When a case is thoroughly investigated by the first court, it is the duty of the lower appellate court to decide all relevant issues of fact, so that the High Court in second appeal may have before it materials which will enable it to dispose of the case without a remand. (1904) 6 Bom LR 726 (728) (DB).

4. Judgment of affirmance.

——O. 41, R. 31 — In a judgmenut of affirmance, it is not necessary for the appellate Court to deal with the matter in dispute at the same length as would be necessary in a judgment of reversal. AIR (Vol 13) 1926 Cal 545: 91 Ind Cas 478 (DB).

——O. 41, R. 31 — When fatal.

Whether or not a judgment of an appellate Court is according to law must depend upon the facts and circumstances of each case. There is firstly that difference which exists between cases of affirmance of judgments and cases of reversal of judgments of the first Court. Then there is to be considered nature of the judgment affirmed, its fulness & accuracy and so forth. When Court has fully discussed all facts which were placed before it and the lower appellate Court's judgment affirmed it, it is not contrary to law simply because the judgment is in a short form. AIR (Vol 10) 1923 Cal 163: 68 Ind 467 (DB).

——O. 41, R. 31 — Where a judgment of a Court of first appeal consisted only of a general statement by the judge that he had carefully considered the record and found no reason to interfere with the conclusions arrived at by the trial Court the judgment is not in accordance with law. AIR (Vol 6) 1919 Oudh 131: 21 OC 309: 49 Ind Cas 56.

——O. 41, R. 31 — A judgment in affirmance of a decree must be precise and definite, and it must show with reasonable clearness that the mind of the Appellate Court has been brought to bear sufficiently upon every aspect of the case requiring his decision. AIR (Vol 6) 1919 Pat 13: (1919) Pat 88: 49 Ind Cas 504 (DB).

——O. 41, R. 31 — Wholesale concurrence with Lower Court.

A judgment of a District Judge merely stated that the findings of the Lower Court were perused, that both sides were heard and the findings accepted, without dealing with or stating certain objections against the findings.

Held, the judgment is not a judgment in accordance with law. (1912) 16 Ind Cas 354 (Mad) (DB).

——O. 41, R. 31 — How should be made.

Where a lower Court's judgment is exhaustive and well-written, an Appellate Court, if it confirms that judgment, may express concurrence with it without more but there should be enough to show that the Court of appeal has considered it fully and formed its own opinion. (1911) 13 Ind Cas 194 (Cal).

5. Judgment of Reversal.

——O. 41, R. 31 — Appellate Court reversing original Court's judgment, if bound to discuss all reasons given by original Court.

It cannot be said that a judgment of reversal is not a proper judgment merely because all the reasons given by the original Court are not discussed. If the reasons given by the Appellate Court are so cogent as to justify the finding, no discussion of other less convincing reasons is necessary, and in such a case omission to discuss all the reasons given by the original Court is perfectly justified. AIR (Vol 28) 1941 Cal 248: 45 CWN 699: ILR (1941) 1 Cal 309: 196 Ind Cas 241 (DB).

——O. 41, R. 31 — Judgment — Appellate Court not considering evidence in all its aspects.

When the Judge of the first Appellate Court reverses the judgment of the lower Court but has not considered the evidence in all its aspects, its judgment is not a proper judgment of reversal. AIR (Vol 26) 1939 Cal 451: 69 CLJ 431: 43 CWN 745: ILR (1939) 1 Cal 592: 183 Ind Cas 802 (DB).

——O. 41, R. 31 — Appellate Court reversing trial Court's finding — It must consider and discuss relevant evidence in the trial Court.

Where the Appellate Court reverses the findings of the trial Court, it must discuss all the relevant evidence and give any reasons for its inability to agree with the trial Court in its conclusion on these facts which depended mostly on the oral testimony of certain witnesses whom the trial Court heard and whom it had no opportunity of hearing. AIR (Vol 23) 1936 Cal 256: 64 CLJ 65: 162 Ind Cas 790.

——O. 41, R. 31 — In a reversing judgment the appellate Court has to come into close quarter with the judgment it reviews and meet the reasoning employed by the trial Judge therein, in order to upset the latter's conclusions. AIR (Vol 13) 1926 Nag 435: 95 Ind Cas 614.

——O. 41, R. 31 — Reversing judgment — Reasons for reversal to be stated.

The Appellate Court in arriving at a conclusion different from that of the first Court should state its reasons for doing, so as to enable the Court of second appeal to see whether the conclusion has been legally arrived at. AIR (Vol 7) 1920 Cal 538: 56 Ind Cas 816 (DB).

——O. 41, R. 31 — Statement of reasons.

Where a Court of appeal reverses the decision of the primary court the law imposes upon the Court of Appeal the imperative duty and obligation of giving an adequate and satisfactory judgment such as is required by law. AIR (Vol 5) 1918 Pat 543: 43 Ind Cas 973.

——O. 41, R. 31 — Discussion of evidence.

When the judgment of an appellate Court is one of reversal the aggrieved party is entitled to a consideration of the points on which the Lower Court relied for the purpose of giving the successful party a decree. AIR (Vol 3) 1916 Pat 349: 34 Ind Cas 185.

——O. 41, R. 31 — In reversing a decision of the first Court, the Lower Appellate Court should state the facts and the points raised before it, its decision and the reasons for decision. The High Court should not be left to spell out the meaning of the Lower Appellate Court by gathering together portions of findings from the judgment of the first Court and the judgment in appeal. (1910) 7 Ind Cas 421 (Cal) (DB).

——O. 41, R. 31 — Appellate — Duty of Appellate Court in reversing judgment of lower court.

It is better that the appellate Court, whenever it reverses the judgment of the lower Court, comes into close quarters with the judgment of the lower Court and meets the reasoning therein. (1906) 3 CLJ 560 (568): 1 MLT 175 (PC)

——O. 41, R. 31 — Appellate Court, functions of — Question of fact — Inferences from fact.

A Court of appeal ought never to reverse the judgment of an inferior Court unless quite confident that the judgment given in the Court below is wrong. Where the case depends upon proper inferences to be drawn from facts indisputably established by the evidence, an appellate court may be in as good a position to judge as the original tribunal. But where the case hinges on the question which of two conflicting stories is to be believed, to which witnesses' credence is to be given the original tribunal is far better placed than the appellate Court to correctly gauge the truth. (1904) 6 Bom LR 1130 (1131) (DB).

——O. 41, R. 31 — Appellate Court, functions of.

A Court of Appeal ought never to reverse the judgment of an inferior court unless quite confident that the judgment given in the Court below is wrong. (1903) 5 Bom LR 584 (586) (DB).

Also (1903) 5 Bom LR 956 (964) (FB).

See also (1904) 6 Bom LR 1130 (1131) infra.

6. Non-compliance — Effect.

(a) General.
(b) Consideration of evidence.
(c) Procedure.
(d) Second appeal — Maintainability.

(a) General.

——O. 41, R. 31 — Duty of appellate Court — Judgment — Contents of — Failure to give reasons for finding agreeing with trial Court — Statement agreeing with trial Court — Sufficiency. See AIR (Vol 37) 1950 Pat 298.

——O. 41, R. 31 — Appellate judgment not coming to close quarters with judgment of trial Court and not alluding to reasoning of trial Judge.

Where the judgment in appeal does not come to close quarters with the judgment which it reviews and never discusses or alludes to the reasoning of the trial Judge, such judgment seriously invalidates its authority, and does not satisfy the requirements of the law and must, therefore, be deemed to be a judgment vitiated by an error in procedure. AIR (Vol 28) 1941 Mad 393: (1941) 1 MLJ 174: 53 MLW 160: 1941 MWN 98.

——O. 41, R. 31, Ss. 99, 108 — Appeal heard by two Judges — Judgment delivered by one of them the other agreeing — Judgment signed by latter alone, former having gone on leave — Judgment, if nullity.

Order 41, R. 31, Civil P. C., requires that the judgment of the Appellate Court shall be in writing and shall state various matters, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

The rule does not say that if its requirements are not complied with, the judgment shall be a nullity. So starting a result would need clear and pre-

cise words. Indeed the rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply as it is their duty to do.

But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing the judgment may call for more comment but even so the convenience of the Court and the interest of litigants must prevail. The defect is merely an irregularity. But in truth the difficulty is disposed of by Ss. 99 and 108 of the Civil P. C. and it is always in the discretion of the Board to apply the principle of the sections on appeal to His Majesty in Council.

So where the appeal is heard by two Judges and the judgment is delivered by one of them and the other agrees but is signed by the latter alone, the former having gone on leave, the judgment is not a nullity. AIR (Vol 25) 1938 PC 292: 5 BR 154: 68 CLJ 497: 20 PLT 61: 43 CWN 87: (1939) MWN 1: (1939) 1 MLJ 56: 49 MLW 248: 1939 OWN (CC) 272: 41 Bom LR 128: 41 PLR 310: ILR (1939) Lah 56: ILR (1939) Kar (PC) 35 Sup: 66 IA 12: 178 Ind Cas 425.

——O. 41, R. 31 — One judgment disposing of four appeals — Question raised distinct — Parties not same — Judgment, if a judgment within O. 41, R. 31.

Where the Judge has disposed, in a single judgment of less than one page of type, of four appeals, of which one raised a question quite distinct from the question raised in either of the other three, and in fact, the parties were not the same and as a result he has not been able to give proper consideration to the points for decision in these appeals:

Held, that in neither appeal could his so-called judgment be regarded as a "judgment" within the meaning of O. 41, R. 31, Civil P. C. AIR (Vol 23) 1936 Rang 262: 163 Ind Cas 604.

——O. 41, Rr. 31, 11 — Appeal — Summary dismissal — Judgment, contents of — Compliance with R. 31, necessity of.

In a judgment delivered on hearing an appeal under O. 41, R. 11 by a Court subordinate to the High Court, compliance with the provisions of R. 31, O. 41, is necessary.

The question whether in a particular case there has been a substantial compliance with the provisions of R. 31 is a different one depending on the nature of the judgment delivered in each case. A non-compliance with the strict provisions of this rule may not vitiate the judgment and make it wholly void, and the irregularity may be ignored if there has been a substantial compliance with it and the second Appellate Court is in a position to ascertain the findings of the lower Appellate Court. AIR (Vol 18) 1931 All 597: (1931) ALJ 875: 54 All 220: 136 Ind Cas 274 (FB). (Overrules 5 ALJ 300: 30 All 319.)

——O. 41, R. 31 — Where the judgment of first appellate Court simply affirmed the judgment of the lower Court just saying that there was a previous decree and so there can be a decree now.

Held, that the judgment was not a sufficient judgment. It ought to decide the points of fact. AIR (Vol 15) 1928 Cal 408: 108 Ind Cas 245.

——O. 41, R. 31 — To set out the facts of a case and then without any discussion, merely to dispose of the appeal by saying that the trial Court has discussed the matter fully and that, therefore, the appeal is dismissed is not a proper method of dealing with an appeal. (1928) 112 Ind Cas 698 (Lah).

——O. 41, R. 31 — Trial Court decided a case on preliminary point but also expressed opinion on merits. Appellate Court reversed the decision on preliminary point and decided on merits basing its decision on the decision of that of trial Court.

Held, that the trial Court's judgment on merits being an obiter, and that of appellate Court being based on that, the latter was not a judgment in accordance with law. AIR (Vol 14) 1927 Lah 418: 9 LLJ 174: 102 Ind Cas 280: 28 PLR 330.

——O. 41, R. 31 — The provisions of O. 41, R. 31 must be strictly followed by the appellate Court. A mere general statement that on a perusal of all the evidence in the case it was satisfied as to certain conclusion is not a sufficient judgment within the meaning of the law. AIR (Vol 14) 1927 Oudh 95: 95 Ind Cas 925: 1 Luck 458: 29 OC 330: 3 OWN 352: 13 OLJ 586.

——O. 41, R. 31 — Where the judgment of the first appellate Court was to the effect: "I see no reason to disagree with the finding of the lower Court. The appeal is dismissed under O. 41, R. 11."

Held, the judgment did not comply with the requirements of O. 41, R. 31. AIR (Vol 14) 1927 Rang 208: 103 Ind Cas 766 (DB).

——O. 41, R. 31 — Only part of the subject-matter dealt.

Where the judgment of the lower appellate Court does not deal with the whole subject matter, but deals with only a part, the appeal cannot be said to be legally disposed of. AIR (Vol 13) 1926 Lah 351: 93 Ind Cas 829.

——O. 41, R. 31 — The lower appellate Courts' judgments should be complete and self-contained as, the result of their writing short and unsatisfactory judgments is that the work of the High Court is thereby increased to a great extent. AIR (Vol 13) 1926 Oudh 458: 94 Ind Cas 349: 29 OC 271: 13 OLJ 265: 3 OWN 392.

——O. 41, R. 31 — Where the appellate Court recorded a finding merely stating that the plaintiff has failed to discharge the burden of proof which lay very heavily upon him.

Held, that the judgment is not a good judgment. AIR (Vol 10) 1923 All 412.

——O. 41, R. 31 — Mere approval.

There is abundant authority for holding that the Judge of an appellate Court should state his own reasons for the case and should not confine himself to approving reasons of the Court of the first instance. A general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law. AIR (V 10) 1923 Lah 658 : 75 Ind Cas 1013.

——O. 41, R. 31 — Where the appellant's vakil sought to attack the other side upon an entirely new

and different ground, not set up in the lower Court and the appellate Court dismissed the appeal without discussion of the new plea.

Held, that the judgment was not bad on that ground. AIR (Vol 10) 1923 Lah 259: 73 Ind Cas 817: 5 LLJ 97.

——O. 41, R. 31 — Findings of fact.

(Obiter) The first Appellate Court should necessarily give its findings of fact (which are conclusive in second appeals) clearly and decisively on each material point; otherwise its decision is liable to be set aside in second appeal, though the litigation may have gone on for a long time and the amount involved is small. AIR (Vol 4) 1917 Cal 233: 34 Ind Cas 942 (DB).

——O. 41, R. 31 — Revision.

Where an Appellate Court passed a judgment in a cursory manner and the judgment did not show that the evidence on the record had been fully weighed and considered, it is liable to be set aside in revision. AIR (Vol 2) 1915 Lah 242: 4 PWR 1915: 36 PLR 1915: 27 Ind Cas 561.

——O. 41, R. 31 — Defect in.

The judgment of an appellate court was — "The conduct of H has been throughout tortuous and I am satisfied that the view taken by the Lower Court is correct. The appeal is dismissed with costs."

Held that this was not a Judgment according to law as it did not comply with O. 41, R. 31, C. P. C. (1912) 16 Ind Cas 382 (Mad) (DB).

——O. 41, R. 31 (S. 574, Old Code) — Judgment of Appellate Court.

The Judgment of the Appellate Court should show on the face of it that the points in dispute were clearly apprehended by the Judge and that he exercised his own judgment in the decision. Where in an appeal the Judgment was "The Lower Court's Judgment is in accordance with the evidence on the record. Appellant relies on a decree of the High Court which has been never executed. The appeal is dismissed with costs."

Held, that this was not a sufficient compliance with the terms of S. 574. 1906 AWN 86 (86).

(b) Consideration of evidence.

——O. 41, R. 31 — Duty of first appellate Court — Discussion of evidence.

It is the duty of a first appellate Court to consider the evidence on record and arrive at an independent decision. It is not sufficient for it to concur with the reasons given by the trial Court without discussing the evidence itself. Where there is no such discussion the judgment is not a judgment in law. 1949 RD 402 (DB).

——O. 41, R. 31 — Judgment of first appellate Court — No discussion of evidence — If a proper judgment.

Where there is no discussion of the evidence in the judgment of the first appellate Court and it does not contain any indication of the Court having even applied its mind to it, it is not a judgment which can be upheld in second appeal. 1949 RD 332 (2) (DB).

——O. 41, R. 31 — Judgment of Appellate Court — Contents — Discussion of evidence — Necessity.

It is not necessary for the first appellate Court to discuss each and every item of oral and documentary evidence produced before the trial Court. So long as the Court discusses in its judgment all the material points at issue before it and all the material evidence relating thereto it would be enough to warrant the assumption that the Court has applied a judicial mind to the evidence on the record. 1949 RD 6.

——O. 41, R. 31 — Should be considered in full.

Where very old receipts, showing that the same jama continued, had been filed but where the trial Court discarded the presumption raised by this fact by referring to plaintiff's papers showing that rent had been reduced at some time.

Held, that the matter ought to have been examined by the lower appellate Court because a party in appeal expects that all the objections which he has taken to the decree should be considered by the appellate Court in the same way as they were considered by the trial Court. AIR (Vol 16) 1929 Cal 110: 55 Cal 1216: 49 CLJ 70: 114 Ind Cas 485 (DB).

——O. 41, R. 31 — Where the reasons which the appellate Court gives while writing a judgment are that it has carefully considered the reasons adopted by the trial Court and found these reasons satisfactory, it must be held that it has stated its reasons as required by R. 31, O. 41. An omission to refer in the judgment to every detail of evidence adduced does not necessarily vitiate a judgment. AIR (Vol 15) 1928 Oudh 480: 5 OWN 893: 117 Ind Cas 479 (DB).

——O. 41, R. 31 — A judgment of the first appellate Court, omitting to set out the evidence on which the judgment is based is not one in accordance with law. AIR (Vol 7) 1920 Cal 774: 63 Ind Cas 436 (DB).

——O. 41, R. 31 — The omission of the Court of first hearing to mention a document of obvious importance in its judgment is proof that it failed to consider the document inasmuch as it may be presumed that the document if duly considered would have been mentioned.

Where the omission of reference to a document by a first Appellate Court is urged in second appeal as proof that the first Appellate Court failed to consider the document he must either prove that he relied on the document in argument in first appeal or that he relied on the particular part of the judgment of the first Court treating the document as supporting its decision. 22 OC 312: 6 OLJ 551: 2 UPLR (JC) 22: 54 Ind Cas 353: AIR (Vol 6) 1919 Oudh 44 (DB).

——O. 41, R. 31 — A mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain set of facts is not a sufficient judgment. AIR (Vol 6) 1919 Pat 521: 51 Ind Cas 46.

——O. 41, R. 31 — The failure of an Appellate Court to weigh all the evidence and to come to a satisfactory conclusion on the evidence before it, is an error of procedure which vitiates the judgment. AIR (Vol 6) 1919 Pat 486: (1910) 51 Ind Cas 11.

——O. 41, R. 31 — Omission to consider an important piece of evidence is an error in procedure and vitiates the whole trial. AIR (Vol 6) 1919 Pat 124: 49 Ind Cas 832.

——O. 41, R. 31 — Where in the suit for confirmation of possession and declaration of title, the trial Court went into both the questions of title and possession, but the Appellate Court did not consider the

question of possession, holding that the title was not proved.

Held, that the Appellate Judgment could not stand as being founded on a partial view of the case. AIR (V 5) 1918 Cal 251 : 46 Ind Cas 328 (DB).

——O. 41, R. 31 — The Appellate Court must weigh and discuss conflicting evidence and come to its own conclusion on it and give reasons for coming to that conclusion. Where an Appellate Court refers to only one of the seven grounds of appeal and says that it finds no sufficient reason to differ from the Lower Court and where the evidence is conflicting, the appeal is not disposed of according to law, and the judgment and decree should be set aside. The Court should be ordered to consider all the seven grounds. (1912) 5 Bur LT 269: 17 Ind Cas 898.

——O. 41, R. 31 — The law requires that a Judge shall in his judgment state his findings with the reasons thereof and a mere reference to the evidence of certain witnesses in a previous part of the judgment of an Appellate Court is not a sufficient compliance with law. (1910) 35 Cal 813: 13 CWN 177: 5 MLT 89: 4 Ind Cas 321 (DB).

(c) **Procedure.**

——O. 41, R. 31 — Mere approval — Procedure in second appeal.

The Judge of an appellate Court must state in his judgment his own reasons and should not confine himself to approving of the reasons of the Court of first instance. The reason is that the judgment must show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discretion in deciding them.

The proper form of the order to be made in second appeal in such cases is to set aside the decree of the lower appellate Court and send back the case to that Court in order that the appeal may be disposed of according to law. AIR (Vol 15) 1928 Lah 655: 10 LLJ 257: 112 Ind Cas 670.

——O. 41, R. 31 — Where the only portion of the appellate Court's judgment, which could be regarded as containing the judgment of the Court, was (1) "On the evidence on record this Court does not find reason to disagree with the decision" and (2), "the appeal is dismissed with costs."

Held, that there was absolutely no indication whatever of the lower appellate Court having brought a judicial mind to bear on the decision of the trial Court with regard to the various points and arose for determination; that the judgment should be set aside and the case remanded to that Court for fresh hearing and disposal. AIR (Vol 15) 1928 Mad 16.

——O. 41, R. 31 — Irregularity.

The omission of an Appellate Court to comply with the provisions of O. 41, R. 31 is mere irregularity and is curable by S. 99 of the Code. AIR (Vol 7) 1920 Sind 12: 59 Ind Cas 673: 14 SLR 132 (DB).

——O. 41, R. 31 — Consideration of evidence — General statement.

A general statement that on perusal of all the evidence in the case, the Court is satisfied as to certain facts is not a sufficient judgment within the meaning of the law and the High Court may interfere, if there is a miscarriage of Justice by the Court's failure to consider all the evidence. AIR (Vol 3) 1916 Pat 262: 1 Pat LW 188: 2 Pat LJ 8: (1917) Pat HCC 308: 38 Ind Cas 509 (DB).

——O. 41, R. 31 — Interference by High Court.

An Appellate judgment not complying with the provisions of O. 41, R. 31 C. P. C., is liable to be interfered with by the High Court under S. 100 of C. P. C. An appellate judgment, specially one that concerns with the finding of the Lower Court, should contain the points for determination and the reasons for the decision. (1912) 4 Bur LT 201: 11 Ind Cas 915.

——O. 41, R. 31 — The Lower Appellate Court without considering the elements which constitute a "garden" within Bengal Revenue Sale Law S. 37 Excep. 4, simply held that the existence of some fruit trees does not make the land a garden.

Held, the High Court should interfere in second appeal. (1910) 7 Ind Cas 912 (Cal) (DB).

(d) **Second appeal — Maintainability.**

——O. 41, R. 31, (Ss. 99, 100, 574, 578, 584 old Code) — Appellate judgment — Omission to state reasons for decisions — Defect if curable — Ground of second appeal.

In a suit on a mortgage bond, the defence of the contesting defendant was that the bond was executed by collusion between the plaintiff and certain other defendants who did not appear. The lower appellate Court recited that the Court of first instance had found that the plaintiff was entitled to no relief, and then concluded as follows: "The point in dispute is a question of fact and I see no reason to differ, from the finding of the lower Court. The appeal is dismissed".

Held — that the appellate judgment did not comply with the provisions of S. 574, Civil Procedure Code. The points for determination were set out but the reasons for the decision were not stated. That the facts of the case demanded fuller treatment than they received, and the defect was not cured by the provisions of S. 578 of the Code. Defect of the appellate judgment is a ground of second appeal. (1909) 13 CWN 143 (145): 2 Ind Cas 404 (DB).

——O. 41, R. 31 (S. 574 old Code) — Judgment appellate — Not in accordance with the section — Appeal — Practice — Procedure.

Where there has been failure by the appellate Court to comply with the requirements of S. 574, C. P. C., the proper form of the order to be made by the second appellate Court is to set aside the decree and remand the case to the first appellate Court for disposal according to law.

If the Judge of the first appellate Court happens to be the same individual who heard the appeal originally, he need re-hear the appeal only if he is of opinion that he cannot properly dispose of it without a re-hearing; and where he is not the person who originally heard the appeal he should always re-hear it. (1908) 18 MLJ 34: 31 M. 469 (471): 3 MLT 71 (FB).

7. "Points for determinations."

——O. 41, R. 31 — Judgment silent on certain grounds taken in memo. of appeal — Abandonment of those grounds — Presumption.

Where a Judge mentions specifically certain points which were argued before him and the judgment is silent on other points taken in the memorandum of appeal, it may be presumed that such points have been abandoned, particularly in the absence of an affidavit to the contrary by the counsel who appeared in the appellate Court. AIR (Vol 37) 1950 Lah 126: Pak LR (1950) Lah 201.

——O. 41, R. 31 — Decision on all points.

Where the appellate Court decides the appeal on a preliminary issue it is desirable that it should

decide the case on the merits as well as to obviate an order of remand if the decision set aside by the High Court in appeal. (1930) 34 CWN 836 (DB).

——**O. 41, R. 31 (S. 574 old Code) — Appellate Court — Issues in appeal — Practice — Procedure.**

The object of the Legislature in making it incumbent by S. 574, C. P. C., on an appellate court to raise points for determination, is to clear up the pleadings and focus the attention of the court and of the parties on the specific and rival contentions of the latter.

Held that an issue like the following. 'Had the lower court erred in holding that the land at D was not liable to plaintiffs' claim was too wide and general to convey any clear idea of what the plaintiff claimed and how he sought to make the land liable in the hands of all or any of the defendants. (1905) 7 Bom LR 174 (174) (DB).

——**O. 41, R. 31 — Boundary disputes.**

In a case of disputed boundary, it is not enough for the appellant to throw doubts upon the respondent's case, or to show that the respondent's title is not free from doubts; but the appellant must show clearly where the judgment of the appellate court is wrong and what other course is right. (1901) 12 MLJ 83: 29 C. 187 (199): 29 IA 24: 4 Bom LR 167: 6 CWN 386 (PC).

8. "Reasons for decision".

——**O. 41, R. 31 — Judgment of appellate Court — Contents — Findings of fact — Duty to set out material evidence.**

The judgment of an appellate Court must be self-contained, so self-contained that findings of fact can be sustained upon a bare perusal of it. It is not sufficient for the Court to say that the oral evidence on a particular point is not satisfactory. It should reproduce the material evidence and state reasons for its conclusion. AIR (Vol 37) 1950 Assam 79 (DB).

——O. 41, R. 31 — A Court should not interfere with findings of fact unless it is satisfied that the trial Court is clearly wrong. The judgment must show that the findings of the trial Court and the reasons therefor have been fully considered by the Appellate Court. Further the Appellate Court should give its reasons for reversing the findings of the trial Court. (1941) 73 CLJ 196.

——O. 41, R. 31 — It is not sufficient judgment, to state that the Judge is in agreement with the finding of the Court below. He is bound to give his reasons for the findings at which he arrives and although he need not, so far as the questions of fact are concerned, deal in detail with the evidence, a definite finding must be arrived at by him in order to comply with the provisions of the Code. AIR (Vol 25) 1938 Pat 69: 4 BR 293: 19 PLT 362: 173 Ind Cas 479 (DB).

——O. 41, R. 31 — Where an appellate Court has independently considered every material point in the case there is no objection to its adopting the reasons of the trial Court without once more writing down the same reasons at length. AIR (Vol 14) 1927 Cal 323: 97 Ind Cas 760 (DB).

——O. 41, R. 31 — An Appellate judgment should state the reasons for the decision on all the points for determination and must show that the Appellate Judge has exercised his own mind independently on the questions involved, and not relied en bloc on the reasoning of the trial Court. AIR (Vol 5) 1918 Bom 235: 20 Bom LR 461: 46 Ind Cas 161 (DB).

——O. 41, R. 31 — A lower Appellate Court is not bound to dispose of all the reasons given by the first Court, if it gives special reasons for holding differently. AIR (Vol 2) 1915 Cal 99: 19 CLJ 385: 25 Ind Cas 543 (DB).

——O. 41, R. 31 — Whether certain words amount to a sufficient statement of the reasons for the decision must be decided with reference to the facts of each case. (1909) 13 CWN 1031 : 2 Ind Cas 405 (DB).

——**O. 41, R. 31 (S. 574, old Code) — Appellate judgment, contents of.**

The question of the permanency of the tenure was discussed in considerable detail by the first Court and decided against the defendant, and although the lower Appellate Court came to the same conclusion, it did not deal with it as the importance of the question to the parties deserved.

On second appeal, the finding was set aside as not being in compliance with S. 574 of the Code of the Civil Procedure (Act XIV of 1882). (1909) 13 CWN 949 (961): 2 Ind Cas 656: 36 C. 927 (DB).

——**O. 41, R. 31 (S. 574, old Code) — Judgment, contents of — Mere reference to evidence without discussion.**

Where the lower appellate court in coming to a finding that a certain payment was made on account of interest did not state any reasons for the finding but merely referred to the evidence of certain witnesses on which it relied.

Held, that the judgment was not in accordance with law. (1909) 13 CWN 177 (180) : 35 Cal 813 (DB).

——**O. 41, R. 32.**

——**O. 41, R. 32 — O. 41, Rr. 32, 33 — Suit dismissed on merit — Plaintiff ordered to make good deficiency in court-fee within fixed time — Appellate Court, if can extend time — Court-fee made good within extended time — Plaint, if can be considered as having been rejected — Court-fee.**

While dismissing the suit on merits, the Munsif passed the following decree: "the plaintiff is called upon to make the deficiency in court-fees as ordered above within 10 days hence, falling which the plaint shall stand rejected. On payment of the above court-fees only, his suit will be taken to have failed on merits. The defendant will receive his costs of the case in all events of the case." The plaintiff filed an appeal. The deficiency of the lower Court was noticed when the appeal was filed. A report was made by the munsarim and the lower Appellate Court allowed certain time for making good the deficiency within which the deficiency of the lower Appellate Court as well as of the trial Court was made good:

Held, that under O. 41, Rr. 32 and 33, Civil P. C. the Appellate Court has ample power to vary the decree of the trial Court. The Appellate Court could extend the time and suspend the order made in the decree of the trial Court, after the appeal was filed. The trial Court could not give any extension and it was the Appellate Court which became seised of the case and could give an extension. Since the court-fee was paid within the extended time, the plaint could not be regarded as having been rejected. The decree consisted of two alternative orders from both of which an appeal lay to the lower Appellate Court. The order rejecting the plaint in the case of non-payment of the deficiency in the court-fee was a decree and an appeal lay from it. After the payment of the deficiency in the Court -fee within the extended time given by the lower Appellate Court, the first order did not become effective and it was only the latter order, that is the decision on merits, which remained in the case. AIR (V 25) 1938 All 150 : (1937) ALJ 1346 : 1938 AWR (H C) 13 : 174 Ind Cas 298.

——O. 41, R. 32 — Confirming judgment.

Where the appellate Court affirmed the lower Court's decision on the point of necessity for alienation without giving reasons therefor, the High Court remanded the case for fresh decision on the point. AIR (V 12) 1925 Lah 246 : 84 Ind Cas 946 : 6 LLJ 506.

——O. 41, R. 32 — Powers of Court.

Once an appeal is preferred from a decree the appellate Court becomes seised of the entire proceedings and becomes vested with the jurisdiction ot confirming, varying and reversing the decree from which the appeal is preferred. AIR (V 17) 1930 Oudh 13 : 119 Ind Cas 462 : 6 O W N 644 (DB).

——O. 41, R. 32 — Enlargement of time fixed by decree.

The jurisdiction with which a Court is invested by the provisions of S. 148 in the matter of enlargement of time is restricted to cases where time for doing an act is fixed by the Court, otherwise than by its decree in a suit. But once an appeal is preferred from a decree, the appellate Court becomes seised of the entire proceedings and becomes vested with the jurisdiction of confirming, varying or reversing the decree from which the appeal is preferred, and it follows that the appellate Court has jurisdiction to extend the time though not under S. 148 but under the provisions of R. 32, O. 41, by varying the decree of the Court of first instance in that behalf. AIR (V 15) 1928 Oudh 32 : 101 Ind Cas 258 : 2 Luck 425 : 4 OWN 252 (DB).

——O. 41, R. 33.

See also Civil P. C. O. 41 Rr. 4 and 22.

1. Addition of parties.
2. Applicability and scope.
3. Amendment.
4. Connected suits.
5. Co-respondent.
6. Correction of error.
7. Costs.
8. Discretion.
9. Duty of Court.
10. Exonerated party.
11. Ex parte decree.
12. Finding of fact.
13. Making new case.
14. Non-appealing defendants.
15. Non-appealing parties.
16. Non-appealing plaintiffs.
17. Parties.
18. Powers of Appellate Court — Refund of consideration.
19. Relief.
20. Remand.
21. Second appeal.
22. Subsequent events.

1. Addition of parties.

——O. 41, R. 33 — Suit for contribution — Power under R. 33, should be freely used.

There is nothing in O. 41, R. 33, Civil P. C., or in the illustration to it to confine its application to cases where there is but one cause of action or ground of liability against the defendants. In a contribution suit it is necessary that all the parties should be before the Court and for this, powers of the Appellate Court under R. 33 read with R. 20, should be used freely. A I R (Vol 24) 1937 Pat 628 : 18 P L T 787 : 16 Pat 557 : 4 B R 118 : 172 Ind Cas 187 (DB).

——O. 41, R. 33 — A person who is a party to a suit in the lower Court can be made a party to the appeal at any time before the appeal against him is time-barred but where that is not done, he cannot be added by the Court under O. 41, R. 33 after the period for limitation had expired. A I R (Vol 22) 1935 Rang 364 : 159 Ind Cas 186.

——O. 41, R. 33 — The Court will not exercise its discretionary power under O. 41, R. 20 or R. 33 to add new respondents to an appeal, where the period of limitation for filing an appeal against them has elapsed and the lower Court's decree has become res judicata. Because, if the Court should exercise its discretionary power of adding respondents in such cases the result will be to allow the appellant to make a fresh appeal against person who had been exonerated by the lower Court. A I R (Vol 12) 1925 Rang 108 : 84 Ind Cas 522 : 2 Rang 541 : 3 Bur L J 259 (DB).

——O. 41, R. 33 — Second appellate Court can even exercise power under R. 20 to add respondents who were parties to the suit if lower appellate Court has omitted to do so even after limitation and may hear the appeal or remand. A I R (Vol 11) 1924 Pat 773 : 82 Ind Cas 600 : 5 P L T 509 : 1924 P H C C 249 (DB).

——O. 41, R. 33 — Apart from all questions as to the scope of Order 41, Rule 20, and Order 41, Rule 33, the Court has inherent power to add a respondent to the appeal. A I R (Vol 8) 1921 Cal 722 : 67 Ind Cas 10 : 34 C L J 405 (DB).

2. Applicability and scope.

(a) Applicability.
(b) Scope.

(a) Applicability.

——O. 41, R. 33 — Death of one of several appellants — Abatement — Power of Court to bring heirs on record under inherent powers.

Where one of several appellants dies, pending an appeal and his heirs are not brought on record within the time limited, the appeal abates. But in a fit and proper case the Court may exercise its inherent powers under O. 41, R. 33, C. P. C. and bring on record the heirs of the deceased appellant. A I R (Vol 36) 1949 Pat 184 : 14 Cut L T 25 (DB).

——O. 41, R. 33 — The plaintiff's claim to certain lands in the defendants' village based on the custom of dhar dhura was decreed by the lower Court. The defendants were the co-sharers of the village & owned separate & independent shares. Some of the defendants acquiesced in the trial Court's decree while others who belonged to one family and had nothing to do with the remaining co-sharers who belonged to different castes, appealed.

Held, that the plaintiff's suit could be dismissed as against the appellants as there was no question of conflicting decrees coming into existence. AIR (V 30) 1943 All 68 : 1942 ALJ 661 : 205 Ind Cas 505 (DB).

——O. 41, R. 33 — Court cannot pass adverse order in absence of one of parties affected — Order affirming trial Court's decree against party is not adverse.

Under O. 41, R. 33, Civil P. C., the Court has jurisdiction to alter a decree in favour of a party who is not a respondent in the appeal. It could have no such jurisdiction unless the decree as a whole was the subject-matter of the appeal, although of course it cannot pass an adverse order in the absence of one of the parties affected. When the Appellate Court affirms the lower Court's decree against one of the defendants who was not a respondent to the appeal, the Appellate Court cannot be said to have done anything adverse to that defendant who had submitted to the decree and preferred no appeal against it. A I R (Vol 30),

1943 Mad 160 : 1942 M W N 681 : 55 M L W 840 : (1942) 2 M L J 599 : 207 Ind Cas 621.

——O. 41, R. 33 — Though Rr. 4 and 33 of O. 41 and R. 3 of O. 22 are independent, yet there is no inconsistency or conflict between them (their scope indicated). AIR (V 28) 1941 Oudh 155 : 1940 OWN (CC) 1155 : 1943 AWR (CC) 478 : 16 Luck 382 : 191 Ind Cas 234.

——O. 41, R. 33 — Appeal from Original Side of High Court — Principles to be applied.

In appeals from the Original Side of the High Court what the Appellate Court has to do is to see first, whether the principles of law applicable to the case were appreciated and correctly applied, secondly, whether there was evidence upon which the Court of first instance, could find the facts as it did, thirdly whether any mistake of fact or of inference, or any material oversight has occurred, any one of which might reasonably affect the result; and, fourthly whether the weight of the evidence shows that the trial Court came to a right conclusion, bearing in mind that the Judge who saw and heard the witnesses is in a much better position to form an estimate of the worth of the testimony than the Appellate Court which has not had that advantage. AIR (V 28) 1941 Rang 276 : 1941 Rang LR 445 : 19 Ind Cas 42.

——O. 41, R. 33 — Leave to appeal to Letters Patent granted — Appellate Court, if can pass whatever decree which should have been passed by trial Court.

To assume that when leave is granted, the appeal and the terms of the certificate are to be regarded as a reference only is an error and the Appellate Court has the right and duty to pass whatever decree should have been passed by the Subordinate Court in all the circumstances of the case, that is, in all the circumstances which gave rise to the litigation originally and to all the disputes between all the relevant parties in the matter. AIR (V 28) 1941 Rang 63 : 1940 Rang LR 693 : 194 Ind Cas 306 (DB).

——O. 41, R. 33 — Person acquiescing in decree appealed from whether entitled to benefit of O. 41, R. 33.

Order 41, R. 33, Civil P. C. confers discretionary power on the Court. That power cannot be exercised in favour of a person who acquiesced in the lower Court's decree passed against him by payment of the decretal amount and bound himself not to appeal from the decree. AIR (V 27) 1940 Nag 129 : 1940 NLJ 78 : ILR (1940) Nag 244 : 194 Ind Cas 454 (DB).

——O. 41, R. 33 — Order 41, R. 33, applies not only to appeals from original decrees but also to appeals from appellate decrees. AIR (V 27) 1940 Pat 300 : 6 BR 229 : 21 PLT 165 : 185 Ind Cas 638 (DB).

——O. 41, R. 33 — Where after a decree was passed against the legal representatives of the deceased person to the extent of his assets in their hands, the creditor appealed to obtain a personal decree against them as well but lost, the original decree which remained intact and which could have been executed even while the appeal was pending was not affected. (1938) 1938 NLJ 176.

——O. 41, Rr. 33 and 4 — Distinction.

Rule 33 applies to a case where the appeal is as to a part only of the decree, while R. 4 applies to a case where the appeal is from the whole decree. AIR (V 24) 1937 All 796 : (1937) ALJ 1111 : 1937 RD 548 : 1937 AWR (HC) 916 : 172 Ind Cas 635.

——O. 41, R. 33 — The provisions of O. 41, R. 33 give powers to the Court to pass such orders as the case may require in spite of the fact that the parties affected may not file any appeal or objections. AIR (V 23) 1936 Pesh 20 (21) : 160 Ind Cas 1005 (DB).

——O. 41, R. 33 — Two appeals from decree — Interest of each appellant distinct and independent — Order 41, R. 33, if applies.

Where one of the two appeals from a decree is time-barred and the appellants who are respondents in the other appeal, seek under O. 41, R. 33, Civil P. C., whatever relief is given to the appellants in the second appeal, but the interest of each of the appellants is independent and distinct, such relief cannot be granted. Rule 33 does not apply to such a case as each appellant has to contest the decree passed against him as he alone is interested in that portion of the decree. If his appeal is barred by time, he is out of Court and can drive no benefit from the provisions of O. 41, R. 33. AIR (V 22) 1935 Lah 889 : 160 Ind Cas 897 (DB).

——O. 41, R. 33 — Order 41, R. 33, confers on the Appellate Court very wide powers to pass any decree and make any order which ought to have peen passed or made and to pass or make such further or other decree or order as the case may require. AIR (V 22) 1935 Lah 378 : 158 Ind Cas 71.

——O. 41, R. 33 — Order 41, R. 33, does not apply to a case where a person was a party to the suit but was not made party to the decree. AIR (V 13) 1926 Lah 499 : 97 Ind Cas 338 : 8 Lah 161 : 8 LLJ 333 : 27 PLR 576 (DB).

(b) Scope.

——O. 41, R. 33 — Decree passed against all defendants — Plaintiff allowed to withdraw from suit against one defendant:

Held, that the decree against other defendants was not affected. AIR (V 31) 1944 Bom 264 : 46 Bom LR 525 : 218 Ind Cas 479.

——O. 41, R. 33 — Object of cross-objections.

The object of O. 41, R. 33, Civil P. C., is to enable the Court to do justice between the parties where the strict application of previous rules might result in conflicting decrees or result in actual injustice. It was not intended in a case where there are two conflicting parties to allow one, against whom an appeal has been preferred and who has himself not preferred an appeal against that part of the judgment which was not in his favour, to argue in the Appellate Court as if he had preferred an appeal without any payment of court-fees. AIR (V 22) 1935 Nag 243 : 158 Ind Cas 576.

——O. 41, R. 33 — Order 41, R. 33, is undoubtedly expressed in wide terms and must be applied with caution, so as not to enable a litigant to avoid the provisions of other statutes such as the Lim. Act or the Court-fees Act. There can be no hard and fast rule regarding the cases to which O. 41, R. 33 may be applied; but one of the tests that may be usefully applied is whether the questions which arise between the several sets of parties are so connected that one of them ought not to be allowed to re-open matters so far as he is concerned without opportunity allowed, in the interest of justice, to another to protect himself by urging his objections, even though they may be directed, not against the appellant, but against a co-respondent. AIR (V 21) 1934 Pat 134 : 15 PLT 42 : 13 Pat 200 : 153 Ind Cas 412 (DB).

——O. 41, R. 33 — Though the terms of the R. 33 are very wide, the rule should be cautiously applied and only in cases where but for recourse to

it, the ends of justice would be defeated. AIR (V 20) 1933 Cal 165 : 56 CLJ 285 : 143 Ind Cas 377 (DB).

——O. 41, R. 33 — Order 41, R. 33, Civil P. C., gives discretion to the Court of Appeal in order to further the ends of justice and not to favour one party as against another. AIR (V 20) 1933 Pat 224 : 14 PLT 113 : 12 Pat 261 : 149 Ind Cas 561 (DB).

——O. 41, R. 33 — The illustration to the rule is a type of one class of cases, which calls for the exercise of the powers conferred by R. 33, but it does not by any means exhaust the class of cases in which the powers of the appellate Court under this rule may be invoked. AIR (V 17) 1930 Mad 801 (FB).

——O. 41, R. 33 — Power to grant relief to respondent not filing cross-appeal or cross-objections.

An appellate Court has jurisdiction to exercise its discretionary powers under O. 41, R. 33 in favour of a respondent though he did not prefer a cross-appeal or memorandum of cross-objections challenging the decree passed by the first Court. In such cases the question whether the interference by the appellate Court was justified or not should be decided on the circumstances of each case. AIR (V 17) 1930 Mad 801 : (1930) MWN 798 : 32 LW 395 (FB).

——O. 41, R. 33 — Person whose rights are not the subject of enquiry.

The powers conferred under R. 33 are very wide but they are to be restored to with great care and circumspection and not as a matter of course but only where strong grounds exist for the exercise of such powers. There is nothing in O. 41, R. 33 to indicate that relief could be granted to a person who is not before the Court and whose rights are not the subject matter of enquiry in the appeal and whose presence is not necessary for the final settlement of any dispute between the parties who are actually before the Court, and whose legal rights would not be in any way affected by any decision at which the Court might arrive after the hearing of the case. AIR (V 15) 1928 All 746 : 111 Ind Cas 751 : 51 All 63 : 26 ALJ 1139 (DB).

——O. 41, R. 33 — When the Court will interfere.

Although the language of R. 33, O. 41, is widely expressed, ordinarily the exercise of the power conferred thereby should be limited to cases where, as the result of the appellate Court's interference in favour of the appellants, further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. AIR (V 15) 1928 Cal 488 : 113 Ind Cas 32.

——O. 41, R. 33 — When the powers will be exercised.

The powers given to the High Court under O. 41, R. 33 have to be exercised with care and discretion and only when the party appealing to it can fairly be said to be entitled to the relief equitably. AIR (Vol 15) 1928 Lah 599: 112 Ind Cas 425: 9 Lah 291: 29 PLR 477 (DB).

——O. 41, R. 33 — When the powers can be used.

Although the language of R. 33 is somewhat wide, the rule should not be construed too widely, lest it lead to an abrogation of the rules of the C. P. Code, the Court Fees Act and the Limitation Act. It should be limited to cases where in interfering on behalf of the appellant it becomes necessary to alter the decree in favour of the respondent or respondents against other respondent lest injustice result. The rule cannot be properly read as giving a right to a respondent to urge something in his favour against another respondent which has nothing to do with the result of the appeal, without his filing an appeal or memorandum of objections himself. AIR (Vol 14) 1927 Mad 620: 52 MLJ 612: 103 Ind Cas 394: 50 Mad 614: 38 MLT 323: 25 MLW 699 (DB).

——O. 41, R. 33 — Favourable order — Practice.

The appellate Court may pass any order it thinks fit in appeal though the appeal does not extend to the whole of the decree appealed against and though the power is exercised in favour of any respondent or any party who has not objected before it to the decree. The use of the expression "respondents or parties" shows that the appellate Court may pass an order in favour of the respondents who have not appealed and it may similarly decide any question in favour of a party, by which is meant a party to the suit and who is not a respondent in the appeal. The illustration to the rule does not limit the rule and is not intended to illustrate its full scope: 22 C. L. J. 61, Rel. on. But the power which the Court is vested with under this rule must be exercised in the interest of and for the furtherance of justice. AIR (Vol 13) 1926 Cal 1042: 30 CWN 885: 45 CLJ 119: 96 Ind Cas 474 (DB).

——O. 41, R. 33 — When the power can be used.

Although the terms of O. 41, R. 33 are very wide and they do confer on an appellate Court wide powers for the purposes of making such decree or order as the exigencies of the case or ends of justice may require still, ordinarily the powers contained in R. 33 should be limited to those cases where as a result of the appellate Court's interference with a decree in favour of the appellant, a further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience.AIR (Vol 13) 1926 Cal 57: 89 Ind Cas 24 (DB).

——O. 41, R. 33 — Order 41, R. 33 is intended to cover cases where the Court may vary the decree in such a way or pass such an order as to make the party in whose favour the order of the lower Court was passed liable under the order passed by the appellate Court. AIR (Vol 13) 1926 Cal 335: 30 CWN 45: 90 Ind Cas 986 (DB).

——O. 41, R. 33—Modification of decree in favour of a person not a party to appeal is not authorised by R. 33. A I R (Vol 13) 1926 Nag 135 : 88 Ind Cas 803.

——O. 41, R. 33 — When the powers can be used.

To enable the Appellate Court, in case its decision interferes with, or modifies, or extends the decision of the lower Court, to give effect to that decision by interfering if necessary even with the rights and liabilities of those who were not in fact appearing from that decision of the trial Court, is the object of O. 41, R. 33. Save when it is necessary, in the interests of justice, to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before the Appellate Court there is no right whatever in the Appellate Court to interfere. A I R (Vol 12) 1925 Pat 285 : 82 Ind Cas 984 : 4 Pat 37 (DB).

——O. 41, R. 33 — Rule 33 is not controlled by O. 22. A I R (Vol 7) 1920 Cal 990 : (1921) 62 Ind Cas 623.

——O. 41, R. 33 — The powers of appellate Court under O. 41, R. 33, can only be exercised in favour of a person who is a party to the appeal. A I R (Vol 7) 1920 LB 114: 63 Ind Cas 973: 13 Bur LT 163.

——O. 41. R. 33 and O. 23, R. 1 — Leave to withdraw — Appeal from a part of a decree by deft — No cross-appeal or cross-objection by the plaintiff — Power of Appellate Court to grant leave.

The power given to the Appellate Court by O. 41, R. 33 is to be cautiously exercised and is not to be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes like the Lim. Act and the Court Fees Act. The defts. appealed against the partial decree in so far as it was adverse to them. The plff. did not prefer a cross-appeal, nor did he present a memorandum of cross-objections. An application was made to the Appellate Court on behalf of the plff. during his argument, for leave to withdraw from the suit with liberty to bring fresh suit upon the same cause of action.

Held, that the Appellate Court had power under O. 41, R. 33 to do so. A I R (Vol 3) 1916 Cal 261 : 20 C W N 544 : 22 C L J 397 : 32 Ind Cas 499 (DB).

——O. 41, R. 33 — Appellate Court — Functions of — Cognizance of event subsequent to decree — Ex parte decree, setting aside sale, reversal — Order setting aside ex parte decree, reversed.

A Court of appeal is not only competent, but may under certain circumstances, be bound to take cognizance of an event which has happened since the order, questioned on appeal, was passed by the Subordinate Court. When the decree-holder is the purchaser in execution of an ex parte decree, upon reversal of the decree, the sale falls through. The fact that before the judgment-debtor applies for reversal of the sales the plaintiff succeeds in obtaining another decree of similar character against the defendant, does not validate the title based upon the decree which has been reversed. But this does not apply when the order of reversal of the decree is set aside by a superior Court and the decree is ultimately restored. (1907) 6 C L J 92 (94) (DB).

3. Amendment.

——O. 41, R. 33, S. 151 — Judgment imposing personal liability for costs on mortgagor — Decree making no mention of such liability — Power of Appellate Court to direct amendment to bring decree in conformity with judgment.

Where although the judgment does impose personal liability for costs on the defendant-mortgagor in express terms, the decree has been drawn up in the usual form and it nowhere imposes any personal liability on the mortgagor for costs, what is executed is the decree, and not the judgment, and unless the decree is brought into conformity with the judgment, it will not be permissible to the decree-holder to realize the costs in suit personally from the mortgagor. Order 41, R. 33, Civil P. C. invests an Appellate Court with plenary powers and authorizes the Court to pass any decree or order as the case may require and even in favour of any respondent who may not have appealed. Even otherwise under S. 151, Civil P. C., the inherent powers of the Court to make such orders as may be necessary for the ends of justice are unlimited. The Appellate Court can order the decree to be amended and brought in conformity with the judgment. A I R (Vol 25) 1938 Lah 188 : I L R (1938) Lah 148 : 40 P L R 640 : 181 Ind Cas 487 (DB).

——O. 41, R. 33 — Suit for ejectment dismissed — Pending appeal one plaintiff dying and his representative not brought on record — Although other plaintiffs have no absolute right to go on with appeal, still, in proper cases, Court should allow amendment of plaint so as to pray for joint possession instead of khas possession and should go on with appeal. A I R (Vol 16) 1929 Cal 519 : 119 Ind Cas 814 : 33 C W N 359 : 56 Cal 622 (DB).

——O. 41. Rr. 33 and 22 — Amendment — Decree — Cross-objections not necessary.

The C. P. C. gives an Appellate Court full discretion in the matter of altering and amending decrees so as to give a just judgment between the parties and failure of the respts. to file cross-objections does not bar the Court from granting appropriate relief. A I R (Vol 4) 1917 Oudh 399 : 4 O L J 532 : 42 Ind Cas 411.

——O. 41, R. 33 — Decree — Powers of Appellate Court.

The High Court is entitled to correct errors in the decree of the Lower Court even if some of the parties are not present before it in appeal. A I R (V 3) 1916 Mad 538 : 17 MLT 220 : 28 MLJ 334 : 28 Ind Cas 694 (DB).

——O. 41, R. 33 — Error in decree — Correction of, by Appellate Court in favour of party not appealing.

Three of four trustees brought a suit for rent against the lessee, the first deft. making the other trustee the second deft. in the suit. The trial judge passed a decree for three fourths of the rent in favour of the plffs. and a decree in favour of the second deft. for one fourth less the sum received by him on account. The first deft. alone appealed to the High Court which in dismissing his appeal modified the decree of the first court by awarding to the plff. the entire amount and declaring that as to a portion, it was for the second deft's. share.

Held, that the decree of the trial judge was erroneous and the High Court had power to make the decree they did, as the Appellant had brought the entire decree on appeal. A I R (Vol 3) 1916 P C 182 : 44 Cal 759 : 44 I A 65 : 1 P L J 262 : 15 A L J 217 : 25 C L J 279 : 32 M L J 357 : 21 M L T 264 : 21 C W N 577 : (1917) M W N 363 : 5 L W 654 : 19 Bom L R 450 : 39 Ind Cas 156.

——O. 41, R. 33 — Heading of appeal.

A Court of appeal has the power to allow to amend the heading of an appeal and to hear it. (1910) 8 M L T 199 : 7 Ind Cas 797 (DB).

4. Connected suits.

——O. 41, R. 33 — Appeal filed in one — Conflicting findings.

Where a plff. instituted a suit for rent and also a title suit and an appeal was preferred against the decision in the rent suit only and the Judge came to certain findings different from those arrived at by the Munsif in the title suit.

Held, though no appeal was preferred from the decision in the title suit the Judge could deal with the appeal before him and go into questions necessary for the decision of the appeal. A I R (Vol 7) 1920 Cal 425 : 56 Ind Cas 282.

5. Co-respondent.

——O. 41, Rr. 33 & 22 — Co-respondents — Appeal by one defendant against plaintiff — Cross-appeal by defendant — Respondent — Relief.

Where one of several defts. against whom a decree is passed has allowed the period for appealing to elapse, O. 41, R. 22 C. P. C. is not intended to revive his right merely because a co-deft. has instituted an appeal against the plaintiff on entirely different grounds. O. 41, R. 22 (1) in so far as it related to a cross-objection provides for a case where a respondent, although the decree is not entirely in his favour, is content to let the matter rest provided his opponent does not appeal, but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportunity of appealing against the finding which are adverse to him. The rule should ordinarily be confined to cases of cross-objection, urged against the appellant but O. 41, R. 33 gives the Court a wide discretion where justice requires it, that cross-objections

against a co-respondent should be heard. 33 Mad 705 not Foll. A I R (Vol 7) 1920 Pat 77 : 5 Pat L J 328 : (1920) Pat H C C 161 : 1 Pat L T 434 : 56 Ind Cas 262 (DB).

6. Correction of error.

——O. 41, R. 33 — **Appellate Court — Powers of.**

An Appellate Court has power under O. 41. R. 33 of the C. P. C. to correct accidental slips in the judgment or decree of the lower court even without an application under S. 152 of the C. P. C. A I R (Vol 5) 1918 Nag 41 : 48 Ind Cas 193.

7. Costs.

——O. 41, R. 33 — The powers of the Appellate Court are wide enough to permit of interference with the order passed in regard to costs. A I R (V 26) 1939 Bom 271 : 41 Bom LR 445 : ILR (1939) Bom 396 : 183 Ind Cas 394 (DB).

——O. 41, R. 33 — **Non-appealing party.**

Where a trial Court leaves the parties to bear their own costs, and one of them appealed from such order while the other does not, the appellate Court cannot make the former pay the costs of the latter in the trial Court. A I R (Vol 16) 1929 Lah 177 : 118 Ind Cas 464 : 30 P L R 600.

8. Discretion.

——O. 41, R. 33 — **Powers under — When can be exercised.**

The exercise of powers under O. 41, R. 33, Civil P. C., is discretionary and is normally exercised only in cases in which the failure to exercise them would lead to impossible, contradictory and unworkable orders. A I R (Vol 24) 1937 Pesh 69 : 170 Ind Cas 195.

——O. 41, R. 33 — Appellate Court's discretionary powers under O. 41. R. 33, have not been cut down by S. 107, Civil P. C. A I R (Vol 20) 1933 Mad 529 : 37 M L W 798 : 65 M L J 15 : 145 Ind Cas 289.

——O. 41, R. 33 — **When to be exercised.**

The discretion given by O. 41, R. 33 should not be exercised unless success of the appeal filed will render it just that relief should be granted against a party who has not appealed. A I R (Vol 20) 1933 Nag 186 : 29 N L R 173 : 144 Ind Cas 226.

——O. 41, R. 33 — **Suit against principal and agent — Decree against principal — Appeal by principal — Agency found against — Power of Appellate Court to pass decree against agent — Discretion — Interference in second appeal.**

The plaintiff instituted a suit against A and B for the recovery of the price of certain goods on the allegation that B had purchased them as agent of A and that A was, therefore, liable for the price. The suit was decreed against A. The Appellate Court found that B was not A's agent but had taken the goods on the false representation that he was taking them for A, and dismissing the suit against A passed a decree against B under O. 41, R. 33, Civil P. C. On second appeal.

Held, that the Court had power under O. 41, R. 33, Civil P. C., to pass a decree against B and even assuming that the lower Appellate Court had not exercised its discretion properly, there was no reason to interfere in second appeal. A I R (Vol 18) 1931 Lah 370 : 130 Ind Cas 774 (DB).

——O. 41, R. 33 — **Cross objections.**

The amendment substituting the words "the party who may be affected" for the word "appellant" in O. 41, R. 22 (3) does not give a respondent an absolute right of filing cross-objections against a co-respondent, even where such co-respondent is not an interested party at all and no relief has been claimed against him in the appeal. In such cases the discretion given by O. 41, R. 33 to the appellate Court to allow cross-objection should not be exercised. A I R (Vol 16) 1929 All 195 : 107 Ind Cas 569 (DB).

——O. 41, R. 33 — **Refusal of appellate Court to add omitted respondents as parties.**

The plaintiff whose suit had been dismissed against all the defendants failed to appeal against the decree in so far as it affected some of them and allowed the appeal as against them to become barred. The appellate Court in the exercise of its discretion refused to take action under the Rule so as to deprive these defendants of the very valuable right which they had acquired in consequence of the plaintiff's failure to appeal against the decree in so far as it affected them.

Held, that assuming that under this rule the Court in a proper case might add a defendant as respondent for the purpose of passing a decree against him, there is no sufficient reason for interfering with the refusal of the appellate Court to do so in such a case. A I R (Vol 14) 1927 P C 252 : 54 M L J 88 : 107 Ind Cas 237 : 6 Rang 29 : 27 M L W 1 : 1928 M W N 20 : 4 O W N 1231 : 47 C L J 136 : 32 C W N 281 : 30 Bom L R 220 : 26 A L J 371.

——O. 41. R. 33 — The discretion allowed to the Judge by O. 7, R. 7 and O. 41, R. 33, is expressed in wide terms and covers the granting of a declaratory decree in a suit for possession where alternate relief is claimed therein. A I R (Vol 10) 1923 Lah 422 : 85 Ind Cas 95.

——O. 41, R. 33 — **Power of Appellate Court.**

When a lower Court vested with discretion has exercised it upon an immaterial ground, it is a case of no real exercise of discretion and the Appellate Court can freely interfere. A I R (Vol 4) 1917 Cal 411 : 33 Ind Cas 540.

9. Duty of Court.

——O. 41, R. 33 — It is the duty of the Court which still retains control of the judgment to take such action as will shorten litigation, preserve the rights of both parties and best sub-serve the ends of justice. A I R (Vol 20) 1933 Cal 534 : 60 Cal 685 : 37 C W N 339 : 145 Ind Cas 668 (DB).

——O. 41, R. 33 — **Appeal — Admission without expressly granting leave to appeal — Effect.**

When an appeal which can be admitted only with the leave of the Court has been admitted to a hearing without expressly granting leave the best course for the Appellate Court will be to dispose of the appeal on the merits. A I R (Vol 20) 1933 Lah 642 (2) : 34 P L R 827 : 145 Ind Cas 474.

——O. 41, R. 33 — **Power to refrain from passing futile orders.**

Per Broomfield, J. — The powers given to the Court by R. 33, O. 41, Civil P. C., "to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require" are very wide, and, justify the Court in refraining from passing an order which would ordinarily follow as a result of the conclusions on the issues, if in review of subsequent events the order would be inequitable or futile, a mere waste of time and money, and in fact an abuse of the process of the Court. A I R (Vol 18) 1931 Bom 288 : 33 Bom L R 396 : 133 Ind Cas 248 (DB).

——O. 41, R. 33 — Sulaiman, J. — A mere danger of multiplicity of suits is not sufficient for the dismissal of the whole appeal when it is not impossible to pass a decree in favour of the plaintiffs against one set of the defendants. A I R (Vol 15) 1928 All 172 : 114 Ind Cas 177 : 50 All 559 : 9 LRA Rev. 49 : 26 ALJ 217 (FB).

——O. 41, R. 33 — **Reversing judgment.**

An appellate Court is bound, when delivering a reversing judgment, to give definite findings upon

the case. A I R (Vol 15) 1928 Mad 489 : 1928 M W N 98 : 110 Ind Cas 21 (DB).

10. Exonerated party.

——O. 41, R. 33 — Decree against some defendants and others exonerated — No appeal by plaintiff, but defendants against whom whole decree was passed appealing with a prayer that decree might be passed against other defendants as well — Appeal held competent.

The plaintiff having got a decree against some of the defendants, was content with the decree and did not appeal against the other defendants who were exonerated, but an appeal was preferred by some of the defendants against whom decree was passed praying that a decree might be passed against the other defendants as well in order that their liability might be reduced.

Held, that O. 41, R. 33, Civil P. C., applied and that the appeal was competent. (1940) 187 Ind Cas 634 : 6 B R 519.

——O. 41, R. 33 — Mortgage suit.

Where in a mortgage suit for sale the trial Court makes a decree only against one of the defendants, appellate Court is at liberty, under O. 41, R. 33, to make a decree for sale of the mortgaged property, including the part of it in which some of the other defendants are interested against all the defendants if they are all parties before it. A I R (Vol 14) 1927 Mad 349 : 52 M L J 135.

——O. 41, R. 33 — Exonerated deft. — If can be made party in appeal — Interlocutory order — Revision C. P., C. S. 115.

An Appellate Court can add as party a person who was exonerated by the trial Court, but where there is already a memo of objections seeking to make him liable and the appeal is pending, the order making him a party is in its nature interlocutory, and a High Court will not interfere. A I R (Vol 3) 1916 Mad 1219 : 31 Ind Cas 978.

——O. 41, R. 33 — Exonerated deft. — Power to decree — Power to decree against deft. exempted by Lower Court.

An Appellate Court can decree the suit against a person who had been exempted from liability by the Lower Court's decree, under O. 41, R. 33 C. P. C. A I R (Vol 1) 1914 All 361 : 25 Ind Cas 273.

——O. 41, R, 33 — Exonerated deft. decree — Plff. not appealing against one of several defts. — Whether decree can be given against that deft.

The respdt. in an appeal prayed in his cross objections that one of the defts. against whom the suit was dismissed should be made jointly liable for the decree. It was held, that the court under O. 41, R. 33 had power to decree the claim against that deft. even though there has been no appeal against him. A I R (Vol 1) 1914 Lah 62 : 93 P L R 1914 : 37 P W R 1914 : 23 Ind Cas 410.

——O. 41, R. 33 — Decree — Appellate Court's powers.

The Appellate Court is competent to make a decree in favour of a party in second appeal though such person was not a party to the first appeal. (1911) 9 Ind Cas 815 (Cal) (DB).

11. Ex parte decree.

——O. 41, R. 33 — Ex parte decree.

There is nothing in the Code which confines the power of the appellate Court in appeal from ex-parte decree only to the investigation of the cause of non-appearance. A I R (Vol 16) 1929 Cal 322 : 56 Cal 21 (DB).

——O. 41, Rr. 33 and 4 and O. 9, R. 13 — Ex parte decree — Application to set aside.

Where an ex parte decree imposes a separate liability on the absent deft. who is no party to the appeal from the total decree, the application to set aside the ex parte decree should not be disposed of so as to affect the interests of the co-defts. A I R (Vol 5) 1918 Mad 665 : (1917) M W N 803 : 22 M L T 480 : 7 L W 10 : 42 Ind Cas 972 (DB).

12. Finding of fact.

——O. 41, R. 33 — Case tried without jury coming to Court of Appeal.

No doubt an appeal in a case tried by a Judge alone is not governed by the same rules which apply to an appeal after a trial and verdict by a jury. It is a re-hearing. Nevertheless before an Appellate Court can properly reverse a finding of fact by a trial Judge who has seen and heard the witnesses and can be the best Judge not merely of their intention and desire to speak the truth but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is a presumption in favour of its correctness which must be displaced. A I R (Vol 24) 1937 P C 288 : 170 Ind Cas 563.

——O. 41, R. 33 — Evidence as to tradition.

Although it is true that the acceptance of one version of the tradition does not necessarily involve that a man who deposed to a different version was testifying to something which he knew to be untrue, it is nonetheless true that prima facie a trial Judge who hears and sees how the witnesses give their evidence as to tradition, is better qualified to form an opinion as to which is the accurate version than those who have not that advantage. A I R (Vol 24) 1937 P C 288 : 170 Ind Cas 563.

——O. 41, R. 33 — Appellate Court, if can reverse it.

It cannot be doubted that it is within the powers of the Appellate Court to reverse the trial Judge's finding upon a question of fact based upon oral evidence of witnesses, if there is justifiable reason to do so. A I R (Vol 24) 1937 P C 288 : 170 Ind Cas 563.

——O. 41, R. 33 — What must be shown before reversing.

Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal is in the nature of a re-hearing the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the Court below. If all that the appellant can show is nicely balanced calculation which lead to the equal possibility of the judgment on either the one side or the other being right, he cannot succeed. A I R (Vol 12) 1925 Pat 68 : 93 Ind Cas 454 : 5 PLT Sup 1 (FB).

——O. 41, R. 33 — Reason not acceptable.

It is with great hesitation that an appeal Court differs with the trial Court on its estimate of witnesses whom the trial Court has had an opportunity of seeing; but where the opinion of the trial Court depends not upon the honesty of the witness but upon reasons which the appeal Court cannot accept, it is obviously the duty of the appeal Court to record its disagreement with the trial Court and to set aside the findings of fact arrived at by it. AIR (Vol 12) 1925 Pat 68 : 93 Ind Cas 454 : 5 P L T Sup 1 (FB).

13. Making new case.

——O. 41, R. 33 — When a suit for declaring a pre-decree compromise binding on the decree-holder and for injunction restraining them for executing the decree, was valued at only Rs. 11,000 arbitrarily for purposes of jurisdiction and court-fee of Rs. 10 only was paid for declaration only, the relief for injunction being said to be a mere consequential

relief and the suit being dismissed, the judgment-debtor in appeal prayed for allowing alternative relief of refund of amount of Rs. 80,000 paid by him to the decree-holder under the compromise:

Held, that as no court-fees were paid on Rs. 80,000 and consequently no issue being framed on the point in trial Court, there being no pleading the alternative relief for refund could not be allowed in appeal. AIR (Vol 24) 1937 Lah 537 : 39 PLR 29 : ILR (1937) Lah 209 : 171 Ind Cas 189 (DB).

——O. 41, R. 33 — Reversing judgment of a lower Court on a new question not raised by the parties and for which there were not sufficient materials for the Court, is acting with material irregularity. AIR (Vol 12) 1925 Mad 357 : 80 Ind Cas 724.

14. Non-appealing defendants.

(a) General.
(a1) Cross-objections.
(b) Common decree.
(c) Decree against.
(d) Dismissal of suit.
(e) Joint decree.
(f) Joint right.
(g) One set of defendants.
(h) One defendant.
(i) Relief.
(j) Rent suit.
(k) Separate defences.
(l) Separate interest.
(m) Several defendants.
(n) Tenant and trespassers.
(o) Two sets of defendants.
(p) Whole decree.
(q) Modify decree.
(r) Vary decree.

(a) General.

——O. 41, R. 33 — Appellate Court, if can pass decree for non-appealing defendants.

The Appellate Court cannot, in law, decree the claim of those defendants who did not choose to prefer an appeal against the decision of the trial Judge, and were satisfied with that judgment, for they take the consequences of not appealing against that. AIR (Vol 32) 1945 Pat 453 : 24 Pat 379 (DB).

——O. 41, R. 33 — The practice whereby one of the defendants, who is clearly possessed of assets abstains from joining in an appeal in order that other defendants may prosecute the appeal as paupers must be condemned. Such conduct would be sufficient to deprive the non-appealing defendant of his cost, if he is subsequently impleaded under O. 41. R. 33, Civil P. C. and the appeal is allowed. AIR (Vol 30) 1943 Mad 263 : 56 MLW 15 : 1943 MWN 9 : (1943) 1 MLJ 90 : 207 Ind Cas 89 (DB).

——O. 41, R. 33 — Revenue sale of gati-tenure in existence from before Permanent Settlement — Suit by purchaser for declaration of title — Plaintiff's title not disputed — Some defendants filing compromise petitions giving up all interest in land in plaintiff's favour — Appellate Court held could not set aside decree against non-contesting and non-appealing defendants.

A gati tenure which was in existence from before the Permanent Settlement was sold at a revenue sale and the purchaser instituted a suit for declaration of his title to the property purchased. Some of the defendants filed petitions of compromise giving up all their interest in the land in favour of the plaintiff. Plaintiff's title as purchaser was not questioned:

Held, that the plaintiff was certainly entitled to a decree against the disclaiming defendants but the nature of that decree would necessarily depend on the nature of the interest acquired by the plaintiff by virtue of the compromise.

Held, further that the Appellate Court was not justified in setting aside the decree in toto against the non-appealing defendants. AIR (Vol 28) 1941 Cal 368 : 45 CWN 896 : 199 Ind Cas 733 (DB).

——O. 41, Rr. 33, 22 — Suit by A decreed against B but dismissed against C — Appeal by B — C not impleaded as respondent — Decree, if can be passed against C under R. 33 — A, if can invoke aid of R. 22 to obtain decree against C.

Under R. 33, O. 41, Civil P. C., the Appellate Court has been given very wide powers to do complete justice between the parties. Under this rule, the Appellate Court enjoys discretionary power to pass such decree as ought to have been passed by the trial Court. This power, however, can be exercised only in favour of a party to the suit who has not been impleaded in the appeal. It is not permissible under this rule to pass any decree against a party who has not been impleaded as a respondent in the appeal. It is not permissible under R. 33 to pass any decree against a party who has not been impleaded as a respondent.

A's suit was decreed against B but dismissed against C, B went in appeal and C was not impleaded even as pro forma respondent. A filed cross-objections impleading C after the expiry of the period of limitation for appeal against him:

Held, that the Appellate Court could not pass a decree against C under O. 41, R. 33.

Held, also that in cross-objections, A had no right to re-open the question that was finally decided against him and in favour of C in the appeal which was made solely for the purpose of setting aside the decree passed against B and consequently A could not invoke the provisions of O. 41, R. 22, to enable him to obtain a decree against C. AIR (Vol 27) 1940 All 225 : (1940) ALJ 161 : 1940 AWR (HC) 169 : 188 Ind Cas 396 (DB).

——O. 41, R. 33 — Respondent wishing to maintain decree of lower Court — Whether can challenge finding, result of which would be to destroy part decree passed by lower Court in favour of appellant, without preferring appeal or filing cross-objection.

Rule 33 of O. 41, Civil P. C., gives to the appellate Court power to pass any decree and make any order which ought to have been passed or made, etc. This rule contemplates modification of the decree by the Appellate Court at the instance of the appellant. It has no scope where the respondents in effect want to maintain the decree of the lower Court or where the decree under the appeal is not modified in appeal. Where the respondent says that he wants to maintain the decree of the lower Court and does not want it to be disturbed, he cannot challenge a finding, the result of which would be to destroy the foundation on which the part decree made by the lower Court in favour of the appellant rests, without preferring any appeal or filing a memorandum of cross-objection. AIR (Vol 26) 1939 Cal 582 : 69 CLJ 385 : 185 Ind Cas 94 (DB).

——O. 41, Rr. 33, 4 — Appeal by defendant on grounds common to them — Appeal by one of them failing — Other defendant, whether should be deprived of his right to appeal.

Reading Rr. 4 and 33 of O. 41, Civil P. C., together, there can be no doubt that one of the defendants can file an appeal without impleading the other defendants as respondents, if the decree appealed from proceeds on grounds common to all of them and that the Appellate Court may thereupon exercise the power of varying the decree in case of non-appealing defendants, although they were not made parties to the appeal. If the appeal on behalf of one of the defendants failed on a technical ground, there is no reason why the other defendant should be deprived of his right to

challenge the decision of the lower Court in appeal AIR (Vol 24) 1937 Oudh 448: 1937 OWN (CC) 768: 170 Ind Cas 636.

——O. 41, Rr. 33, 20 and S. 151 — In appeal by some of the defendants against a decree in a suit for contribution, a point was raised by respondent that if appeal of any of appellants was allowed the amount of contribution decreed against the other should be proportionately increased:

Held, that the prayer could be granted only upon hearing of the defendants in the suit who have not appealed and have not entered appearance in Appellate Court. AIR (Vol 23) 1936 Pat 49 : 16 PLT 813 : 8 BR 399 : 15 Pat 219 : 169 Ind Cas 976 (DB)

——O. 41, R. 33 — Mortgage suit — Parties — Defendants interested in different items — Common defence — Decree in plaintiff's favour — Appeal by some defendants without impleading other defendants — Appeal held maintainable and held further that question whether Appellate Court should exercise its power under O. 41, R. 33 in favour of defendants who had not appealed in a case of this nature arises only at a later stage and has no bearing on the competency of appeal. AIR (Vol 22) 1935 Mad 121 : (1934) MWN 321 : 40 MLW 576 : 153 Ind Cas 1013.

——O. 41, R. 33 — Distinct and separate decree against non-appealing defendants — Interference.

Order 41, R. 33, Civil P. C., is intended, to enable the Appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of the trial Court, but it ought not to be applied to cases where there has been a distinct and separate decree against those defendants who have not chosen to appeal. AIR (Vol 21) 1934 Pat 524 : 150 Ind Cas 784.

——O. 41, R. 33 — Power of Court to dismiss appeal in toto.

Where a plaintiff, being dissatisfied with a decree passed in his favour, prefers an appeal, the appellate Court, in a proper case, has jurisdiction to exercise its powers in favour of the respondent by dismissing the plaintiff's case in toto, though the respondent did not prefer a cross-appeal or memorandum of objections challenging the decree passed by the first Court. AIR (Vol 17) 1930 Mad 801 (FB).

——O. 41, R. 33 — The appellate Court is entitled to grant relief to a defendant who could have appealed but has not appealed. AIR (Vol 16) 1929 All 334 : 117 Ind Cas 111.

——O. 41, R. 33 — Where an appeal against the whole decree is preferred by one defendant, on a ground common to all, it can be set aside as against all. AIR (Vol 16) 1929 Mad 230 : 29 MLW 220 : 52 Mad 322 : 56 MLJ 255 (DB).

——O. 41, R. 33 — Decree in favour of.

An Appellate Court can set aside decree of the trial Court in respect of a portion which is against the respondent and in respect of which respondent has not appealed. AIR (V 2) 1915 All 284 : 28 Ind Cas 428 (DB).

——O. 41, R. 33 — Power of Appellate Court.

An Appellate Court cannot vary a decree in favour of a party not appealing, so that where plaintiff obtained a mortgage decree subject to paying a certain amount to a prior mortgagee and in an appeal by the defendant the sum was reduced, held that the amount could not be so reduced. AIR (Vol 1) 1914 All 247 : 23 Ind Cas 886 (DB).

——O. 41, R. 33 — Appeal by some defendants — If Court can rescind against other defendants.

An Appellate Court is generally not justified in rescinding a declaratory decree given by the lower Court, as against those defendants who have accepted it upon an appeal by other defendants. 80 PLR 1913 : 109 PWR 1913 : 18 Ind Cas 758 (DB).

(a-1) Cross-objections.

——O. 41, R. 33 — Cross-objection by some of defendant-respondents that suit was not maintainable — Possibility of contradictory decree.

The plaintiff's claim to compound interest on the basis of an agreement was partly allowed by the trial Court. In the appeal some of the defendants-respondents filed cross-objections that the suit was not maintainable at all and hence should be dismissed. The Appellate Court found the agreement in respect of compound interest to be void and unenforceable:

Held, that the cross-objections went to the very root of the matter and since two contradictory decrees would result by reason of their being allowed only in favour of the respondents who had filed them, the entire suit should be dismissed as against all the defendants under O. 41, R. 33. AIR (Vol 29) 1942 Pat 493 : 21 Pat 397 : 9 BR 111 : 204 Ind Cas 48 (DB).

——O. 41, R. 33 — No appeal or cross-objection by plaintiff — High Court, if can grant relief.

The object of R. 33 of O. 41, Civil P. C., is manifestly to enable the Court to do complete justice between the parties to the appeal. Where it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the Court may grant relief to the respondent although he has not assailed the decree appealed against either by means of an appeal or by a cross-objection. (1937) ALJ 804: 1937 AWR (HC) 705 : (1937) 172 Ind Cas 695.

——O. 41, R. 33 — R. 33 does not empower the appellate Court to set aside the decree passed against a defendant, when the latter has not appealed or filed cross-objections. AIR (Vol 8) 1921 Lah 211 : 3 LLJ 231 : 60 Ind Cas 705.

——O. 41, Rr. 33 and 22 — Power of Appellate Court to vary decree of Lower Court — Cross-objections.

If a party appeals against that portion of the decree in which he has been unsuccessful, the Appellate Court cannot in general set aside so much of the decree as has been in favour of the appellant, without any formal cross-objections. AIR (Vol 5) 1918 UB 50 : 2 UBR (1916) 144 : 11 Bur LT 19 : 39 Ind Cas 380.

——O. 41, R. 33 — Power of Appellate Court to vary decree of Lower Court without there being cross-appeal.

Order 41, R. 33, applies only to cases in which for the ends of justice and for the equitable execution of a decree, the Appellate Court considers it necessary to make a material variation in the decree. Under it the Appellate Court cannot wipe off the decree of the Court below even in respect of that portion of the decree which is against the respondents who did not file cross-appeal. AIR (Vol 4) 1917 Pat 52 : (1918) Pat HCC 26 : 5 PLW 213 : 36 Ind Cas 537 (DB).

(b) Common decree.

——O. 41, R. 33 — Common decree — Appeal against part of the decree — O. 41, R. 4.

The appellate Court in the appeal preferred by some of the defendants in respect of only a part of the decree cannot by virtue of the provisions of R. 33, dismiss the suit against those defendants who have in fact submitted to it. There being a distinct provision as to the power of an appellate Court to interfere with the decision of the Court of first instance upon an appeal preferred by some of the defendants in certain cases, in O. 41, R. 4 the provisions of R. 33 cannot apply to cases for which clear provision is made in the order or to cases

which would not come within the purview of the specific rule. AIR (Vol 8) 1921 All 56 : 43 All 320 : 19 ALJ 83 : 60 Ind Cas 817 (DB).

(c) Decree against.

——O. 41, R. 33 — Decree against.

The powers given by O. 41, R. 33 are discretionary and no Court would pass a decree in favour of a litigant who has failed to avail himself of the ordinary remedy by way of appeal, nor against persons not impleaded as parties to the appeal. AIR (Vol 7) 1920 Lah 438 : 1 Lah 396 : 54 Ind Cas 971(2).

——O. 41, R. 33 — Decree against persons not parties to appeal.

Where some of several defendants appeal without impleading their co-defendants as respondent, the Appellate Court has no jurisdiction to pass any decree against those co-defendants, without adding them as parties to the appeal. AIR (Vol 5) 1918 Cal 173 : 47 Ind Cas 917 (DB).

(d) Dismissal of suit.

——O. 41, R. 33 — Court cannot dismiss suit in entirety.

In a suit for declaration and possession against several defendants, a decree was passed against some of the defendants and the suit was dismissed against the respondent. An appeal was filed against the decree only by some of the defendants against whom the decree was passed and the other defendants did not file an appeal nor were they made proforma respondents in the appeal.

Held, that the appellate Court had no power under O. 41, R. 33, C. P. Code to reverse the decision of the trial Court and dismiss the suit in its entirety. (1930) 123 Ind Cas 381 (All) (DB).

——O. 41, R. 33 — Plaintiff appealing against part of the decree — Dismissal of suit in toto.

Rule 33, O. 41 does not apply where a plaintiff whose claim is decreed in part, institutes an appeal with regard to the part not decreed while the defendant prefers neither an appeal nor a cross-objection. In such a case the Court of appeal has no jurisdiction to enter into the question whether the plaintiff is entitled or not to any decree at all and to dismiss his suit wholesale. AIR (Vol 12) 1925 Pat 285 : 4 Pat 37 : 82 Ind Cas 984 (DB).

——O. 41, R. 33 — Dismissal of entire suit.

An Appellate Court cannot dismiss a suit, when some of the defendants only come before it as appellants. AIR (Vol 4) 1917 Cal 87 : 38 Ind Cas 140 (DB).

(e) Joint decree.

——O. 41, R. 33 — Where a joint decree was passed against defendants and only one of the defendants appealed and it was found that the suit was barred against all, it must be dismissed even against the non-appealing defendants. AIR (Vol 10) 1923 Mad 392 : 17 MLW 254 : 74 Ind Cas 416 (DB).

(f) Joint right.

——O. 41, R. 33 — Where the plaintiff claims relief as against all defendants jointly, and his suit is dismissed as against some defendants only, in an appeal against the dismissal, the appellate Court can dismiss the whole suit. AIR (Vol 11) 1924 Pat 160 : 2 Pat 712 : 1 Pat LR Civ 356 : 5 Pat LT 489 : 77 Ind Cas 357 (DB).

(g) One set of defendants.

——O. 41, R. 33 should not be utilized as a mode of evading court-fee — Separate and distinct decrees passed against two sets of defendants — One set appealing — Decree, if can be set aside against non-appealing set.

Although the wording of O. 41, R. 33 gives wide powers to the Court, still it should not be exercised in such a way as to interfere with the provisions of other enactments, e.g., Court-fees Act. Care, of course, must be taken in each case to see that R. 33 is not utilized as a mode of evading court-fees. Where the decree passed against two sets of defendants are separate and distinct but only one set of defendants appeals not from the whole decree but from that part alone which affects it, the decree against the non-appealing defendants cannot be set aside in appeal. AIR (Vol 27) 1940 Pat 137 : 18 Pat 768 : 6 BR 407 : 21 PLT 420 : 186 Ind Cas 865 (DB).

(h) One defendant.

——O. 41, R. 33 — Non-appealing defendant — Appeal by one defendant only — Others not impleaded — Decree in favour of defendant not a party.

A suit for profits was decreed partly against K and party against J and J and B preferred an appeal, without impleading K as a party to it. K did not appeal, and no appeal or cross-objection was filed by the plaintiffs against J and B. The Appellate Court held that K was not liable at all for any sum. It dismissed the appeal and at the same time modified the decree by exempting K, and decreeing the whole amount as against J. On second appeal by J and B, held that the Lower Court had jurisdiction to modify the decree as it did. AIR (Vol 8) 1921 All 367 : 18 ALJ 925 : 58 Ind Cas 114 (DB).

——O. 41, R. 33 — Dismissal of suit against one defendant — Dismissal against other defendants not impleaded — Power of High Court.

Where a suit is dismissed against one of the defendants as time barred, the High Court can dismiss it against the other defendants who did not appeal. AIR (Vol 3) 1916 Mad 887 : 29 Ind Cas 579(1) (DB).

(i) Relief.

——O. 41, Rr. 33 and 22 — Relief — Ijara in record of rights — Onus.

In a suit for arrears of rent against tenants and co-sharers the latter pleaded their right to ijara interest, which would bar the plaintiff's suit. Held, that the onus was on the co-sharers to prove that the Ijara was valid, subsisting and operative at the time of suit. Though respondent does not file a memorandum of cross-objections relief can be given to him under O. 41, R. 33, C. P. C. AIR (Vol 14) 1917 Pat 373 : 42 Ind Cas 414.

——O. 41, R. 33 — Where the Lower Appellate Court set aside a mortgage decree against non-appealing defendants though the grounds of their defence were not common, the High Court upset the decree. AIR (Vol 3) 1916 Mad 907 : 31 Ind Cas 986 (DB).

(j) Rent suit.

——O. 41, R. 33 — The first Court passed a decree in a rent suit for a proportionate amount of rent, payable in respect of land included in the plaint, and held that the holding covered more land. In an appeal by the plaintiff, the Appellate Court held that no relief should be granted to the plaintiff and thus dismissed the suit. Held, that having regard to R. 33, the Appellate Court's decision was not without jurisdiction. AIR (Vol 7) 1920 Cal 990 : 62 Ind Cas 623.

(k) Separate defences.

——O. 41, R. 33 — Separate defences — Both found against.

Suit decreed against K and J, both taking separate defences — K not appealing — J appealing on his behalf only — Suit against K cannot be dismissed in J's appeal. AIR (Vol 15) 1928 Lah 279 : 106 Ind Cas 875.

——O. 41, R. 33 — A brought a suit for redemption against B and C of two houses, one in possession of B and the other in possession of C. B pleaded bar of limitation and C pleaded that A was entitled to redeem only on paying a certain amount. Trial Court decreed plaintiff's suit on condition of his

paying the amount claimed by C. B appealed against the decree impleading other defendant as respondent. The lower appellate Court set aside the trial Court's decree both as against B and C.

Held, that the decree against C could not be set aside under O. 41, R. 4. AIR (Vol 14) 1927 All 177 : 99 Ind Cas 280.

(l) Separate interest.

——O. 41, R. 33 — A decree was passed against several persons, only some of whom appealed against it so far as their interests were concerned. Others being content with the decree did not complain against it and admitted the claim of the other party.

Held, that the appellate Court had no jurisdiction under O. 41, R. 33, to reverse that part of the decree which was not appealed against as the decree relating to that part became final. 10 LW 357, Diss, from 1 LW 376 and 28 MLJ 334 not Appr. AIR (Vol 15) 1928 Mad 1144 : 116 Ind Cas 824.

(m) Several defendants.

——O. 41, R. 33 — Suit against several defendants — Ex parte decree against some — Document sued upon found to be forgery and suit dismissed against others — Appeal — Power of Appellate Court to dismiss suit against ex parte defendants also.

The plaintiff instituted a suit against 7 defendants to enforce an agreement of sale executed by the husband of defendant No. 1 and father of the defendant No. 7. The Court passed an ex parte decree against all the 7 defendants. Defendants Nos. 2 to 6 afterwards applied to him to set aside that ex parte decree and restore the suit so far as it was against them; and the Subordinate Judge who dealt with that application set aside the whole decree against all the defendants. On appeal the ex parte decree against defendants Nos. 1 and 7 was restored. The suit was ultimately dismissed against defendants Nos. 2 to 6 on the ground that the agreement sued upon was not a genuine document. The plaintiff appealed and the High Court being also of the same opinion dismissed the suit against defendants Nos. 2 to 6:

Held, that the High Court had power under O. 41, R. 33, Civil P. C., to dismiss the suit against defendants Nos. 1 and 7 also, although an ex parte decree had been passed against them and an order setting aside that decree had been confirmed on appeal.

Held, also, that in the circumstances, the decree against defendants Nos. 1 and 7 should be set aside in the interests of justice. AIR (Vol 20) 1933 Mad 529 : 37 MLW 798 : 65 MLJ 15 : 145 Ind Cas 289 (DB).

(n) Tenant and trespassers.

——O. 41, R. 33 — Tenants and trespassers — Jurisdiction.

A landlord filed a suit against tenants in respect of rent due and other defendants were joined as trespassers. The suit was decreed against all defendants. The trespassers defendants only appealed and challenged the decree on the ground of jurisdiction.

Held, that though, when a question of jurisdiction is raised with regard to a suit as framed, the jurisdiction will relate to the entire suit, yet in this case tenants defendants not being affected the decree against them need not be disturbed but the suit should be dismissed against the trespassers defendants. AIR (V 15) 1928 Mad 681 : 1928 MWN 213 : 110 Ind Cas 247 (DB).

——O. 41, R. 33 — Where in a suit for declaration of title to certain lands the tenants defendants pleaded occupancy rights and their claim was disallowed by the trial Court but on appeal by other defendants the claim was allowed though the tenants did not appeal.

Held, the Appellate Court's judgment cannot be upheld and that, O. 41, R. 33 did not apply. AIR (Vol 12) 1925 Mad 771 : 48 MLJ 577 : 22 MLW 376 : 1925 MWN 730 : 88 Ind Cas 99.

(o) Two sets of defendants.

——O. 41, R. 33 — Suit against two sets of defendants claiming relief alternatively either against first party or against second party — Decree passed against defendant first party — No appeal by plaintiff but appeal by such party — Appellate Court, if can pass decree against defendant second party.

Where in a suit the relief is claimed either against defendants' first party or in the alternative against defendants' second party and the Court decrees the suit against defendants' first party and the plaintiff does not appeal but an appeal is preferred by defendants' first party, the Appellate Court is entitled to pass a decree against defendants' second party even though there is no appeal by the plaintiff. The powers of the Appellate Court are governed by O. 41, R. 33, Civil P. C. which are sufficiently wide to enable the Court to pass such decree. AIR (V 25) 1938 Pat 275 : 19 PLT 198 : 17 Pat 338 : 4 BR 694 : 176 Ind Cas 269 (DB).

(p) Whole decree.

——O. 41, R. 33 — When the whole decree cannot be set aside.

Per Mukherji, J. — Where the decree passed by the trial Court against some sets of defendants is really a combination of several decrees against the several sets of defendants, and only one set of defendants appeals, the appellate Court cannot set aside the decree in whole. AIR (V 15) 1928 Cal 593 : 109 Ind Cas 247 : 55 Cal 1193 (DB).

——O. 41, R. 33 — Mortgage decree against two defendants — One defendant only appealing — Whole decree can be set aside.

Where only one of the defendants appealed from a mortgage decree.

Held, that the Appellate Court was quite competent under the provisions of O. 41, R. 33 to set aside the whole decree although the other defendant had not appealed. AIR (V 11) 1924 Pat 336: 75 Ind Cas 946 : 1923 PHCC 332 (DB).

(q) Modify decree.

——O. 41, R. 33 — Power to modify decree in favour of.

Where one only of three defts. appealed to the lower court which modified the decree of the Court of first instance in so far as the other defts., also were concerned.

Held, it was wrong in modifying the decree appealed against in favour of the absent defts. without making them parties to the appeal. AIR (Vol 6) 1919 Cal 127 : 23 CWN 223 : 49 Ind Cas 834 (DB).

——O. 41, R. 33 — Power to modify decree in favour of deft. not party to the appeal.

It is competent to a Court under O. 41, R. 33 to modify the decree of the Lower Court in favour of parties to the suit even though they have not been impleaded as respdts. in the Court of appeal. As a rule where interference with a decree in favour of a person not before the Court of appeal is deemed necessary, the Court should implead him in the exercise of its plenary powers. AIR (V 6) 1919 Mad 196 : (1919) MWN 807 : 10 LW 357 : 53 Ind Cas 201 (DB).

——O. 41, Rr. 33 and 22 — Power to modify decree.

An Appellate Court has power to modify the decree in the respondent's favour though no cross-objections had been filed by him. AIR (V 4) 1917 Lah 423 : 168 PWR 1917 : 42 Ind Cas 443 (DB).

(r) Vary decree.

——O. 41, R. 33 — Power to vary decree.

Where a decree makes a minor personally liable on a guardian's contract, the Appellate Court has jurisdiction to amend and rectify it, even in the absence of a memorandum of appeal or cross objections by the minor. AIR (V 6) 1919 Mad 1102 : 34 MLJ 177 : 23 MLT 280 : 45 Ind Cas 949 (DB).

15. Non-appearing parties.

——O. 41, R. 33 — Power to vary decree to benefit of party who has not appealed.

Order 41, R. 33, Civil P. C., has been enacted to empower the Appellate Court to do complete justice between the parties. The Appellate Court has power under this rule to vary the decree of the lower Court, although the variation may benefit a party who has not appealed. But the Court will exercise a wise judicial discretion in using the power under this rule. AIR (V 25) 1938 Mad 322: (1938) MWN 67 : 47 MLW 751 : (1938) 1 MLJ 154 : 177 Ind Cas 693 (DB).

——O. 41, R. 33 — Decree not appealed against inseparably connected.

Though the power of the Appellate Court is wide, the cases in which it should interfere with the decree which has not been appealed against are those in which the portion of the decree appealed against is so inseparably connected with the decree not appealed against that justice cannot be done, unless the portion against which no appeal has been preferred is also interfered with.

(Where there were two independent transactions though the questions of law and fact involved in both of them were, to some extent, the same, the High Court refused to interfere.) AIR (V 24) 1937 Pat 40 : 17 PLT 780 : 3 BR 183 : 16 Pat 45 : 166 Ind Cas 555 (DB).

——O. 41, R. 33 — Party not filing appeal or cross-objection — Interference under O. 41, R. 33.

Where a party has a right to invoke the assistance of the Court either by filing an appeal or cross-objections and has failed to avail himself of such right the Court will very rarely and then only for very cogent reasons interfere with the decree of the trial Court under O. 41, R. 33, Civil P. C. AIR (V 20) 1933 Lah 682 : 34 PLR 844 : 145 Ind Cas 432 (DB).

——O. 41, R. 33 — Suit by some co-sharers impleading other co-sharers as defendants — Power of Appellate Court to pass decree in favour of all co-sharers.

A and B instituted a suit for possession impleading C and D, their co-sharers, as defendants. The trial Court pased a decree for the half share of A and B. On appeal by A, B and C the Appellate Court decreed the entire suit. On second appeal by the defendants:

Held, that the lower Appellate Court had power to pass a decree for the recovery of the entire property even in respect of D's share, in view of the provision of O. 41, R. 33, Civil P. C. AIR (Vol 20) 1933 Lah 40 : 140 Ind Cas 22.

——O. 41, R. 33 — Power to vary decree in favour of respondent.

The powers given by O. 41, R. 33, are very wide and they can be exercised even in favour of a respondent who has neither appealed nor filed a cross-objection. Ind Rul (1932) Lah 661.

——O. 41, R. 33 — Discretion.

A decree in a suit for contribution was passed against two defendants. One defendant successfully appealed but the other defendant was not made a respondent. Appellate Court passed an additional decree against the absent defendant.

Held under O. 41, R. 33 the Court could pass an order against a party to the suit in his absence although it would have been sound exercise of discretion to give an opportunity to that party of appearing before him and of being heard. AIR (V 16) 1929 Cal 315 : 33 CWN 221 (DB).

——O. 41, R. 33 — Power of Court to make decree in favour of.

It does constantly occur where some people appeal and others do not that the Court is put in a position of having to make impossible or contradictory or unworkable orders. Accordingly, it has been given power to make a decree in favour of persons who have not even approached it. This power may be exercised by the Court in favour of any of the parties who may not have filed any appeal or objection. AIR (V 16) 1929 Cal 123 : 48 CLJ 281 : 32 CWN 1228 : 114 Ind Cas 84 : 56 Cal 598 (DB).

——O. 41, R. 33 — Respondents not filing cross-objections.

Although there is no appeal or cross-objection by the respondents, it is still open to the Appellate Court to make a decree which would be proper in the circumstances of the case. AIR (V 16) 1929 Cal 28 : 49 CLJ 83 : 115 Ind Cas 180.

——O. 41, R. 33 — Respondent not filing objections.

The object of R. 33 is manifestly to enable the Court to do complete justice between the parties to the appeal; where, for example, it is essential in order to grant relief to an appellant, the Court may grant relief to the respondent although he has not filed an appeal or preferred an objection. AIR (V 15) 1928 All 77 : 50 All 218 : 108 Ind Cas 728 : 25 ALJ 1017 (DB).

——O. 41, R. 33 — Common defence.

It is open to an appellate Court to vary the decree appealed against, where there is a common defence even in favour of persons who have not appealed but who were parties to the suit. AIR (V 14) 1927 All 37 : 48 All 551 : 24 ALJ 586 : 94 Ind Cas 347 (DB).

——O. 41, R. 33 — Decree cannot be challenged.

If a party against whom a decree has been passed files no appeal, and no cross-objections when the opponent files an appeal, then he cannot be allowed to dispute the decision of the Court below against him. AIR (V 14) 1927 Bom 128 : 28 Bom LR 627 : 98 Ind Cas 383 (DB).

——O. 41, R. 33 — Legal representatives not on record.

Where one of the appellants dies and in consequence of his legal representatives not being brought on the record the appeal abates, the Court can accept the appeal in favour of all the appellants including the legal representatives not brought on record. AIR (V 13) 1926 Lah 564 : 94 Ind Cas 530: (DB).

——O. 41, R. 33 — Power to quash the whole decree — Sufficient reason.

O. 41, R. 33 gives an appellate Court in an appeal against a portion of the decree alone, jurisdiction to quash whole of the decree-passed, against the respondent, although the respondent had not himself appealed against the decree or filed cross-objections, in the presence of sufficient reasons for the respondent not doing so. The respondent's failure to present cross-objections or to appeal due to the state of authorities at the time subsequently changed, as to the period when the cross-appeal or memorandum ought to have been filed, was held to have been due to sufficient reasons. AIR (V 12) 1925 Mad 26 : 85 Ind Cas 312 : 20 MLW 761.

16. Non-appealing plaintiffs.

——O. 41, R. 33 — Power of appellate Court to alter decree in favour of plaintiff who is respondent to appeal and who has not either filed appeal or objection.

Order 41, R. 33, confers upon the Appellate Court very wide powers to pass such orders as may dispose of the dispute between the parties to the litigation. The rule expressly empowers a Court to pass an appropriate decree not only in favour of the appellant but in favour of any of the respondents or parties although respondents or parties may not have filed an appeal or objection. There is no bar, therefore, to the Appellate Court altering the decree of the trial Court in favour of the plaintiff who is a respondent in the appeal. To contend that although the Appellate Court may alter a decree in favour of a respondent who has not appealed, it has no power to do so to the detriment of other respondents, would be to nullify the rule altogether. AIR (Vol 27) 1940 Pat 47: 6 BR 23: 184 Ind Cas 137.

——O. 41, R. 33 — Suit dismissed against one defendant — No appeal or cross-objection filed — Relief against such defendant in second appeal.

Where the plaintiff's suit against several defendants is dismissed as against one of them and the plaintiff does not prefer any appeal or cross-objection in the lower Appellate Court against the trial Court's decision nor is the point taken as a ground of second appeal to the High Court, it is not proper to give the plaintiff any relief under O. 41, R. 33, against such defendant against whom the suit was dismissed. AIR (Vol 26) 1939 Cal 593 (DB).

——O. 41, R. 33 — Where an action is dismissed and an appeal has been filed by one of the defendants, the Appellate Court has power under O. 41, R. 33, Civil P. C. to grant the plaintiff relief even if he had not preferred an appeal but has filed only cross-objection. AIR (Vol 26) 1939 Pat 504: 6 BR 141: 185 Ind Cas 250 (DB).

——O. 41, R. 33 — Plaintiff purchasing land from defendants Nos. 2 and 3 — Entry in Record of Right showing land as belonging to defendant No. 1 — Suit by plaintiff against defendants Nos. 1, 2 and 3, for possession or in alternative for money paid — Court granting decree for price paid — Appeal by defendants Nos. 2 and 3 — Plaintiff and defendant No. 1 made respondents — Plaintiff appearing but not defendant No. 1 — Appellate Court, if can reverse decree and pass one against defendant No. 1 who did not appear, in favour of plaintiff who did not appeal for possession and mesne profits.

Defendants Nos. 2 and 3 sold certain land to the plaintiff. The plaintiff alleged that he was dispossessed from this land on account of certain entries in the Record of Rights, whereupon the plaintiff filed a suit impleading defendant No. 1 with whose lands the purchased land was said to have amalgamated, and defendants Nos. 2 and 3.

The prayer was either to get possession of the land or to get the price that he had paid to defendants Nos. 2 and 3 The Munsif decreed the plaintiff's suit and passed a modified decree in the terms that the plaintiff was entitled to get a sum of Rs. 175, from the defendants Nos. 2 and 3. Defendants Nos. 2 and 3 appealed to the lower Appellate Court. The plaintiff and the defendant No. 1 were made respondents. The plaintiff appeared, but the defendant No. 1 did not appear and the lower Appellate Court, having come to the conclusion that the plaintiff was entitled to the land he claimed, passed a decree against the defendant No. 1 and reversed the decision of the Munsif with regard to defendants Nos. 2 and 3.

The plaintiff was given a decree for declaration of title to and recovery of possession of the disputed land along with mesne profits:

Held, that the lower Appellate Court had under O. 41, R. 33, Civil P. C. ample powers to pass an order of this nature. When the lower Appellate Court found that the plaintiff was not entitled to the alternative prayer which was granted by the Court of first instance it was its duty to grant, if the findings justified the other relief in order to adjust the rights of the parties in accordance with justice, equity and good conscience. AIR (Vol 25) 1938 Pat 323: 4 BR 449: 174 Ind Cas 452.

——O. 41, R. 33 — The Appellate Court has power to pass a decree for possession as mortgagees in favour of the plaintiffs even though they had not appealed. AIR (Vol 19) 1932 All 32: (1931) ALJ 601 : 133 Ind Cas 536 (DB).

——O. 41, R. 33 — Mistake of law.

Where a person brings a suit claiming 3/4th as his share as an heir to his father and the Court allows only 1/2 and where in an appeal by the other party the person is found entitled to 3/4th as his share in view of the change in the law introduced by a ruling published subsequent to the decision by the lower Court, the High Court, has power to correct lower Court's mistake of law even though the person has not appealed against lower Court's decision allowing him only 1/2 as his share. AIR (Vol 17) 1930 Rang 190 (DB).

——O. 41, R. 33 — Pre-emption suit — Part decreed — Vendor no title to the other part — Appeal by vendee.

A pre-emption suit alleged in the first place that the sale of a portion of the property sold was invalid and in the second place claimed possession by pre-emption of the whole property or any part thereof as the Court may think proper. The trial Court decreed the claim for pre-emption in respect of only a part of the property, holding that as regards the rest the vendor had no title. The pre-emptor submitted to the decree but the vendee appealed and urged that the whole suit should be dismissed for defect of partial pre-emption.

Held further; that although the pre-emptor plaintiff did not appeal from the lower Court's decree, still the appellate Court had power to consider the alternative case to pre-empt the whole property and to decree the whole suit. AIR (Vol 16) 1929 All 398: 116 Ind Cas 16: 1929 ALJ 589 (DB).

——O. 41, R. 33 — The powers conferred under R. 33 are very wide but they are to be resorted to with great care and circumspection and not as a matter of course but only where strong grounds exist for the exercise of such powers.

The unsuccessful co-plaintiff was not a party to the appeal which had been preferred by the unsuccessful defendant against the successful co-plaintiff. The determination of his right, title or interest in the property was not necessary for the grant of proper or adquate relief to the parties actually before the appellate Court. The law of limitation had completely run out against him and the decree against him had become final. He did not pay the necessary Court-fee for an appeal on his behalf.

Held: in view of all these circumstances it would be extremely difficult to hold that the legislature could ever have intended to extend O. 41, R. 33, to a person so situated as the co-plaintiff who did not appeal. AIR (Vol 15) 1928 All 746: 51 All 63. 26 ALJ 1139: 111 Ind Cas 751 (DB).

——O. 41, R. 33 — When only one plaintiff appeals against the dismissal of a suit, the Court has power to set aside the entire decree of the trial Court and grant relief to all the plaintiffs. AIR (Vol 13) 1926 All 425: 94 Ind Cas 315.

——O. 41, R. 33 — There were three defendants to the suit. The suit was decreed as against the first two defendants but dismissed as against the third defendant. The first two defendants appealed; but the plaintiff did not appeal against the dismissal of his claim against the third defendant.

Held, that the appellate Court could pass a decree against the 3rd defendant alone while exonerating the first two defendants. AIR (Vol 12) 1925 All 555: 88 Ind Cas 438: 47 All 597: 23 ALJ 501: 6 LRA Civ. 346 (DB).

——O. 41, R. 33 — Appeal by one — If decree in favour of all can be passed.

Under O. 41, R. 33 an Appellate Court can pass a decree in favour of all the plffs. though only one of them has appealed. 26 PWR 1912: 34 PLR 1912: 13 Ind Cas 957.

17. Parties.

——O. 41, R. 33 — Appeal in suit for contribution.

Suit for contribution — Decree as claimed by plaintiff — Appeal by one of defendants without making others parties on ground that basis of calculation for contribution was wrong.

Held, that the defendants who were left out were necessary parties to the appeal and the appeal in their absence was incompetent. AIR (Vol 31) 1944 Cal 383: 79 CLJ 45: 48 CWN 484.

——O. 41, Rr. 33, 4, S. 35 — "Parties" — Suit decreed by trial Court against Y and dismissed against X without costs — Appeal by Y — Appellate Court while dismissing suit against Y also, can decree costs incurred by X in the trial Court — Defendants filing joint memorandum of appeal — Appeal allowed — Separate sets of Pleaders' fee, if can be allowed — Trial Court's decree against A and B on common ground — Appeal by A alone — Appellate Court while dismissing suit against A, it can dismiss it with costs against B also.

Rule 33 of O. 41, Civil P. C., authorises Appellate Court to pass any decree which ought to have been passed by the trial Court. The word 'parties' in R. 33, is wide enough to include persons who were parties to the suit in the trial Court but were not parties to the appeal. Where, therefore, the trial Court dismisses the suit against one of the defendants X without awarding him any costs, the Appellate Court in the appeal by the other defendant Y while dismissing the suit against Y also can under O. 41, R. 33, decree costs incurred by X in the trial Court even if X did not file any appeal or cross-objection and was not a party to the appeal. Order 41, R. 4 cannot apply to such a case as it contemplates a case where the decree appealed against proceeds on any ground common to all the defendants.

Where the defendants file a joint memorandum of appeal from the decree passed against them by the trial Court, the Appellate Court while allowing the appeal cannot award separate sets of Pleaders' fee for appeal to each defendant.

Where the decree of the trial Court against defendants A and B proceeds on a common ground and A alone appeals, the Appellate Court while allowing the appeal and dismissing the suit against A can dismiss it with costs against B as well although he was not a party to appeal. AIR (Vol 29) 1942 Cal 257: ILR (1941) 2 Cal 556: 46 CWN 227: 204 Ind Cas 618 (DB).

——O. 41, R. 33 — Co-defendants against whom alternative claim was made, not made party.

It is an elementary principle that no Court has jurisdiction to pass a decree against any person who is not a party to the proceeding before it. An Appellate Court has therefore no jurisdiction in an ordinary case of co-defendants against whom an alternative claim is preferred, to give a decree against one of those defendants who has not been made a party to the appeal. AIR (Vol 27) 1940 Mad 609: 51 MLW 615: 1940 MWN 422: 191 Ind Cas 891.

——O. 41, R. 33 — Party to suit not necessary party to appeal not joined in appeal — Decree even in his favour, if can be passed.

There is nothing in the wording of R. 33 of O. 41, to show that the power under that rule can be exercised only in the case of a person who is interested in the appeal. Hence if once it is found that a certain person, party to the suit, who was not joined in the appeal is not a necessary party to the appeal, the Appellate Court can pass a decree in his favour when it can in no way prejudice the opposite party. AIR (Vol 26) 1939 Rang 213: 182 Ind Cas 1005.

——O. 41, R. 33 — Suit dismissed against co-defendant — No appeal against him — Order against him, if can be passed.

What is contemplated by R. 33, O. 41, Civil P. C., is that an order may be passed in favour of a person who has not appealed but not that an order can be passed against a person who is not a party to the appeal and who is not on the record. The discretionary power of the Court under O. 41, Rr. 20 and 33, however ample it may be, cannot be used to the detriment, or prejudice of a person against whom the suit has been dismissed by the trial Court and against whom no appeal had been preferred before the lower Appellate Court. AIR (Vol 24) 1937 Sind 312: 173 Ind Cas 862 (DB).

——O. 41, R. 33 — Person not party to appeal — Order against him.

What is contemplated by R. 33 of O. 41, Civil P. C., is that an order may be passed in favour of a person who has not appealed but not that an order can be passed against a person who is not a party to the appeal and who is not on the record. AIR (Vol 24) 1937 Sind 236: 21 SLR 486: 171 Ind Cas 315 (DB).

——O. 41, R. 33 — Rule 33 does not authorise the Court to pass a decree against a person who is not a party to the appeal. AIR (Vol 22) 1935 Cal 24: 61 Cal 919: 154 Ind Cas 101.

——O. 41, R. 33 — Suit for correction of entries in Record of Rights — All landlords are necessary parties — Death of some abates the suit or the appeal therefrom and the provisions of O. 41, R. 33 cannot be invoked in aid of one of the defendants-appellants. AIR (Vol 20) 1933 Cal 787: 37 CWN 756: 58 CLJ 29: 146 Ind Cas 831 (2) (DB).

——O. 41, R. 33 — Meaning of.

The word "parties" in O. 41, R. 33, is intended to connote persons other than those who have been arrayed as appellants or respondents in the appeal.

A decree can, therefore, be passed in favour but not against a person who is no party to the appeal. AIR (Vol 16) 1929 All 243: 115 Ind Cas 436: 51 All 575: 1929 ALJ 344 (DB).

——O. 41, R. 33 — Meaning of.

The word "parties" in O. 41, R. 33 is not intended to connote persons other than those who are arrayed as appellants or respondents in the appeal. AIR (Vol 15) 1928 All 746 : 51 All 63 : 26 ALJ 1139 : 111 Ind Cas 751 (DB).

18. Powers of Appellate Court.

(a) General.
(a1) Abatement.
(b) Cross appeals.
(c) Decree.
(d) Discretion.
(e) Enhancement of Rent.
(f) Evidence.
(g) Insufficient Court-fee.
(h) Issue of Commission.
(i) Limits.
(j) Memo of objections, absence of.
(k) No cross objections.
(l) No appeal.
(m) Non-appealing defendants.
(n) Partition.
(o) Portion not appealed.
(p) Party not appealing.
(q) Point not taken in Lower Court.
(r) Rectification.
(s) Redemption suit.
(t) Review.
(u) Remand.
(v) To do justice.
(w) Vendor and Purchaser.

(a) General.

——O. 41, R. 33 — How to be exercised.

The power given to the appellate Court under O. 41, R. 33, C. P. Code, should be exercised with discretion and in order to do justice between the parties. If there be two alternative cases made by the plaintiff and relief is given by the trial Court in favour of the plaintiff under one of such alternatives, and the defendants have preferred an appeal from that decree, it is competent for the appellate Court to allow the claims of the plaintiff on the second alternative which had been dismissed by the trial Court. If the appellate Court interferes with or modifies or extends the decision of the lower Court to give effect to that decision by interference if justice and equity demand, the Court is entitled to interfere, if necessary, with the rights and liabilities of those who are not in fact appealing from the decision of the trial Court. What is required under these provisions is to empower the appellate Court to do complete justice between the parties without trenching upon the provisions contained in the Code or in other special statutes relating to limitation or court-fees. AIR (Vol 38) 1951 Cal 199.

——O. 41, R. 33 — Subsequent events — Power to take notice.

The power of the appellate Court under O. 41, R. 33, C. P. Code, to make further or other decree or order as the case may require would justify consideration of events taking place after the institution of the suit in proper cases. There would not be any excess of jurisdiction if in the exercise of the power given to it under that rule the Court takes notice of facts which entitled a plaintiff to a relief which though claimed in the plaint could not be given to him on the date of the suit. Normally, and as a general rule, a Court of appeal in considering the correctness of the judgment of the Court below is to confine itself to the state of the case at the time when the judgment was given. But in exceptional cases it may depart from this rule in order to shorten litigation or to achieve the ends of justice.

Where, therefore, in a suit for redemption which was not premature the relief claimed was that redemption or delivery of possession of the property be decreed without payment of mortgage money on the ground that the charge had been extinguished by operation of law, but that relief was not available to the plaintiff on the date of the suit and became available during the pendency of the appeal, the appellate Court would not be exceeding its jurisdiction in granting that relief. AIR (Vol 37) 1950 Assam 208 (DB).

——O. 41, R. 33 — Modification of decree in favour of party not appealing or preferring memorandum of objections — Rule.

Order 41, R. 33, though it is in very wide terms, cannot be interpreted in such a way as to abrogate the other provisions in the Code, with regard to the filing of appeals, cross-objections, etc. As an ordinary rule, an appellate Court must not, therefore, reverse or vary a decree in favour of a party who has not appealed or preferred any objections against it and this general rule should hold good notwithstanding R. 33 of O. 41, which enables an appellate Court in exceptional circumstances to pass decrees in favour of person not preferring any appeal or cross-objection.

The illustration to the rule gives some indication of the class of cases in which R. 33 will apply, e.g., where, as a result of interference in favour of the appellant, further interference with the decree under appeal is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience.

Held, the appellate Court was not justified in modifying a part of the decree of the Court of first instance, on appeal by the defendant, but without any appeal or cross-objections having been preferred by the plaintiffs against that part of the decree which was against them. To be retained. AIR (Vol 37) 1950 Pat 346 (DB).

——O. 41, R. 33 and O. 47, R. 1 — Powers under O. 41, R. 33 not exercised by the appellate Court at the time of judgment — If could be exercised on an application for review of that judgment.

Order 41, R. 33, C. P. Code, is a purely enabling provision which enables the appellate Court to exercise certain powers in favour of a party who has not filed the appeal if the circumstances of the case and the interests of justice so require. The powers being discretionary, no Court can be compelled to make an order under this rule; but if the appellate Court, while it allows the appeal, refuses to make an order in favour of a non-appealing party whose position is identically the same as that of the successful appellant, without applying its mind to the provisions of O. 41, R. 33, C. P. Code and without considering whether it should or should not exercise its power under that

rule, the Court is not incompetent to rectify its omission and reconsider the matter if and when it is brought to its notice by way of an application for review. Where in fact there is an omission on the part of the Court to consider the clear provision of O. 41, R. 33, when the original judgment was passed, such omission would constitute a sufficient ground analogous to those mentioned in O. 47. R. 1, and the Court would not be incompetent to reconsider the matter, if it so desired. AIR (Vol 36) 1949 FC 106 : 1949-2 MLJ 20 : 1949 FCR 36 : 1949 FLJ 125.

——**O. 41, R. 33 — Trial Court granting injunction restraining defendant from obstructing public road but omitting to direct removal of obstruction — Appeal by defendant — Appellate Court, if can direct removal of obstruction by defendant.**

Where the trial Court grants a permanent injunction restraining the defendants from causing obstruction to a procession taken by the plaintiff along a certain public road but omits to direct the removal of the obstruction, the appellate Court, on appeal by the defendants, has power under O. 41, R. 33, C. P. Code, to grant a mandatory injunction ordering the defendants to remove the obstruction, although there is no appeal by the plaintiff. Under O. 41, R. 33, the appellate Court has power to pass any decree in the form in which it ought to have been passed by the trial Court. The appellate Court in supplementing the decree does not add any relief which is not granted by the trial Court but simply elucidates the trial Court's decree. AIR (Vol 33) 1946 Nag 228: ILR (1946) Nag 246: 223 Ind Cas 486: 1946 NLJ 223.

——**O. 41, R. 33 — Appellate Court held, could change and vary the decree of the trial Court.**

Plaintiff filed a suit for arrears of annuity allowance and prayed for a charge decree for arrears. The trial Court decreed the suit but did not create a charge. On appeal the defendant was exonerated from personal liability but the charge on property was given:

Held, that it was competent for the Appellate Court under O. 41, R. 33, Civil P. C. to vary the decree and the order passed by the lower Court even though no objection was taken to that part of the decree in the trial Court. AIR (Vol 24) 1937 Cal 10: 40 CWN 1397: 168 Ind Cas 646 (DB).

——O. 41, R. 33 — Appellate Court should not reverse the decision of trial Court solely on the ground that the trial Court had gone into the question of paramount title when the trial Court thought it fit to do so in the interest of all parties to a mortgage suit. AIR (Vol 23) 1936 Mad 338: 43 MLW 525: (1936) MWN 579: 163 Ind Cas 303.

——O. 41, R. 33 — Where the appellants sued for a declaration that the development trust had no right to claim a tax from them & for an injunction restraining the defendants from selling the plaintiffs' properties to realise the tax and the trial Court, holding that a claim for a bare declaration or injunction was not maintainable issued a mandamus against the defendants :

Held, (i) that the appellants were entitled to sue for the reliefs claimed by them and it was not, therefore, a case for issuing a mandamus under S. 45, Specific Relief Act ;

(ii) that the Appellate Court had power under O. 41, R. 33, Civil P. C. to modify the decree passed by the trial Court by granting a declaration that the proceedings taken against the appellants were ultra vires and void and by ordering the respondents to release the properties. AIR (Vol 19) 1932 Rang 123: 10 Rang 412: 139 Ind Cas 566 (FB).

——O. 41, R. 33 — The Appellate Court in a proper case, can allow a respondent, who has not filed an appeal or a memorandum of objections, to argue that the plaintiff's suit should be dismissed but this power will not be exercised by Court except on suciffient grounds. AIR (Vol 18) 1931 Mad 513 : 131 Ind Cas 833.

——**O. 41, R. 33 — No appeal — Mortgage decree cannot be converted into personal decree.**

Where the appellate Court reversed the mortgage decree of the lower Court and gave a money decree instead of mortgage decree in spite of the fact that the mortgagors had not appealed nor filed a cross-objection,

Held : that the appellate Court had no power under O. 41, R. 33, to take such an action and acted ultra vires. AIR (V 15) 1928 Nag 322 : 112 Ind Cas 893.

——O. 41, R. 33 — Even in the absence of a respondent an appellate Court has the power to vary the decree in his favour. AIR (Vol 14) 1927 Nag 196: 101 Ind Cas 255.

——**O. 41, R. 33 — Appeal from part of the judgment.**

An appellate Court has power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. O. 41, R. 33 confers powers to do this, although the appeal may be from a part of the judgment only, and although the respondent may not complain of the decision. AIR (Vol 13) 1926 Oudh 304: 13 OLJ 648: 3 OWN 299; 95 Ind Cas 957.

——**O. 41, R. 33 — Where appeal has been filed.**

Though no general rule can be laid down that Court should not apply O. 41, R. 33 in favour of party who has appealed or filed cross-objections and failed, yet, without strong reasons, it will not take such a course. AIR (Vol 12) 1925 Lah 2: 17 PWR 1923: 79 Ind Cas 670 (DB).

——**O. 41, R. 33 — Of decree — Form — Confirming decree.**

Where a decree is confirmed on appeal any order to amend the decree so as to make it agree with the judgment should be passed by the Appellate Court. The omission on the part of the party to file a memo of objections praying for the amendment of the decree when Appellate Court has cognizance of the case, will not have the effect of taking away the party's inherent right to have a decree in accordance with the judgment passed in his favour. AIR (Vol 12) 1925 Mad 735: 88 Ind Cas 828: 1925 M WN 209: 49 MLJ 385.

——**O. 41, R. 33 — Appeal by some and of part of a decree.**

Rule 33 of O. 41 of the Code, enables the Appellate Court to deal with the entire decree although the appeal may be as to a part of the decree, and also to give directions in favour of parties who have actually not filed any appeal or objection In an appeal from a part of the decree by some of the parties the entire decree becomes the subject-matter of the appeal. AIR (Vol 12) 1925 Pat 40: 3 Pat

327: 79 Ind Cas 794: 5 PLT 21: 1924 PHCC 105 (DB).

——O. 41, R. 33 — Decree in part against defendant.

Where a suit is decreed partly against one defendant and partly against another defendant but only one defendant appeals and the other is not made a party to the appeal, it is open to the appellate Court to modify the decree of the lower Court by making the whole sum payable by the defendant who has appealed. AIR (Vol 8) 1921 All 367: 43 All 85 (DB).

——O. 41, R. 33 — An Appellate Court has power to pass any decree which ought to have been passed or to make any further decree as the case may require in favour of any of the parties. AIR (Vol 6) 1919 Pat 196: (1919) Pat 393: 51 Ind Cas 981 (2) (DB).

——O. 41, R. 33 — The object of O. 41, R. 33 C. P. C., is to enable the Court to do complete justice between the parties to the appeal. It was not intended to enable a deft. to obtain for a plff. not a party to the appeal a relief which the latter never asked for. AIR (Vol 5) 1918 Nag 228: 14 NLR 56: 44 Ind Cas 51.

——O. 41, R. 33 — Where A, a broker purchased paddy from the plff. for B, and C, and the plff. sued A, B and C for recovery of the price and the trial Court granted a decree against A. alone, but on appeal by the plff. the Divisional Court decreed the plff.'s claim against B and C making no order as to the decree against A, for the reason that he had not appealed at all. Held by the Chief Court that the Divisional Court was wrong in not cancelling the decree against A. and under O. 41, R. 33 it set aside the decree of the Court of first instance passed against A. AIR (Vol 4) 1917 LB 61: 39 Ind Cas 149.

——O. 41, Rr. 33 and 4 — Co-sharers suit by some impleading others as defts. — Decree in favour of all.

Where some of the co-sharers bring a suit for recovery of their share of the common properties impleading the others as defts. and the first court granted a decree in favour of all of them, held, that it was the duty of the Appellate Court to transpose the co-sharer defts. as plffs. and maintain the decree in their favour and that it was not proper to dismiss the suit so far as the co-sharer were concerned. AIR (Vol 3) 1916 PC 96: 43 Cal 660: 20 CWN 522: 30 MLJ 529: (1916) 1 MWN 332: 3 LW 471: 18 Bom LR 418: 24 CLJ 1: 20 MLT 10: 33 Ind Cas 452.

——O. 41, R. 33 — The discretion given to an appellate Court under O. 41, R. 33 is very wide and empowers the Court to act in such a manner as will seem equitable to all parties. 65 PWR 1911: 103 PLR 1911: 9 Ind Cas 825.

——O. 41, R. 33 — Power to dismiss suit and alter decree.

The High Court can only try the case on the issues on which the parties went to trial and hence it cannot dismiss a suit in which a decree was passed in the Lower Court in the plff's favour, on an appeal by plff. (1910) 6 Ind Cas 446 (Cal) (DB).

(a-1) Abatement

——O. 41, R. 33 — Appellate Court has power to declare not only that the appeal had abated but also that the suit has abated. AIR 1926 Lah 607, Not Foll.; AIR 1928 Lah 359 Expl. and Not Foll. AIR (Vol 16) 1929 Lah 256: 118 Ind Cas 437.

(b) Cross appeals.

——O. 41, R. 33 — Cross-appeals out of same suit — Legal representative of deceased party added in time in one appeal but not in the other — Latter appeal abates. It is however open to the defendant appellant to ask Appellate Court to exercise its powers under O. 41, R. 33 and give any proper relief. AIR (Vol 18) 1931 Mad 277: 60 MLJ 267: 33 MLW 411: 130 Ind Cas 764.

(c) Decree.

——O. 41, R. 33 — Decree in favour of plaintiff of trial Court supplemented by Appellate Court in appeal by defendant — No new relief added but decree merely elucidated — Decree of Appellate Court supplementing that of trial Court is valid.

The trial Court found that the road in question was a public road and passed a decree for permanent injunction restraining the defendants from obstructing the procession being taken out by the plaintiff along that road but omitted to direct the removal of the wire-fencing which caused the obstruction. The lower Appellate Court in an appeal by the defendants supplemented the decree by adding that the defendants had no right to cause nuisance by putting any sort of obstruction on the road and by a mandatory injunction ordered the defendants to remove the wire-fencing erected by them across the road. It was contended that in the absence of appeal by the plaintiff the lower Appellate Court ought not to have supplemented the decree:

Held, that the lower Appellate Court had power under O. 41, R. 33, Civil P. C., to pass any decree in the form in which it ought to have been passed by the trial Court; that in view of the trial Court's finding the plaintiff could have applied under S. 152 for amendment of the decree so as to bring it in line with the judgment; that the lower Appellate Court in supplementing the decree did not add any relief which was not granted by the trial Court but simply elucidated the trial Court's decree that as the declaration was that the road was a public road, the removal of the wire-fencing was implicit in the decree of the trial Court; and that all that the lower Appellate Court did was to make them explicit. AIR (Vol 33) 1946 Nag 228: 1946 NLJ 223: ILR (1946) Nag 246: 223 Ind Cas 486.

——O. 41, Rr. 33, 4 — Decree against any of debts, it can be altered.

Provisions of O. 41, R. 33 are in wide terms and, give the Appellate Court ample power to pass such orders as it may deem just and proper and necessary to do full justice having regard to all the circumstances of the case; though they must not be so applied as to disregard other provisions of the law, such as those contained in the Limitation Act and the Court-fees Act.

Order 41, R. 33 is intended to enable the Appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with rights and liabilities of those who have not in fact appealed from the decision of the trial Court; but it ought not to be applied to cases where there has been a distinct and separate decree against persons who have not chosen to ap-

peal. AIR (Vol 29) 1942 Pat 204: 20 Pat 811: 8 BR 421: 23 PLT 588: 193 Ind Cas 521 (DB).

——**O. 41, R. 33 — Power to pass decree in favour of respondent against co-respondent.**

A borrowed a sum of money from B. B transferred the debt to C. C sued A and B. The trial Court passed a decree against A for half the amount and a decree against B for the other half, holding that B was entitled only to half the amount. C appealed. The Appellate Court held that the money belonged entirely to B but refused to pass a decree for the whole amount against A holding that it had no power to do so on the ground that C had not put in appearance:

Held, that the Appellate Court had power under O. 41, R. 33, Civil P. C., to pass a decree for the entire amount against A even though C had not put in appearance. AIR (V 18) 1931 Nag 97 : 132 Ind Cas 459.

——**O. 41, R. 33 — Power to pass proper decree.**

The High Court had power to pass a proper decree by expunging, from the decree of the lower court the direction of the lower court with regard to the manner of the realisation of the decretal amount which is not justified by law. AIR (Vol 6) 1919 Lah 341: 59 PWR 1919: 51 Ind Cas 819 (DB).

——**O. 41, R. 33 — Alternative decree — No appeal by plaintiff.**

Where plaintiff succeeded against one of the two defendants against whom relief was claimed in the alternative on an appeal by one defendant only the decree can be passed against the other defendant. AIR (Vol 3) 1916 Cal 237: 22 CLJ 391: 32 Ind Cas 491 (DB).

——O. 41, R. 33 — Under O. 41, R. 33, C. P. C., the High Court is entitled to pass any decree which is in accordance with justice, whatever the decision of the first Court or the Lower Appellate Court may have been. AIR (Vol 3) 1916 Mad 56: 27 Ind Cas 336 (DB).

——**O. 41, R. 33 — To pass decree against any or all of co-defendants.**

Order 41, R. 33 empowers an Appellate Court to pass in appeal a decree against any or all of the co-defendants against one or more of whom the Lower Court passed the decree under appeal. AIR (Vol 3) 1916 Pat 16: 37 Ind Cas 842.

——O. 41, R. 33 — An Appellate Court should not set aside the decree as a whole where the appeal is not against the whole decree. (1913) 18 Ind Cas 543 (All) (DB).

——**O. 41, R. 33 — Appeal not against the whole decree.**

An Appellate Court should not disturb the decree of the lower court so as to affect the decrees against those defendants who had not appealed from the decree. (1913) 18 Ind Cas 530 (All).

——**O. 41, R. 33 — Decree.**

Where a suit by co-plaintiffs of whom one or the other is entitled to the property, is dismissed as one of them failed to establish the title if the dismissal bars the right of co-plaintiffs the Appellate Court should act under O. 41, R. 33 (a) and pass a decree. (1911) 38 C 721 : 12 Ind Cas 931 (DB).

(d) Discretion.

——O. 41, R. 33 — The power contained in the rule must be used with discretion and is ordinarily limited to cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required to adjust the rights of the parties according to justice, equity and good conscience. AIR (Vol 1) 1914 Cal 722: 22 CLJ 390: 24 Ind Cas 208 (DB).

(e) Enhancement of rent.

——O. 41, R. 33 — Suit for enhancement of rent — Appeal by tenant — No appeal or cross-objection by landlord against the lower Court's order — Appellate Court cannot further enhance the rent. AIR (Vol 22) 1935 Cal 458: 39 CWN 420.

(f) Evidence.

——O. 41, R. 33 — An Appellate Court has no power to question the admissibility of a document on the ground that it has not been duly stamped, where the Lower Court has already admitted the document in evidence. UBR 1907-09: Stamp Act p. 3: 4 Ind Cas 1086.

(g) Insufficient Court-fee.

——**O. 41, R. 33 — Insufficient Court-fee — Appellate Court reversing but can reject the plaint on the ground of limitation.**

Where it was urged that, the first Court's decision as to the insufficiency of the Court-fee, on the ground of which the plaint was rejected, having been reversed, the lower appellate Court ought to have remanded the case and not entertained and decided the objection on the ground of limitation, held, the plaint can be rejected if from the statement therein the suit is barred by any law. If the plaintiff does not show in the plaint the grounds of exemption for bringing the suit after the period prescribed by law as is his duty to do under O. 7, R. 6, the appellate Court can reject the plaint as the first Court can do. AIR (V 10) 1923 Nag 30.

(h) Issue of Commission.

——O. 41, R. 33 — An appellate Court can issue a commission for the purpose of examining the accounts and remedying certain mistakes and omissions made by the previous Commissioner. AIR (Vol 10) 1923 Lah 115: 77 Ind Cas 207: 3 Lah 382 (DB).

(i) Limits.

——O. 41, R. 33 — The rule should not be invoked to enable a litigant to avoid the provisions of other statutes such as the Limitation Act or the Court-fees Act. 5 Pat LJ 328 : (1920) Pat HCC 161 : 1 Pat LT 434 : 56 Ind Cas 262 : AIR (V 7) 1920 Pat 77 (DB).

——O. 41, R. 33 — O. 41, R. 33 of the C. P. C., must be cautiously applied, generally in cases where but for recourse to it the ends of justice would be defeated. Thus, the rule should not be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes like the Limitation Act and the Court-fees Act. AIR (V 5) 1918 Cal 13 : 28 CLJ 123 : 48 Ind Cas 78 (FB).

——O. 41, R. 33 — The rule is widely expressed and should be limited to cases when the interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. Where a plaintiff obtained a decree for a portion of the claim and appealed against the part disallowed and the defendant did not prefer any cross appeal nor take objections, the court of appeal had no power in the proper exercise of discretion to dismiss plaintiff"s suit. AIR (Vol 4) 1917 Cal 343: 38 Ind Cas 361 (DB).

——O. 41, R. 33 — R. 33 is very wide but care and discretion must be used by Appellate Courts in exercising the powers conferred by the rule, and they should not lose sight of the other provisions of the Code itself nor of the Court-fees Act nor the law of limitation. R sued J for rents. The first Court partly decreed and partly dismissed the suit. R appealed but J neither appealed nor filed any objections. The Appellate Court referred certain issues to the lower court and on return of the findings dismissed R's suit entirely. Held, the dismissal of the entire suit was not a proper exercise of the discretion. (1912) 34 All 32: 8 ALJ 1111: 11 Ind Cas 640 (FB).

(j) Memo of objections, absence of.

——O. 41, R. 33 — Pending a suit for administration of the estate of the deceased, X applied to be made a defendant claiming to be the adopted son of the deceased. The trial Court held in an interlocutory order that the adoption was unproved. X appealed against this order but this appeal was dismissed as premature. On preliminary decree being passed, other parties appealed against it but X did not; nor did he submit any cross-objection when he was joined as respondent on his application in the appeal by the other parties.

Held, that the memorandum of his previous appeal could not be dealt with as his cross-objection in this appeal.

Held further: that under the circumstances it was not possible to reverse the findings against him under O. 41, R. 33, in the absence of a cross-objection from him. AIR (Vol 17) 1930 Rang 237 (DB).

(k) No cross objections.

——O. 41, R. 33 — Respondent not filing cross-objections — No grounds — Court will not exercise powers under R. 33 in his favour.

The Appellate Court will not exercise its powers under R. 33 of O. 41, Civil P. C., in favour of a respondent who has not filed any cross-objections and no good grounds have been shown why these cross-objections were not filed. AIR (Vol 30) 1943 Oudh 365: 1943 OWN (CC) 247 (2): 1943 AWR (CC) 60: 208 Ind Cas 356.

——O. 41, R. 33 — Appellate Court can pass perpetual injunction in favour of plaintiff despite refusal by lower Court and his failure to ask for it in memorandum of cross-objection. (1936) 63 Cal 1068: 40 CWN 916: 63 CLJ 210.

——O. 41, R. 33 — Appeal by plaintiff from partial decree — No cross-appeal or cross-objection — Suit if can be dismissed.

O. 41, R. 33 though very widely expressed, is not to be applied to enable a party litigant to ignore the other provisions of the Code or the provisions of other statutes, such as Limitation Act or Court-fees Act, etc. Ordinarily, O. 41, R. 33 is limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. On an appeal by plaintiff against a partial decree for rent the whole suit could not be dismissed. Even if it could be, the discretion is not properly exercised in dismissing it. AIR (Vol 3) 1916 Cal 250: 20 CWN 542: 22 CLJ 394 : 32 Ind Cas 494 (DB).

(l) No appeal.

——O. 41, R. 33 — The High Court in second appeal and the District Judge on appeal can pass a decree against a defendant though the plaintiff has not filed any appeal or cross objections against the decree dismissing the suit against him. (1910) MWN 640: 8 MLT 377: 8 Ind Cas 366 (DB).

(m) Non-appealing defendants.

——O. 41, R. 33 — Decree in favour of.

If the real dispute is between co-defendants, out of whom decree is passed against one, then in appeal from that decree plaintiff can be granted relief even against the non-appellant defendant if the Court finds it necessary. (1909) 12 OC 260: 3 Ind Cas 917 (DB).

(n) Partition.

——O. 41, R. 33 — Partition suit.

The Appellate Court has power to exercise the powers conferred upon it by O. 41, R. 33, in partition suits. There is no restriction of the powers as to any class of suits under that rule. Whether in any case power should be exercised is in the discretion of the Court. AIR (Vol 9) 1922 Cal 398: 69 Ind Cas 981: 49 Cal 379 (DB).

(o) Portion not appealed.

——O. 41, R. 33 — An Appellate Court has no power to interfere with the decree of the first court with regard to matters regarding which there was no appeal preferred to the Appellate Court. (1911) 9 Ind Cas 121 (Sind).

(p) Party not appealing.

——O. 41, Rr. 33 and 22 — Powers of Appellate Court — Party not appealing.

On appeal by one of the defendants against whom a decree had been made without cross-objection by plaintiff his suit was dismissed. Held, plaintiff cannot appeal against the Appellate decree and claim a decree against the other defendant. (1910) MWN 546: 34 M 249: 20 MLJ 369: 7 MLT 178: 5 Ind Cas 927 (DB).

(q) Point not taken in Lower Court

——O. 41, R. 33 — In spite of the defective pleadings of parties, an Appellate Court is right in determining their legal rights on the evidence adduced in the case. A new plea which might be rebutted by evidence could not be raised for the first time on appeal. (1911-1912) 6 LBR 144: 6 Bur LT 72: 19 Ind Cas 2.

(r) Rectification.

——O. 41, R. 33 — Property misdescribed in sale-deed — Suit for rectification of sale-deed and possession — Court granting possession according to right description of property but failing to grant relief of rectification expressly in judgment though holding on issue that deed should be rectified — Application to Appellate Court by vendee to amend decree by granting relief of rectification of decree — On appeal by vendor — Such mistake held could be rectified by Appellate Court though no appeal filed. AIR (Vol 24) 1937 All 401: (1937) ALJ 280: 1937 AWR (HC) 245: ILR (1937) All 489: 169 Ind Cas 570.

(s) Redemption suit.

——O. 41, R. 33 — Amount fixed by trial Court deposited — Mortgagee continuing in possession of part of property — Mortgagee's appeal dismissed — The mortgagor is not entitled to a direction from the

Appellate Court for taking further account. AIR (Vol 27) 1940 Cal 550: ILR (1940) 1 Cal 544: 191 Ind Cas 398.

(t) Review.

——O. 41, R. 33 — An Appellate Court cannot review and act upon the copy of a document not duly proved before the first Court. Where an omission to grant a relief is a mere slip of the pen, it can be decreed on further appeal, though no appeal is preferred against the decree of the first Court. 93 PWR 1909: 83 PLR 1909: 4 Ind Cas 892.

(u) Remand.

——O. 41, R. 33 — Remand of whole case on the merits — Practice.

Where a suit had been partly decreed in appeal and no second appeal had been preferred to the High Court against the portion allowed, the High Court has ample jurisdiction to make an order remanding the whole case for determination on the merits. AIR (Vol 6) 1919 Cal 65: 46 Cal 738: 52 Ind Cas 801 (1) (DB).

(v) To do justice.

——O. 41, R. 33 — Power to make order to do justice.

If in a suit by certain reversioners for recovery of possession of the properties of the last male owner one or other of the plaintiffs is entered to the property by succession, the suit should not be dismissed because one of the plaintiffs alone has failed to make out a title, particularly, when, as a result of the dismissal of the suit the right of the co-plaintiffs would be barred. In such a case the Appellate Court should act under O. 41, R. 33 C. P. C. AIR (Vol 2) 1915 PC 57: 43 C 417: 36 Ind Cas 499.

(w) Vendor and Purchaser.

——O. 41, R. 33 — Trusts Act (1 of 1882) S. 91 — Vendor and purchaser — Breach of contract — Suit by 1st contracting party — Form of decree.

Where a vendor agreed to sell a certain property to a certain person, but afterwards sold the property to another and the first contracting party brought a suit for specific performance, Held, that the proper decree to be passed was not to declare the second sale void but to direct the subsequent purchasers to execute a conveyance to the plaintiff. The Court has power under O. 41, R. 33 to pass such a decree. The purchaser can only be considered as a trustee for the first contracting party. 10 MLT 524: (1911) 2 MWN 560: 22 MLJ 124: 13 Ind Cas 176 (DB).

19. Relief.

——O. 41, R. 33 — Relief under — Availability — Conditions — Right to apply under R. 33 of O. 41 after pursuit and failure of other remedies.

The relief which can be granted under R. 33 of O. 41, C. P. Code, can only be granted in a pending appeal and not in an appeal which had been already disposed of. Though the latitude of the discretion vested in the Court under that provision of law is very large, the discretion is invokable only in a pending appeal.

The concluding words of R. 33 of O. 41, namely, "although such respondents or parties may not have filed any appeal or objection" shows that where a party has pursued such a remedy but failed he could not apply under the rule. 62 LW 251: 1949 MWN 213: AIR (Vol 36) 1949 Mad 763: (1949) 1 MLJ 425.

——O. 41, R. 33 — Alternative Reliefs — One relief denied — Other relief can be granted and that fully.

Rule 33 is primarily intended for a contingency like this when there are two alternative prayers made by the plaintiff he may be well satisfied with one of the reliefs obtained by him. But if on appeal that relief is denied to him in justice the plaintiff ought to be given the other alternative relief if the findings arrived at by the appellate Court justify such a decree. If the plaintiff is entitled to the alternative relief as prayed for in the plaint when a decree is made under O. 41, R. 33, the plaintiff should get all that he is entitled to under the judgment arrived at by the Court of appeal; for example in a suit for declaration of title and recovery of possession or for recovery of compensation if the plaintiff is given a decree for recovery of possession, he is also entitled to mesne profits. AIR (Vol 14) 1927 Cal 831: 105 Ind Cas 600: 46 CLJ 247 (DB).

——O. 41, R. 33 — Where plaintiff made alternative claims on one of which the Trial Court decreed the claim, the appellate Court in reversing the decree is bound to see whether the plaintiff is not entitled to the alternative relief. AIR (Vol 12) 1925 Lah 155: 6 LLJ 464.

——O. 41, R. 33 — Relief to — Principle to be borne in mind.

Where the lower appellate Court interferes with the portion of decree to which the plaintiff had submitted by not appealing, it does not exceed the powers given to it as Appellate Court by O. 41, R. 33 if it adopts the principle on which the decision of the First Court was based and makes an order which it considers ought to have been made on the basis of of that principle. AIR (Vol 11) 1924 Pat 322: 72 Ind Cas 96.

——O. 41, R. 33 — When can be used.

An appellate Court can grant relief to an appellant as against a defendant against whom there is no appeal. The powers conferred by O. 41, R. 33, should be exercised in cases where, as the result of an Appellate Court's interference in favour of the appellant, further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. (1922) 64 Ind Cas 178 (Cal) (DB).

——O. 41, R. 33 and O. 7, R. 7 — New reliefs — Reliefs not claimed not to be granted.

An usufructuary mortgagee who sues the purchasers of the equity of redemption and prays for a decree for possession or for a money decree, is not entitled to a decree for the usufruct of the property accumulated in the hands of the District Magistrate while the property was under attachment in proceedings under S. 145 of the Cr. P. C. An Appellate Court ought not to give a decree for a relief not claimed in the plaint. AIR (Vol 4) 1917 Pat 42: 2 PLJ 698: 43 Ind Cas 463 (DB).

20. Remand.

——O. 41, R. 33 — Where on appeal from an order returning a plaint to be presented to the proper Court, an order was passed remanding the case to the trial Court no further appeal therefrom is competent. Nor is it liable to revision. (1930) 125 Ind Cas 581 (1) (All) (DB).

——O. 41, R. 33 — Not limited to one under O. 41, R. 23.

The pleader of the defendants presented an application for adjournment on the day fixed for hearing. The Court refused the application, proceeded to hear the plaintiff's evidence ex parte and passed a decree. On appeal the Appellate Court held that although sufficient reason had been shown for adjournment, it had no power to remand except when the case came within O. 41, R. 23, C. P. Code.

Held, the power of remand by the Appellate Court could not be limited to the case described in O. 41, R. 23. The lower Appellate Court has the power to consider the question whether the suit was heard ex parte against the appellant on sufficient grounds. It may be that a case may not fall within the scope of R. 23, O. 41, but the words of R. 33, O. 41 as also the provisions of S. 151 are wide enough to save the power of the Appellate Court to make an order suited to the circumstances of the case or in the interest of justice, and if necessary to remand the suit for a re-trial. AIR (Vol 9) 1922 Bom 267: 63 Ind Cas 478: 46 Bom 184: 23 Bom LR 769 (DB).

21. Second Appeal.

——O. 41, R. 33 — Applicability in second appeal.

The provisions of O. 41, R. 33, Civil P. C., are applicable to a second appeal under the provisions of O. 42. AIR (V 30) 1943 All 342 : (1943) ALJ 440 : ILR (1943) All 830: 1943 AWR (HC) 211: 209 Ind Cas 538 (DB).

——O. 41, R. 33 — Second Appeal — Order 41, R. 33, if can be applied by second Appellate Court when no point was raised in lower Appellate Court.

Quaere — Whether in second appeal the High Court would be justified in applying the principles of O. 41, R. 33, Civil P. C., when that point is not raised in the lower Appellate Court. AIR (Vol 28) 1941 Oudh 56: 1940 OWN (CC) 807: 1940 AWR (CC) 366: 16 Luck 113: 190 Ind Cas 334.

——O. 41, R. 33, S. 100 — Powers of second Appellate Court — Suit dismissed under S. 78, Bengal Land Registration Act by Appellate Court — Plaintiff getting registered during pendency of second appeal.

The provisions of O. 41, R. 33, Civil P. C., are wide enough to enable the Court to take into consideration the entry in the land registration record made since the institution of the second appeal. In special circumstances, the Court of second appeal can take notice of facts material to the decision of of a case which have arisen subsequent to the decision of the suit. Section 100 must be read with O. 41, R. 33. Order 41, R. 33, applies not only to appeals from original decrees but also to appeals from appellate decrees.

Where, therefore, a suit for rent instituted by a mortgagee has been rightly dismissed by the trial Court as well as the first Appellate Court under S. 78, Ben. Land Regis. Act, and during the pendency of the second appeal the mortgagee has been registered under the Ben. Land Regis. Act, the Court of second appeal can pass a decree in his favour on the basis of the registration. AIR (Vol 27) 1940 Pat 300 : 6 BR 229 : 21 PLT 165 : 185 Ind Cas 638 (DB).

——O. 41, R. 33 — If a case arrives at the higher appellate tribunal in such a state that if the result is that, if to deal with the matter would involve hearing directly an appeal from the first Court without the intervention of the lower appellate Court, that course cannot be permitted. Where one of the parties had been given up in the lower appellate Court held, that relief could not be granted against him in Second Appeal. 43 Mad 803, Not Foll. 1929 MWN 112 (DB).

——O. 41, R. 33 — Ejectment suit — Change of law — Law on the date of appeal judgment.

It is true that an appellate Court has to decide a case as it was presented before the trial Court and on a consideration of which the original judgment is based. But if the right claimed is one which has either ceased to exist or been modified by certain events which have transpired since the decree of the trial Court, the Court is bound to take notice of it in order to give just and proper relief to the parties to the appeal before it. The plaintiff let his premises to the defendant and standard rent was fixed under the Rent Act of 1920. On 14th March 1925, the plaintiff gave a notice to the defendant asking him to vacate the premises by the end of March 1925. The defendant not having vacated within the time allowed to him, a suit was instituted on 13th May 1925, for ejectment against the defendant. The trial Court dismissed the plaintiff's suit on the ground that the defendant was protected from ejectment under the provisions of S. 11, Rent Act. This order was pronounced on 30th July 1926. There was an appeal by the plaintiff against the decree of the trial Court. The appeal came on for hearing on 29th July 1927. In the meantime the Rent Act expired on 31st March 1927 and ceased to exist. The appeal was heard and allowed. Defendant came on second appeal.

Held, that the case was rightly decided as on the day the lower appellate Court delivered its judgment the law applicable was the general law, i.e., T. P. Act, an the tenancy having been validly determined under it a decree ordering ejectment was correct. AIR (Vol 15) 1928 Cal 436: 110 Ind Cas 715: 47 CLJ 530 (DB).

——O. 41, R. 33 — Suit against two persons A and B — Decree against A — Plaintiff not appealing — Defendant's appeal allowed in part — Plaintiff cannot implead B.

A suit was filed against A, and B as agent of A. The trial Judge (the Original Side of the High Court) passed a decree against A but by his decree dismissed the suit against B but decreed that B should pay to the plaintiffs taxed costs and interest thereon. The plaintiffs did not appeal to the High Court against the decree of the trial Judge dismissing the suit against B. A and B jointly appealed to the High Court against the decree which had been made against them. On that appeal the High Court found that A was not liable to pay anything in respect of one of the suit contracts and modified the decree in respect of their liability under the other suit contract with certain costs and dismissed the suit against A and B. Against that decree of the High Court the plaintiffs appealed to the Privy Council.

Held, the appeal to His Majesty in Council, in so far as B was concerned, was in effect, an appeal direct to His Majesty in Council from the decree of the trial Judge, which is not allowable under the Code of Civil Procedure, or under the Letters Patent of the High Court, and that O. 41, R. 33 is not intended to apply to such an appeal and accordingly the appeal

so far as B was concerned should be dismissed. AIR (Vol 13) 1926 PC 34: 51 MLJ 570: 94 Ind Cas 767: 49 Mad 435: 53 IA 84: 3 OWN 563: 1926 MWN 495: 24 MLW 115: 44 CLJ 67: 28 Bom LR 1391: 31 CWN 1.

——O. 41, R. 33 — **Absence of appeal to first Court.**

Where only a part of plaintiff's claim is decreed by the trial Court and he does not appeal against the claim that is dismissed, but the defendant appeals against the claim allowed and the whole of plaintiff's claim is dismissed and he appeals against this dismissal second appellate Court may if it thinks proper allow the whole claim. AIR (Vol 13) 1926 Rang 172: 97 Ind Cas 876: 4 Rang 110.

——O. 41, R. 33 — An appeal to the Court of Appeal is by way of rehearing, and the Court may make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard. AIR (Vol 12) 1925 Nag 251: 95 Ind Cas 371: 8 NLJ 14.

——O. 41, R. 33 — **Absence of appeal to first Court.**

Where a decree for foreclosure was asked for in plaint but the first Court passed only decree for sale and that was confirmed by the Appellate Court on appeal by defendant, the High Court cannot decree foreclosure where the plaintiff mortgagee had not appealed to the lower Appellate Court against the decree of the first Court. AIR (Vol 9) 1922 Nag 1: 65 Ind Cas 786: 19 NLR 81: 5 NLJ 114 (FB).

22. Subsequent events.

——O. 41, R. 33 — Appeal — Appellate Court's duty to take notice of change pending appeal.

An Appellate Court is entitled to take into consideration any change in circumstances during the pendency of the appeal from an order which was prematurely passed. AIR (Vol 32) 1945 Oudh 25: 1944 OWN (CC) 303: 1944 AWR (CC) 211 (DB).

——O. 41, R. 33 — Statute affecting vested rights passed before hearing of appeal.

Appellate Courts do and are entitled to take into account changes of circumstances which occur between the date of the decree of the lower Court and the date of the hearing of the appeal and if necessary, a Court of Appeal will give retrospective effect to legislation even if by so doing they are obliged to interfere with the rights given to parties by decrees. Where after passing of a decree and before hearing of the appeal therefrom, a new enactment is passed and this has retrospective effect, which affected the vested rights of the parties, the Appellate Court must take into account the effect of the new Act. on the rights under consideration. AIR (Vol 23) 1936 Bom 37: 37 Bom LR 955: 60 Bom 125: 161 Ind Cas 96 (DB).

——O. 41, R. 33 — It is incumbent on an appellate Court to take notice of events happened since the institution of the suit or appeal and mould its decree according to the circumstances at the time of the final decree. AIR (Vol 17) 1930 Bom 254: 54 Bom 125: 32 Bom LR 155 (DB).

——O. 41, R. 33 — **Cognizance of.**

The Court is entitled to take cognizance of events which have happened since the filing of suit or appeal. AIR (Vol 7) 1920 Bom 554: 32 Bom LR 1252 (DB).

——O. 41, R. 33 — **Duty of Court to take note.**

An Appellate Court should not shut its eyes to events occuring during the pendency of suit. AIR (Vol 7) 1920 Pat 559: 4 PLJ 312: 50 Ind Cas 857 (DB).

——O. 41, R. 33 — Appellate Court.

A decision that a gift to unborn persons is invalid before the passing of Madras Hindu Transfers and bequests Act (1914) can be set aside by the Appellate Court after the Act. The Appellate Court can pass such further decree or order that may be necessitated by the introduction of new law during pendency of appeal. AIR (Vol 5) 1918 Mad 1299: 21 MLT 93: 5 LW 334: 40 Mad 818: 38 Ind Cas 223 (DB).

——O. 41, R. 33 — Powers of Appellate Court.

An Appellate Court can take cognizance of matters which may have happened after the institution of the suit for the purpose of moulding the relief that a party is entitled to, provided it is not based on a new title which accrued after the action, so as to prevent in justice or avoid multiplicity of proceedings. Where owing to a mistake in the construction, of a mortgage deed the Lower Court decides that interest as well as the principal sum was due on the date of default in payment of interest, the decree for the entire amount need not be disturbed if at the time of the decision of the appeal, the date for re-payment of the principal sum due had passed. AIR (V 4) 1917 Mad 198 : (1916) 1 MWN 354 : 19 MLJ 360: 34 Ind Cas 411 (DB).

——O. 41, R. 33 — Power of Appellate Court.

It is competent to the Appellate Court to take note of events happening during the pendency of the appeal so as to shorten litigation between the parties. 20 MLJ 528: (1910) MWN 331: 8 MLT 135: 7 Ind Cas 74 (DB).

——O. 41, R. 35.

See also Civil P. C. O. 41, R. 31.

——O. 41, R. 35 — Costs can be awarded against a party in appeal, where the party is one of the answering respondents and its Counsel was present on many hearings of the case. AIR (Vol 28) 1941 Oudh 251: 1941 AWR (CC) 44: 1941 OWN (CC) 1: 16 Luck 697: 192 Ind Cas 269 (DB).

——O. 41, R. 35 — In cases where an appeal against a summary dismissal of an appeal succeeds, it is the general practice to allow costs throughout and those costs include the costs of the appeal in the lower Court which was summarily dismissed. AIR (Vol 26) 1939 Bom 493: 41 Bom LR 949: 186 Ind Cas 105.

——O. 41, R. 35 — Appellate Court decree, how to be drawn up.

Except when the Appellate Court confirms without variation the decree of the original Court, the decree of the Appellate Court must be drawn up in such a form that it can be executed without reference to the decree of the original Court AIR (Vol 22) 1935 Rang 139: 156 Ind Cas 318.

——O. 41, R. 35 — Two cross appeals, whether like appeal and cross-objection — Distinction between them.

The case of two cross-appeals is not exactly identical with an appeal and a cross-objection. In the case of an apppeal and a cross-objection there is only one judgment delivered and only one decree is prepared by the Court which embodies the adjudication in both the appeal and the cross-objection. On the other hand, under O. 41, R. 35, the decree of the Appellate Court has to contain the number of the appeal, the names and description of the appellant and the respondent and a clear specification of the relief granted or other adjudication made. If there are two cross-appeals pending in the High Court, two decrees have to be prepared giving all these particulars. AIR (Vol 22) 1935 All 374: (1935) ALJ 352: 1935 AWR (HC) 380: 57 All 873: 155 Ind Cas 487 (FB).

——O. 41, R. 35 — Scope — If subject to O. 34 — Mortgage suit — Costs — Rule — Personal liability of judgment-debtor.

Order 41, R. 35, C. P. Code, which speaks of a decree in appeal generally, must be read as subject to the provisions of O. 34, which specifically provide in regard to costs in a mortgage suit. The general rule in a mortgage action, therefore, in that costs incurred by the mortgagee form part of the mortgage decree unless there is a specific direction that the whole or part of those costs shall be payable personally by some or other of the judgment-debtors. Under the C. P. Code, the mortgagee in ordinary circumstances has an additional advantage, namely, that he can claim the benefits of a secured creditor not only in respect of the mortgage-debt but also in respect of costs incurred by him in enforcing the mortgage. AIR (Vol 35) 1948 Pat 127: 13 Cut. LT 39: 26 Pat 422 (DB).

——O. 41, R. 35 — Amendment of decree on review — Fresh appeal against amended decree.

It is possible for a party to make an application for review and at the same time before that is decided to file an appeal. The right course where parties adopt simultaneous remedies or endeavour to do so if the review measures are successful to any extent whatever is that a new decree should be drawn up and the party choosing to file an appeal should file it against the decree as it appears in its final shape.

Per Suhrawardy, J.— In a proper case the Court may grant time to a party to file an appeal from the final decree in the place of the appeal from the original decree. AIR (Vol 18) 1931 Cal 323: 34 CWN 1002 (DB).

——O. 41, R. 35 — Cross-appeals.

Cross-appeals against same decree decided — Same decree should be incorporated with each appellate record — Either decree read by itself should be complete. AIR (Vol 15) 1928 All 274: 113 Ind Cas 93: 50 All 517: 26 ALJ 258 (DB).

——O. 41, R. 35 — Sale — Application to set aside ex parte decree pending in Court, discretion of.

It is not only competent to a Court of appeal but it may be its duty to take notice of events which have happened since the order challenged in appeal was made. When a sale has been set aside on the ground that the decree in execution of which the sale took place has been nullified by an ex parte decree in a regular suit, and an appeal has been preferred against the order setting aside the sale, if during the pendency of the appeal the ex parte decree is set aside and the original decree restored, the appeal ought to be allowed and the sale restored. (1907) 6 C LJ 102 (104, 105) (DB).

——O. 41, R. 35 — Suit dismissed on preliminary ground — Reversal in appeal.

Where the defendants succeeded in securing the dismissal of the suit upon a preliminary ground proved in appeal to be untenable, they cannot evade liability to pay plaintiff's costs. (1905) 9 CWN 25 : 32 C 62 (72).

——O. 41, R. 35 — Neutral party.

Where a person not interested in the appeal is added as a party to satisfy the rules of procedure, but no notice is given to him that he need not appear, the costs of his appearance must be paid by the appellant who lost the appeal (1901) 5 CWN 217: 24 M. 377 (336): 28 IA 46 (PC).

——O. 41, R. 35 — Guardian ad litem of a lunatic — Guardian filing an unnecessary appeal — Personal liability of the guardian to pay costs.

The guardian ad litem appointed by the court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff, but when the guardian ad litem takes upon himself to appeal against a decree passed against the lunatic, whom he represents he must personally pay the costs incurred. (1909) 11 Bom LR 1011: 34 B. 374: 4 Ind Cas 107 (107).

——O. 41, R. 35 — Against successful appellant — Case not properly put before lower court.

As the plaintiff (appellant) did not present the matter to the Munsiff in the proper light it was ordered that he should pay the costs of the respondent in the High Court, although the appeal was decided in his favour. (1905) 9 CWN 844 (847): 2 CLJ 70.

——O. 41, R. 35 — Second appeal — Discretion of court to give costs — Principle.

A second appeal lies as to costs against an appellate decree. A court has full discretion as to costs and that must be exercised on general principles and not arbitrarily. Case where it was held that the order of the first court ordering that plaintiff who was the unsuccessful party was not to pay any costs to defendant was bad. (1903) 7 CWN 647 (648, 649).

——O. 41-A (Mad), R. 1.

——O. 41-A (Mad) R. 1 — Power to dispense with production of printed copies of judgment.

The High Court has power to dispense with the production of the printed copies of the judgment appealed against when a certified copy of such judgment is attached with the memorandum of appeal. The power of the Court to dispense with the production of the copy of the judgment under O. 41, R. 1 has not been taken away by O. 41 A (Mad) R. 1. AIR (Vol 33) 1946 Mad 163: 58 MLW 670 (1): (1945) 2 MLJ 563: (1946) MWN 39.

——O. 41-A (Mad) R. 2.

——O. 41-A (Mad), R. 2 — Provisions of R. 2, if mandatory.

The provisions of O. 41-A, (Mad) R. 2 are mandatory. A typed copy of the lower Court's order is, therefore, insufficient and the appellant must produce the requisite number of printed copies of the order or judgment appealed against. AIR (Vol 32) 1945 Mad 353: (1945) 1 MLJ 268.

——O. 41-A (Mad), R. 6.

——O. 41-A, R. 6 (Mad), O. 3, R. 5, O. 41, R. 22 — O. 41-A, R. 6 prevails over O. 3, R. 5.

The provisions of O. 41-A which is added by the Madras High Court being a special provision prevails over the general provision in O. 3, R. 5. Consequently in view of R. 6 of O. 41-A the notice of appeal must be served regularly either on the respondent or on his Advocate and service by merely leaving notice in the office of the Advocate as provided under O. 3, R 5 is not service on the party or his Pleader for the purposes of limitation for filing memorandum of cross-objections under O. 41, R. 22. AIR (Vol 29) 1942 Mad 403: (1942) 1 MLJ 245: 55 MLW 115: 1942 MWN 182 (2): 201 Ind Cas 785 (DB).

——O. 42.

——O. 42 — The provisions of O. 41, R. 33 are applicable to a second appeal under provisions of O. 42, Civil P. C. AIR (Vol 30) 1943 All 342: (1943) ALJ 440: 1943 AWR (HC) 211: ILR (1943) All 830: 209 Ind Cas 538 (DB).

——O. 42 — It is only in the exercise of his appellate power that a Judge of a High Court can exercise his jurisdiction under O. 42, Civil P. C. read with O. 41, R. 19 and whatever order he may pass, it does, no doubt, affect the original appeal. AIR (Vol 22) 1935 Lah 815: 156 Ind Cas 454 (DB).

——**O. 42 — "Copy" means certified copy.**

The word "copy", as used in O. 41 and also O. 42 means copies duly certified under the provisions of the Evidence Act and thus rendered capable of production before a Court of law for examination. AIR (V 16) 1929 Lah 771 : 30 PLR 587 : 11 LLJ 363 (DB).

——**O. 42 — Question of fact — When High Court** can give a finding.

High Court holding in second appeal that certain evidence was improperly rejected in lower Court, cannot weigh the evidence and decide question of fact but must remand the case.

Per Dawson Miller, C. J. — It is not for the High Court, sitting in second appeal, even if it thinks that certain evidence had been improperly rejected by the lower Court, to weigh that evidence as against the evidences on the other side and arrive at a conclusion of fact upon the matter. But if there is evidence on both sides, and the case does not come under S. 103, C. P. Code the only possible thing to do is to remand the case for determination of the question of fact, taking into consideration the evidence improperly rejected along with the other evidence in the case.

Per Jwala Prasad, J. — Once a second appeal has been properly laid, Rr. 23, 24 and 25 under O. 41, and 42 will apply for the disposal of that appeal The finding of fact of the lower appellate Court having been set aside under S. 100, C. P. Code if evidence on the record is sufficient, there is nothing to prevent the High Court from going into evidence & determining the case finally under R. 24 of O. 41, S. 103, which has been added in the new Code (1908) has widened the power of the High Court to determine any issue not determined by the Court below after going into evidence. AIR (Vol 9) 1922 Pat 417: 65 Ind Cas 536: 3 Pat LT 303 (DB).

——**O. 42 — Second appeal — Additional evidence..**

Rule 27 of O. 41, C. P. Code, does not authorise an appellate Court to allow the production of additional evidence in second appeal. AIR (Vol 11) 1924 Lah 444: 80 Ind Cas 998: 5 Lah 84 (DB).

——**O. 42, R. 1.**

See also Civil P. C., Ss. 100 to 103, 107 and 108.

——O. 42, R. 1 — An appeal is properly presented when the memorandum of appeal is filed in Court accompanied by a copy of the judgment and decree appealed from. It is not necessary in the case of a second appeal to file with the memorandum of appeal a copy of the judgment of the trial Court. AIR (V 23) 1936 Pesh 77 : 161 Ind Cas 708.

——**O. 42, R. 1, Ss. 100 to 103 — "Appeals from appellate decrees", scope of — Oudh Courts Act (IV of 1925), S. 12 (2) Cross-objections.**

The words "appeals from appellate decrees" as used in O. 42, R. 1, have reference only to second appeals filed under S. 100. It would be anomalous that while an appellant is not under S. 12 (2) of the Oudh Courts Act entitled to appeal as of right, and cannot do so without obtaining a declaration from the Single Judge concerned that the case is a fit one for appeal, the respondent should be allowed to file cross-objections as a matter of course without the necessity of obtaining any such declaration. AIR (Vol 22) 1935 Oudh 88: 1935 OWN (CC) 8: 1935 RD 12: 10 Luck 513: 153 Ind Cas 371 (DB).

——**O. 42, R. 1 — Trial Court's judgment.**

The memo of Appeal in second appeals must be accompanied by a copy of the first Court's judgment and if the latter is not presented till after limitation expires the appeal should be rejected as barred by time. AIR (Vol 10) 1923 Lah 144: 73 Ind Cas 910.

——**O. 42, R. 1 — Rules of the Allahabad High Court.**

Under Ch. 3, R. 2, of the rules made by the Allahabad High Court and O. 42, R. 1, as amended by the Allahabad High Court a memorandum of second appeal must be accompanied by a copy of the judgment of the Court of first instance. Otherwise the Court must refuse to accept the memorandum under S. 122 of the C. P. Code. Both Ch. 3, R. 22 of the Rules of the Allahabad High Court and the amendment made by that Court in O. 42, R. 1, are intra vires. The terms of the amended O. 42, R. 1, do not allow the construction that the Court can dispense with the copy of judgment of the Trial Court. But when a properly constituted appeal is presented out of time, nothing prevents the application of Limitation Act, S. 5, in a proper case. AIR (Vol 8) 1921 All 23: 63 Ind Cas 338: 43 All 660: 19 ALJ 598 (DB).

——**O. 42, R. 2.**

——**O. 42, R 2 — Old Law — Copy of the intermediate order.**

Where a copy of the intermediate order disposing of the preliminary issues is not attached with the memorandum of appeal, appeal cannot be entertained. Punjab Government Notification No. 138-G, dated 19th March 1926, empowers the High Court to dispense with a copy of the preliminary order but the power to dispense with a judgment should ordinarily be exercised at the first hearing. AIR (Vol 15) 1928 Lah 60: 9 LLJ 393: 105 Ind Cas 653: 29 PLR 224 (DB).

——**O. 42, R. 2 — Judgment of trial Court.**

A memorandum of second appeal to the High Court must be accompanied by a copy of the judgment of the Court of first instance and if the latter is not presented till after the period of limitation has expired, the appeal should ordinarily be rejected as barred by limitation in the absence of any sufficient cause to explain the delay. AIR (Vol 14) 1927 Lah 747: 105 Ind Cas 689 (DB).

——**O. 42, R. 2 — Trial of some issues first and judgment thereon.**

Where the trial Judge decided some issues and afterwards he was succeeded by another Judge who decided the remaining issues and gave judgment only in respect of issues tried by him.

Held, that the decision by the first Judge on the issues tried by him is a judgment. Such judgment is required to be filed with the memorandum of appeal to make the appeal competent. If this has not been done, the appeal cannot be entertained. AIR (Vol 13) 1926 Lah 638: 8 LLJ 361: 27 PLR 701. 97 Ind Cas 780 (DB).

——**O. 42, R. 2 — Copy filed by respondent.**

When a copy of the judgment of the Court of first instance is filed by the respondents in a cross-ap-

peal and not by the appellants, the latter cannot avail themselves of a copy filed by their adversaries. AIR (V 13) 1926 Lah 626 : 8 LLJ 397 : 27 PLR 652: 97 Ind Cas 773 (DB).

——O. 42, R. 2 — When a second appeal was not accompanied by a copy of the judgment of the Court of first instance (on the date on which it was presented).

Held, that there was no valid presentation of the appeal on that day. (1922) 67 Ind Cas 670: 3 LLJ 255.

——O. 43.

——O. 43 — Provisions of O. 43, apply to proceedings under the Madras Estates Land Act before Revenue Courts. Hence, an appeal lies against an order dismissing an application under O. 9, R. 13, filed in proceedings under the Madras Estates Land Act. AIR (Vol 30) 1943 Mad 656: 56 MLW 418: 1943 MWN 474: (1943) 2 MLJ 193: 210 Ind Cas 87.

——O. 43 — Appeal under O. 43, to High Court — Decision of Single Judge, appealability of — Letters Patent (Madras), Cl. 15.

Under Cl. 15, Letters Patent (Madras), an appeal lies against the judgment of a Single Judge of the High Court passed on appeal preferred to the High Court under O. 43. The Code does not control Cl. 15 of the Letters Patent. AIR (Vol 20) 1933 Mad 570: 38 MLW 96: 65 MLJ 222: 56 Mad 915: (1933) MWN 850: 145 Ind Cas 449.

——O. 43 — Filing of order — Allahabad High Court Rr. 2 and 3.

The filing of the formal order outside the limitation period for the filing of an appeal does not bring the appeal itself outside limitation. It is sufficient if the order is filed before the hearing. AIR (Vol 16) 1929 All 858: 119 Ind Cas 4 (DB).

——O. 43 — Second appeal — O. 21, R. 90 C. P. Code.

No second appeal lies against an order setting aside or refusing to set aside a sale, although the matter is one between the decree-holder auction purchaser and judgment-debtor. AIR (V 14) 1927 Cal 657: 104 Ind Cas 188: 45 CLJ 557 (DB).

——O. 43 and S. 104 and O. 9, R. 3 — Appeal order.

There is no appeal from an order under O. 43, R. 3. (1911) 250 PWR 1911: 9 Ind Cas 238 (DB).

——O. 43, R. 1.

See also Civil P. C. Ss. 104 and 106.

1. **Arrest and attachment before judgment, (O. 38, Rr. 2, 3 and 6).**
2. **An order of refusal to re-admit or re-hear appeal (O. 41, Rr. 19 and 21.)**
3. **Finding of fact.**
4. **Interpretation.**
5. **Jurisdiction.**
6. **No appeal.**
7. **Non-compliance with Order for discovery, (O. 11, R. 21).**
8. **Order for attachment (O. 16, R. 10).**
9. **Order as to costs.**
10. **Order giving or refusing to give leave (O. 22, Rr. 3 and 10).**
11. **Order recording or refusing to record agreement, Compromise or satisfaction (O. 23, R. 3).**
12. **Order refusing to set aside abatement or dismissal of a suit (O. 22, R. 9).**
13. **Order for setting aside or refusing to set aside sale (O. 21, Rr. 72, 90 or 92).**
14. **Pronouncing judgment against party (O. 8, R. 10).**
15. **Parties.**
16. **Power of Court.**
17. **Revision.**
18. **Return of Memo of Appeal, and returning a plaint to be presented to proper Court. (O. 7, R. 10).**
19. **Rejecting application to set aside decree passed ex parte (O. 9, R. 13).**
20. **Remand, (O. 41, R. 23).**
21. **Rejecting application to set aside dismissal of a suit (O. 9, Rr. 4 and 9.**
22. **Receiver (O. 40, Rr. 1, 3 and 4).**
23. **Review application.**
24. **Scope.**
25. **Second appeal.**
26. **Temporary injunctions and Interlocutory Order (O. 39, Rr. 1, 2, 4 or 10).**
27. **Where the defendant shows cause or furnishes security (O. 38, R. 6(2),).**

1. **Arrest and attachment before judgment. (O. 38, Rr. 2, 3 and 6).**

——O. 43, R. 1 — Objection to attachment before judgment by party in different capacity.

Where an objection to the attachment before judgment is made by a party to the suit not in the capacity in which he is being sued but claiming property on his own account the objection must be investigated under R. 58 and the following rules in O. 21. No appeal therefore, lies from the order of the trial Court on such matter.. AIR (Vol 25) 1938 Nag 321: ILR (1940) Nag 509: 176 Ind Cas 79.

——O. 43, R. 1 (q), O. 38, R. 5 (3) — Dismissal of application for attachment before judgment.

No appeal lies under O. 43, R. 1 (q), where no conditional attachment has been made under O. 38, R. 5 (3) and the application for attachment before judgment ended in dismissal on the defendant showing cause against it. AIR (Vol 20) 1933 All 557: (1933) ALJ 1269: 146 Ind Cas 838 (DB).

——O. 43, R. 1 (q) — An order under O. 38, R. 6 accepting the contention of defendant that no order should be passed directing attachment of his property is appealable under O. 43, R. 1 (q). AIR (Vol 19) 1932 All 269: (1932) ALJ 228: 140 Ind Cas 95 (DB).

——O. 43, R. 1 — No appeal — Attachment or arrest — 'Judgment'.

An order made under the provisions of O. 38, R. 5 is not a "Judgment" within the meaning of Cl. 13 of the Letters Patent, because it is a mere interlocutory order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit and therefore no appeal lies from that order. AIR (Vol 12) 1925 Rang 267: 90 Ind Cas 995: 4 Bur LJ 108: 3 Rang 307 (DB).

——O. 43, R. 1 — Competency of appeal — Attachment or arrest.

An appeal lies both from an order of arrest before judgment and from that of attachment before judgment. It is true that an order of arrest is not one of the appealable orders enumerated in O. 43, R. 1 but the right is given specifically by S. 104, C. P. Code, and being a statutory right conferred by the body

of the Code is not a matter of procedure and would not be taken away by rules contained in the schedule. AIR (Vol 11) 1924 Rang 361: 84 Ind Cas 270: 2 Rang 362: 3 Bur LJ 159 (DB).

——O. 43, R. 1 — Competency of appeal — Attachment — Order directing furnishing of security.

An order ran thus — "It is ordered that the defendant firm do at once give security to the satisfaction of the Registrar of this Court to the extent of the plaintiff firm's claim and costs in this suit and that in default thereof a writ of attachment do issue out of, and under the seal of this Court, commanding the Sheriff of Calcutta to attach until the final determination of this suit or until the further order of this Court the stock-in-trade of the defendant firm lying at No. 55/11, Canning Street".

Held, that where the Court confines its orders to a direction that the defendant should give security within a fixed time, there should be no appeal from that order inasmuch as O. 38, R. 5 is omitted from the provisions of O. 43, R. 1. But where the Court makes an order that the defendants' property should be attached before judgment, there should be an appeal in as much as O. 38, R. 6 is specifically mentioned in O. 43, R. 1. Consequently the above order, in so far as it directs the attachment of the property, is a judgment and is appealable, but in so far as it directs security to be furnished, it is not appealable. AIR (Vol 10) 1923 Cal 639: 79 Ind Cas 242: 50 Cal 215 (DB).

——O. 43, R. 1 (q) — Dismissal of application — Attachment before judgment.

Where an application for attachment before judgment is dismissed by the Court of first instance after hearing the defendants, no appeal lies against that order. AIR (Vol 3) 1916 Cal 287: 23 CLJ 392: 33 Ind Cas 689 (DB).

2. An order of refusal to re-admit or re-hear appeal. (O. 41, Rr. 19 and 21).

——O. 43, R. 1 (t) — Proceedings under U. P. Encumbered Estates Act — Order of District Judge refusing to re-hear appeal — S. 45 (2A) Encumbered Estates Act, held not applicable — Right of appeal is under O. 43, R. 1 (t).

In proceedings under the U. P. Encum. Estates Act (XXV of 1934) an order of the District Judge refusing to re-hear the appeal decreed ex parte is not an order under Sub-s. (2) of S. 45, Encum. Estates Act but under the Civil P. C., and a right of appeal is conferred by the Code against such an order under O. 43, R. 1 (t). AIR (Vol 32) 1945 Oudh 303: 1945 AWR (CC) 27 and 69: 222 Ind Cas 121 (DB).

——O. 43, R. 1 — Competency of Appeal — Restoration — Refusal to.

An order under O. 41, R. 19, refusing to set aside an order of dismissal of an appeal passed ex parte, is appealable even though the order of refusal was passed in appeal in the course of the insolvency proceedings. AIR (Vol 17) 1930 Lah 112: 120 Ind Cas 791.

——O. 43, R. 1 — Application for restoration.

Appeal lies against an order of dismissal of an application for restoration of the application dismissed in default, for restoration of the suit dismissed in default. AIR (V 10) 1923 Nag 293 : 75 Ind Cas 589 : 19 NLR 119.

——O. 43, R. 1 Cl. (t) — Appeal — Dismissal for default — Review.

An order of the Lower Appellate Court rejecting an application for review of an appeal dismissed for default and a memo. of cross objections allowed ex parte, is not appealable. 53 Ind Cas 333: AIR (Vol 6) 1919 Lah 32.

——O. 43, R. 1 (t) — Refusal to rehear appeal.

—An appeal lies to the High Court from an order refusing to rehear an appeal dismissed for default even though such appeal has been preferred to the special judge under S. 109A (2) of the Bengal Tenancy Act in a suit under S. 106 of the Act. 45 Cal 638 : 28 CLJ 155 : 41 Ind Cas 751 : AIR (Vol 5) 1918 Cal 695 (DB).

——O. 43, R. 1 (c) — Dismissal for default of both parties — Appeal.

No appeal lies from an order rejecting an application to restore a suit dismissed for default of both parties. (1913) 9 NLR 33: 19 Ind Cas 97.

——O. 43, R. 1 (t) and O. 41, R. 10 (2) — Order rejecting appeal for failure to furnish security for costs.

An order rejecting an appeal for failure to furnish security for costs is not appealable. (1911) 14 OC 40: 9 Ind Cas 748.

3. Finding of fact.

——O. 43, R. 1 — Remand.

The Lower Appellate Court made an order of remand under O. 41, R. 23, C. P. Code, remanding the case to the Original Court, for the decision of the remaining questions arising in the case. An appeal was preferred to the High Court. Held, the policy of the Legislature being not to allow a second appeal on facts, it is difficult to see how the appellant coming in appeal under O. 43, R. 1 (u), can question findings of fact in this Court. 59 Ind Cas 715: 2 Lah 25: 36 PLR 1921: 58 PLR 1921: AIR (Vol 9) 1922 Lah 97 (DB).

——O. 43, R. 1 — Remand.

Appeal from an order of remand under O. 41, R. 23, stands on the footing of a second civil appeal and the High Court is bound by the findings of fact of the lower Appellate Court. 65 Ind Cas 376: 8 OLJ 624: AIR (Vol 8) 1921 Oudh 214.

——O. 43, R. 1 (u) — Appeal — Order of remand — Question of fact binding.

Findings of fact cannot be disturbed in an appeal against an order remanding a case under O. 41, R. 23, C. P. C. 109 PR 1918 : 23 PLR 1919 : 48 Ind Cas 379 (1): AIR (Vol 6) 1919 Lah 292.

——O. 43, R. 1 (u) — Remand — Appeal — Punjab Courts Act, S. 40.

Under O. 43, R. 1 (u) C. P. C. and S. 40 of Punjab Court Act, no appeal lies from a Divisional Judge's order or remand if that order is based on a finding of fact only. 162 PLR 1914: 120 PWR 1914: 85 PR 1914: 23 Ind Cas 817: AIR (Vol 1) 1914 Lah 328 (DB).

4. Interpretation.

——O. 43, R. 1 (k) — "Suit" in O. 43, R. 1 (k) does not include appeal. AIR (Vol 28) 1941 All 338: (1941) ALJ 516: 1941 AWR (HC) 251: 1941 OWN (HC) 1010 (2): 196 Ind Cas 574.

——O. 43, R. 1 — Order amending final decree — Whether can be treated as amending preliminary decree.

On an application under S. 151, the Subordinate Judge believing that he was in error when he pass-

ed the final decree purported to amend his own final decree by altering the same in order to correct what was believed to be a mistake. The District Judge on appeal treated the order of the Subordinate Judge amending the final decree as a decree and allowed the appeal:

Held, that the order of the Subordinate Judge amending the final decree was not an appealable order in itself but that he should be treated to have amended the preliminary decree which amended decree could be appealed against. AIR (Vol 26) 1939 Sind 303: ILR (1939) Kar 428: 185 Ind Cas 67 (DB).

——**O. 43, R. 1 — Court refusing to record compromise on ground that no compromise has been made.**

In Cl. (m), the words "refusing to record an agreement, compromise, or satisfaction" are comprehensive and wide enough to cover the case in which the trial Court comes to a finding that no compromise, agreement or satisfaction has been made and hence refuses to record the same and pass a decree in accordance with it. Hence O. 43, R. 1 (m) does provide for an appeal in a case in which the trial Court finds that no compromise has been made and refuses to record it on that ground. AIR (Vol 23) 1936 All 433: (1936) ALJ 336: 1936 AWR (HC) 408: 163 Ind Cas 929 (DB).

——**O. 43, R. 1 — Order passed mechanically.**

Where the order is passed in a mechanical way without adverting to the details of the matter, the desire obviously being to close the petition and to show that it was not pending at the end of the quarter, such a disposal is not a judicial disposal on the merits and it cannot be regarded that any relief claimed by the petitioner was refused to him so as to compel him to appeal to an Appellate Court. AIR (Vol 22) 1935 Mad 803: (1935) MWN 926: 42 MLW 375: 69 MLJ 821: 58 Mad 883: 159 Ind Cas 279 (FB).

——O. 43, R. 1 — In considering whether an appeal is admissible, the Court always looks to the substance rather than the form of the order so as not to deny a party his right of appeal, but it would be a very dangerous analogy to deny a party the right of appeal on the ground that only the substance and not the form can be looked into. AIR (Vol 21) 1934 Mad 484: (1934) MWN 412: 39 MLW 738: 67 MLJ 43: 57 Mad 777: 150 Ind Cas 98.

——O. 43, R. 1 — Where an order is passed under a provision of law which is not made subject to appeal, it is no answer to say that if it had been passed under a different provision under which it might have been passed and which provision is made subject to appeal, then an appeal would have been competent. AIR (Vol 21) 1934 Pat 41: 146 Ind Cas 933.

——**O. 43, R. 1 (b) — Scope.**

O. 43, R. 1 (b) merely gives a right of appeal if a judgment has been pronounced against a party. Where no judgment is pronounced there is no right of appeal. (1930) 31 PLR 946.

——**O. 43, R. 1 — Suit.**

Word 'suit' in O. 43, R. 1 (k) does not include an appeal. 49 CLJ 538: 33 CWN 881: AIR (Vol 16) 1929 Cal 532 (DB).

——O. 43, R. 1 — O. 47, R. 7 — Order 43, R. 1 (w), enables a party to appeal on grounds other than those mentioned in O. 47, R. 7, since there is nothing in the Code which expressly limits the grounds of an appeal under O. 43, R. 1 (w). 12 NLJ 13: 116 Ind Cas 645: 25 NLR 104: AIR (Vol 16) 1929 Nag 73.

——**O. 43, R. 1 — Case open to appeal.**

It cannot be said that words "case open to appeal" should be necessarily construed only with reference to the decree and to no other order. 112 Ind Cas 691: 29 MLW 490: AIR (Vol 15) 1928 Mad 969: 55 MLJ 262 (DB).

——**O. 43, R. 1 — O. 47, R. 7 — Effect of.**

Clause (w) of O. 43, R. 1 has to be read along with O. 47, R. 7, which specifically lays down that an order granting an application for review can be objected to in appeal only on one or the other of the three grounds specified therein. There is no real inconsistency between the two rules, the former rule merely gives a party aggrieved by an order granting a review a right of appeal but it does not deal with the grounds on which the order appealed against can be objected to. The two provisions of the Code are not mutually inconsistent, but are really complementary of each other; the two must be read together and taken together and thus they do not give an unlimited right of appeal. And even assuming that the rule that if "if two sections of a statute are repugnant, the last must prevail and override the earlier" applies, O. 47, R. 7 should be held to control and restrict the earlier rule. AIR 1926 Bom 121, Diss. AIR (V 14) 1927 Lah 435 : 8 Lah 617 : 29 PLR 81.

——O. 43, R. 1 — O. 47, R. 7 — The right of appeal granted by O. 43, R. 1 (w) is not restricted by the grounds set out in O. 47, R. 7. 41 Cal 746, Diss. Order 43, R 1 (w) is a new provision and was perhaps not in the minds of the authors when they reproduced the old S. 629 of 1882 Code in the form of O. 47, R. 7. 27 Bom LR 1446: 94 Ind Cas 591: AIR (Vol 13) 1926 Bom 121 (DB).

——**O. 43, R. 1 — Rejection on the ground that no application lay under O. 9, R. 13.**

An appeal would lie to the District Judges only when an application would properly lie to the Court of first instance under O. 9, R. 13. Where the District Judge says, in appeal, that no application lay under O. 9, R. 13, it can hardly be said that he was entertaining an appeal against an order passed under O. 9, R. 13. 47 All 140: 6 LRA Civ. 79: 85 Ind Cas 470: AIR (Vol 12) 1925 All 267 (DB).

——O. 43, R. 1 — Refusing to remove a receiver already appointed is quite different from refusing to appoint a new receiver. 78 Ind Cas 625: 19 MLW 247: 34 MLT 6: AIR (Vol 11) 1924 Mad 614: 46 MLJ 196 (DB).

——O. 43, R. 1 — Suit does not include an execution proceeding. 73 Ind Cas 453: 45 All 148: 21 ALJ 135: AIR (Vol 10) 1923 All 460 (DB).

——**O. 43, R. 1 (d) and O. 9, R. 13 — Rejection of application.**

The words "rejecting an application" in O. 43, R. 1 (d) signify an immediate rejection and not a conditional or prospective rejection (i.e.,) an order imposing a condition before setting aside. (1917) MWN 815: 6 LW 757: 43 Ind Cas 1: AIR (Vol 5) 1918 Mad 257 (DB).

(Reversing 32 Ind Cas 984 (1) : AIR (V 4) 1917 Mad 596.)

——O. 43, R. 1 (d) — "Case open to appeal".

The words are perfectly general and they mean whether the case was 'open to appeal' and not whether an appeal could have been successfully prosecuted against the decree. 14 ALJ 332: 38 A 297: 33 Ind Cas 80: AIR (Vol 3) 1916 All 51 (DB).

——O. 43, R. 1, Cl. (t) — "Suit" — Whether includes an appeal — Application to release an appeal — Nature of.

"Suit" includes the appellate stage and an application to rehear an appeal heard 'ex parte' is an application in the suit. 19 CLJ 310 : 19 CWN 359 : 23 Ind Cas 12: AIR (Vol 1) 1914 Cal 614 (DB).

——O. 43, R. 1 (S. 588 old Code) — Letters Patent, S. 15 — Meaning of "final" — Judgment of a single Judge of High Court — Appealability.

The word "final" in the concluding sentence of S. 588, Civil Procedure Code is used not in the sense that a judgment or order falling under that section is not subject to review by the same Court or to revision by the High Court or to appeal to his Majesty in Council, but in the sense that there shall be no second appeal to a Court of higher grade. A judgment passed by a single judge of a High Court in an appeal from an order mentioned in S. 588, Civil Procedure Code, is appealable under S. 14 of the Letters Patent. (1903) 13 MLJ 497 (498) (DB).

5. Jurisdiction.

——O. 43, R. 1 (w) — Review — Appeal — Grounds for.

The right of appeal given by O. 43, R. 1 (w) is subject to the conditions laid down by O. 47, R. 7. On revision, held that the order passed by the lower Court readmitting the appeal was not wholly without jurisdiction and was otherwise just and proper. AIR (V 7) 1920 All 112 : 42 All 626 : 18 ALJ 838 (DB).

——O. 43, R. 1 (r) — and O. 39, R. 2 (3) — Appeal — Disobedience to injunction — Power of Appellate Court.

An order refusing to attach property for disobedience of an injunction comes under O. 39, R. 2 (3) and is appealable under O. 43, R. 1 (r). The Appellate Court has jurisdiction to pass an order of imprisonment in appeal. Per Oldfield, J. — Disobedience of an injunction order is an act independent of the suit and calls therefore for a separate punishment. Per Tyabji, J. — (Dissenting) — O. 43, R. 1 (r) is not sufficient to give the Appellate Court the power which is restricted to the "Court granting the injunction." In other words no appeal is intended to be given as regards the exercise of a power which is annexed to a specified Court. AIR (Vol 3) 1916 Mad 446: 27 Ind Cas 131 (DB).

——O. 43 (1) (w) — Appeal against decree passed on review — Appealability Grounds — of.

An appeal against a decree passed on an application for review of judgment is appealable on the ground that the Court which admitted the application for review had no jurisdiction to do so. (1911) 14 OC 108 : 11 Ind Cas 343.

——O. 43, R. 1 — Appeal — Jurisdiction — Question of.

A question of jurisdiction can be taken for the first time in appeal though not taken at the outset. (1909) 36 Cal 193: 5 CLJ 611: 1 Ind Cas 913 (DB).

6. No appeal.

——O. 43, R. 1 — Application for substitution of the names of the legal representatives of the deceased plaintiffs dismissed — No appeal lies. AIR (Vol 30) 1943 Oudh 24 : 1942 OWN (CC) 636 : 203 Ind Cas 125 (DB).

——O. 43, R. 1 (d), S. 104 (2) — Appeal under O. 43, R. 1 (d), abating — Application to set aside abatement — Order passed on application is not appealable.

An order passed on an application to set aside the abatement of an appeal filed under O. 43, R. 1(d) from an order refusing to set aside an ex parte decree under O. 9, R. 13, is not appealable. The words in S. 104 (2) cannot be construed to mean an order deciding the appeal on merits. AIR (Vol 28) 1941 All 338 : (1941) ALJ 516 : 1941 OWN (HC) 1010 (2) : 1941 AWR (HC) 251 : 196 Ind Cas 574.

——O. 43, R. 1 — An order of an Appellate Court, setting aside an order of the Court of first instance rejecting a plaint, and directing the Court to proceed with the trial of a suit on its merits, is not an order under O. 41, R. 23 and is not appealable under O. 43, R. 1 (u), Civil P. C. AIR (Vol 24) 1937 Lah 380 : 39 PLR 720 : 173 Ind Cas 365.

——O. 43, R. 1 — An order of transfer by the High Court under S. 24 of the Code not being a judgment either under the Code nor under any other "express enactment" is not subject to appeal. AIR (Vol 22) 1935 Rang 267 : 13 Rang 457 : 157 Ind Cas 1107 (FB).

(Overruled AIR (Vol 16) 1929 Rang 41: 114 Ind Cas 524 (FB).)

——O. 43, R. 1 (u), S. 96 — District Judge passing order setting aside rejection of plaint — Appeal.

No appeal lies within the meaning of O. 43, R. 1, (u), from an order by a District Judge rejecting a plaint. Such an order does not amount to a decree, as there has been merely a decision as to whether the plaint is properly presented so as to enable the Court to decide the matters in controversy. No appeal, on the ground that neither a decree nor an appealable order is passed by the District Judge, lies to the High Court. AIR (Vol 21) 1934 Pesh 89 : 152 Ind Cas 241 (2) (DB).

——O. 43, R. 1 — Decree removing mahant from office — Application for appointing committee to appoint mahant — Order thereon being neither a decree nor an order under S. 47 is not appealable. AIR (Vol 21) 1934 Pesh 43 : 151 Ind Cas 61.

——O. 43, R. 1 — Amendment of plaint — Amendment introducing time-barred cause of action—Dismissal of suit on merits disallowing amendment — Order of remand of case for fresh disposal after allowing amendment sought for — Appeal from order of remand — Decision held was not on a preliminary point and no appeal lay under O. 43, R. 1(u). AIR (Vol 18) 1931 Mad 1 : 33 MLW 210 : 60 MLJ 713 : 132 Ind Cas 311 (DB).

——O. 43, R. 1 — No appeal — Miscellaneous — Executing Court.

An appeal does not lie when no objection has been specifically allowed or dismissed by the executing Court. AIR (Vol 16) 1929 All 671 : 121 Ind Cas 270.

——O. 43, R. 1 — No appeal — Remand.

Though an appeal lies under O. 43, R. 1 (u) from an order of remand, no appeal will lie from the order when the order is itself made in an appeal preferred under any other clause of that rule. The

reason is that O. 43, R. 1 (u) is subject to S. 104, sub-s. (2), which provides that no appeal shall lie from any order passed in appeal (it may be an order of remand) under that section. (1928) 111 Ind Cas 789 (Oudh) (DB).

——O. 43, R. 1 — S. 151, C. P. Code.

No appeal lies from an order under S. 151, as it is not one of the orders appealable under O. 43, C. P. Code. AIR (Vol 14) 1927 Cal 867 : 104 Ind Cas 331 (DB).

——O. 43, R. 1 — When appealable.

Whether an order of remand is appealable or not should depend on whether the conditions laid down by O. 41, R. 23, have been complied with, and not on whether appellate Court purported or did not purport to make the order under R. 23. Where in the case of an order of remand where the appellate Court without deciding any of the issues in the case, reverses the decree of the trial Court and sends the case back, instead of calling for a finding on the additional issue which it frames, retaining the cases on its own file, the order of remand is not passed under O. 41, R. 23, and is not appealable under O. 43, R. 1(u), nor is the order of remand a decree within S. 2, as it does not itself finally determine all or any of the matters in controversy between the parties, and therefore no appeal lies from this order of remand as being a decree within S. 100. AIR (Vol 14) 1927 Cal 850 : 47 CLJ 69 : 55 Cal 219 : 103 Ind Cas 864 (DB).

——O. 43, R. 1 — Death prior to suit.

No separate appeal stamped as an appeal from an order lies against an order removing from the record the names of persons who admittedly died before the suit was instituted. AIR (Vol 13) 1926 Lah 513 : 8 LLJ 324 : 27 PLR 735 : 97 Ind Cas 192.

——O. 43, R. 1 — A remand order not passed on appeal from a decree is not an order under O. 41. R. 23, and so is not appealable. AIR (Vol 13) 1926 Lah 141 : 89 Ind Cas 384.

——O. 43, R. 1 — Setting aside award.

In a suit for accounts, it was agreed that there should be a preliminary decree passed to the effect that the defendant was liable to account to the plaintiffs and that the amount to be paid by the defendant should be left to the decision of five persons named in the petition. The Court in drawing up the preliminary decree clearly referred the matter of the final decree to the award of the arbitrators. No objection was ever taken to the form of the decree.

Held, that the correct interpretation to be put upon the matter was that the parties asked the Court to refer the matter in dispute to the decision of the arbitrators and the Court did so, that the question came within the second schedule of C. P. Code, and that no appeal lay against the order of the Court setting aside the award. AIR (Vol 12) 1925 Cal 924 : 29 CWN 795 : 95 Ind Cas 773 (DB).

——O. 43, R. 1 — Under O. 43, R. 1(u) of the Code. no appeal will lie against an order of remand unless that order of remand be passed under O. 41, R. 23. AIR (Vol 13) 1923 Oudh 177 : 26 OC 10 : 10 OLJ 36 : 73 Ind Cas 591.

——O. 43, R. 1 — Where the appellate Court decides the main point in a case and remands the case for disposal of remaining issues, the decision is not one on a preliminary point and thus the order is not appealable. AIR (Vol 7) 1920 Mad 759 : 12 MLW 667 : 60 Ind Cas 609 (DB).

7. Non-compliance with order for discovery (O. 11, R. 21).

——O. 43, R. 1 — An application by a person interested under O. 21, R. 89 does not fall under S. 47, for, there is now special provision for an appeal against such an order under O. 43 (1) (f) and the controversy whether an appeal did or did not lie in the case of a dispute between the judgment-debtor and the auction-purchaser is now set at rest. AIR (Vol 27) 1940 Sind 251 : ILR (1940) Kar 447 : 193 Ind Cas 247 (DB).

8. Order for attachment (O. 16, R. 10).

——O. 43, R. 1 — The question whether the property attached was capable of attachment is a question which can be raised in an appeal under O. 43, against an order directing attachment before judgment. AIR (Vol 20) 1933 Cal 757 : 37 CWN 978 : 58 CLJ 289 : 60 Cal 1351 : 147 Ind Cas 924 (DB).

9. Orders as to costs.

——O. 43, R. 1 — Order itself should be appealable.

On the objection taken by the judgment-debtors a certain sale was set aside. But the Court ordered that they should bear their own costs as well as those of the other party. On appeal by the judgment-debtors against that portion of the order only that related to costs.

Held, that appeal could lie on a portion of the order if the order itself was appealable. AIR (Vol 9) 1922 All 90 : 20 ALJ 11 : 44 All 209 : 64 Ind Cas 932 (DB).

10. Order giving or refusing to give leave (O. 22, Rr. 3 and 10)

——O. 43, R. 1 (1) and O. 22, R. 10 — Appealability — Order allowing mortgage decree-holder to implead auction-purchaser of mortgaged property in the proceedings in the suit.

An order under O. 22, R. 10, C. P. Code, allowing a mortgagee decree-holder to implead the auction-purchaser of the mortgaged property as party to the further proceedings in the suit is appealable under O. 43, R. 1 (1). 1950 AWR 563 (DB).

——O. 43, R. 1 — Suit for possession by partition — Death of defendant after preliminary decree — Application by plaintiff and others for their appointment as legal representatives — Plaintiff appointed legal representative — Application by others dismissed as time-barred — Appeal lies under O. 43, R. 1(l) — Case comes within purview of O. 22, R. 10 — Order 22, Rr. 4 and 5 do not apply. AIR (Vol 24) 1937 Lah 615 : 174 Ind Cas 898.

——O. 43, R. 1 — Court purporting to act under O. 22, R. 10.

An appeal from an order which the Judge purports to pass under O. 22, R. 10 must be entertained although that Rule does not really apply. AIR (Vol 8) 1921 Mad 599 : 41 MLJ 316 : 1921 MWN 649 : 14 MLW 287 : 44 Mad 919 : 69 Ind Cas 337 (FB).

——O. 43, R. 1 (l) and O. 22, Rr. 3 and 10 — Appeal — Order adding legal representative.

An application to be brought on record as legal representative of a deceased testator by his widow on the death of his executors who had instituted the suit could be made only under O. 22, R. 3, and orders on such application are not appealable as they are not made appealable under O. 43, R. 1(l). AIR (Vol 3) 1916 Mad 523 : 39 M 488 : 2 LW 403 : 28 MLJ 491 : (1915) MWN 327 : 17 MLT 385 : 29 Ind Cas 142 (DB).

——O. 43, R. 1 (l) — New trustee — Addition of.

An appeal lies against an order allowing application by a new trustee to be brought on the record. (1909) 6 MLT 240 : 3 Ind Cas 435 (DB).

11. Order recording or refusing to record agreement, compromise or satisfaction (O. 23, R. 3).

——O. 43, R. 1 (m) — Applicability — Counter affidavit to petition setting up compromise — Order on — Appealability. AIR (Vol 37) 1950 Mad 433 : (1950) 1 MLJ 151.

——O. 43, R. 1 (m) and O. 23, R. 3 — Consolidated order recording compromise and granting decree in terms thereof — Right of appeal.

Under O. 23, R. 3, C. P. Code, the Court must, no doubt, first pass an order recording the agreement, compromise or satisfaction, as the case may be, and then pass a separate order to the effect that a decree be passed in accordance with the agreement, etc., so far as it relates to the suit, but the mere fact that the Court, instead of passing two separate orders, makes one consolidated order cannot deprive the aggrieved party of his right of appeal under O. 43, R. 1 (m), C. P. Code, which lays down that an appeal shall lie from an order under O. 23, R. 3, recording or refusing to record an agreement, compromise or satisfaction. AIR (Vol 37) 1950 Pepsu 26 (DB).

——O. 43, R. 1 (m) — Order on compromise of execution proceedings — Appealability. 1949 ALJ 545.

——O. 43, R. 1 — An appeal lies from an order recording or refusing to record a compromise or agreement under O. 43, R. 1(m). Even assuming no appeal lies, the High Court can interfere under its revisional powers, if the interests of the public institution have not been considered by the lower Court. AIR (Vol 31) 1944 Pat 115 : 10 BR 435 : 9 CLT 85 : 212 Ind Cas 35.

——O. 43, R. 1(m) — Where the Court had already recorded the agreement arrived at between the parties no appeal lies under O. 43, R. 1(m). AIR (Vol 28) 1941 Oudh 598 : 1941 OWN (CC) 1077 : 1941 AWR (CC) 329 : 17 Luck 17 : 196 Ind Cas 496 (DB).

——O. 43, R. 1(m) — Judge on Original Side of High Court directing compromise to be recorded under O. 23, R. 3 — Compromise recorded by Deputy Registrar, who holding that no fresh decree could be drawn up.

On the Original Side of the High Court, the Judge directed the compromise to be recorded under O. 23, R. 3. The same was recorded by the Deputy Registrar who, however, was of the opinion that no fresh decree could be drawn up. In this procedure adopted by the Deputy Registrar, the defendants also acquiesced:

Held, that the order that no fresh decree could be passed did not come under O. 43, R. 1(m) :

Held, also, that since the defendants themselves acquiesced in the procedure although they had by their petitions asked for decrees, they could not subsequently be permitted to urge that decrees ought not to be passed because the plaintiffs did not take the necessary steps at the time to get the opinion of the Deputy Registrar corrected;

Held, further that the High Court could direct that the operative part of the recorded adjustment with certain modifications should be treated as if it was a decree. AIR (Vol 28) 1941 Rang 316 : 1941 Rang LR 774 : 198 Ind Cas 404 (DB).

——O. 43, R. 1 (m) — An appeal from an order under O. 23, R. 3 recording a compromise is not incompetent merely because it was preferred after a decree had been made. AIR (Vol 25) 1938 Lah 766 : 40 PLR 664 : 178 Ind Cas 829.

——O. 43, Rr. 1, 2, O. 41, R. 1 — Consolidated order recording compromise and granting decree thereon — Appeal — Copy of order filed — Prayer that order recording compromise and granting decree be set aside and case remanded.

An appeal from the consolidated order recording a compromise and granting a decree in terms thereof was filed with a copy of such order. The appeal contained a prayer that the order recording the compromise and the decree be set aside and the case remanded for trial on merits:

Held, that the appeal was one under O. 43, R. 1 (m), and the further prayer for setting aside the decree was merely consequential :

Held, also that the copy of the consolidated order satisfied the requirements of O. 41, R. 1, read with O. 43, R. 2. AIR (Vol 25) 1938 Lah 350 : 40 PLR 138 : 177 Ind Cas 680.

——O. 43, R. 1(m), O. 41, R. 27 — Order recording compromise — Absence of contest.

Order 43, R. 1(m), gives a right of appeal against an order recording a compromise without any restriction as to the nature of that order whether passed after contest or without contest. It cannot be assumed that an order is in fact a consent order merely because there was no contest.

An appeal lies against an order recording a compromise which has ripened into a decree even if no appeal is filed against the decree itself. AIR (Vol 23) 1936 Mad 385 : (1936) MWN 86 : 70 MLJ 400 : 43 MLW 722 : 163 Ind Cas 161.

——O. 43, R. 1(m) and O. 23, R. 3 — Order refusing to record adjustment out of Court — Appeal lies under O. 43, R. 1(m). AIR (Vol 23) 1936 Nag 8 : 31 NLR 72 Sup : 160 Ind Cas 202.

(Overruled in AIR (Vol 27) 1940 Nag 349 : 191 Ind Cas 566.)

——O. 43, R. 1 (m), S. 96, O. 23, R. 3 — Section 96 applies only to a case of a decree by consent of parties to the suit, while O. 23, R. 3 applies to an order recording a compromise and O. 43, R. 1(m) allows an appeal against an order passed under O. 23, R. 3. AIR (Vol 23) 1936 Sind 59 : 29 SLR 437 : 163 Ind Cas 240 (DB).

——O. 43, R. 1 — Scope.

Right of appeal under O. 43, R. 1, against an order under O. 23, R. 3, is not lost on the ground that the decree involved in the order has been passed, although it would be more correct to appeal against the decree at the same time. AIR (Vol 21) 1934 Cal 846 : 59 CLJ 421 : 61 Cal 910 : 153 Ind Cas 807 (DB).

—— O. 43, R. 1 — An order pased in contravention of O. 23, R. 3 is appealable under O. 43, R. 1 (m). AIR (Vol 21) 1934 Cal 479 : 149 Ind Cas 126 (DB).

——O. 43, R. 1 — An appeal from an order under O. 23, R. 3, recording a compromise is not incompetent merely because it was preferred after a decree had been made. It is not necessary to prefer an appeal both from the order and the decree passed in pursuance of the order. AIR (V 20) 1933 Cal 94 : 57 CLJ 26 : 36 CWN 1013 : 141 Ind Cas 732 (DB).

——O. 43, R. 1 — Competency of appeal — Compromise — Refusal to record.

If an appeal is permissible to a party who is aggrieved by an order recording a compromise, whatever the reasons behind the order may be, it is but just that similar remedy should be available to a party aggrieved by the order refusing to record a compromise. AIR 1924 Lah 248, not Foll. AIR (V 16) 1929 Nag 275 : 119 Ind Cas 673 : 12 NLJ 124.

——O. 43, R. 1 — Recording of.

There is nothing in O. 23, R. 3, or in O. 43, R. 1, cl. (m) to suggest that if the Court fails to demand satisfactory proof of the alleged compromise, a party to the suit who is deprived of his right to contest the compromise. is also deprived of his right to appeal against the order. S. 96, cl. 3 presupposes that the party appealing has consented to the decree being passed. It does not purport to deal with a case where the aggrieved party was not a consenting party and had never been asked by the Court whether he had consented to a decree being passed or not. In such a case he does not appeal against the decree passed by consent, but attacks the very foundation on which the decree is passed. 114 Ind Cas 101 : AIR (V 16) 1929 Sind 32 (DB).

——O. 43, R. 1 — Refusal to record.

Where the Court, holding that the compromise is not valid and binding on the parties refuse to record the same, an appeal lies under O. 43, R. (1),

(m) assailing the grounds for refusal to record. 103 Ind Cas 80 : AIR (V 14) 1927 Lah 546 (DB).

——O. 43, R. 1 — Decree.

Where the decree is passed immediately and as part of the order recording the compromise, the order recording the compromise is appealable. 87 Ind Cas 124 : AIR (V 12) 1925 Mad 606 : 48 MLJ 249.

——O. 43, R. 1 — Decree.

The mere fact that an order recording a compromise or refusing to record a compromise has been followed by a decree does not deprive a party of his statutory right to prefer an appeal against such order. 80 Ind Cas 696 : 6 LLJ 187 : AIR (V 11) 1924 Lah 466.

——O. 43, R. 1 — No appeal against finding of no compromise.

O. 23 R. 3 applies, as its very wording shows, only where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plantiff in respect of the whole or any part of the subject matter of the suit. The rule does not lay down what the Court is to do if it finds that there has been no adjustment, compromise or satisfaction. Consequently an order finding that there has been no compromise is not an order under R. 3 of O. 23 and it is not appealable under R. 1 (m) of O. 43 as that rule presupposes the existence of an agreement, compromise or satisfaction 73 Ind Cas 177 : AIR (V 11). 1924 Lah 248.

——O. 43, R. 1 — Matters not covered by suit.

Where a compromise embraces matters not relating to the suit and the decree following such compromise gives reliefs which are not unlawful but which could not have been given, if the suit had been decided after trial the remedy is by way of appeal. If the objection could be taken in execution proceedings, the legislature would not have provided special provisions in O. 43 for an appeal. AIR (V 9) 1922 LB 22 : 64 Ind Cas 391 (DB).

——O. 43, R. 1 (m), O. 12, R. 6 and O. 23, R. 3 — Judgment and decree on admission of defendant — Dismissal of petition — Appeal.

Orders rejecting petitions field by plaintiff and defendants by which the plaintiff prays for judgment against the defendants and the defandants state that they consent to a decree being made against them, are not appealable under the C.P.C unless such petitions are presented and dealt with in the Court on the footing that they, taken together, amount to a lawful agreement or compromise within R. 3 of O. 23 C.P.C. 44 Ind Cas 145 AIR (V 6) 1919 Cal 458 (1) (DB).

——O. 43, R. 1 (m) and O. 23, R. 3 — Compromise — Order refusing to record — Appeal.

The remedy of a party dissatisfied with the order of a Court refusing to record a petition of compromise is to appeal from the order so refusing and not from the judgment given by the Court on the merits. 42 Ind Cas 192 (1) : AIR (V 5) 1918 Cal 431 (DB).

——O. 43, R. 1 (m) — Decree — Appeal — C.P.C., O. 23, R. 3.

A decree under O. 23, R. 3 can be passed only after there has been an order that the compromise be recorded ; this not a mere matter of form and a consent decree pased without such order is liable to be set aside on appeal notwithstanding the bar under S. 96 (3). AIR (V 4) 1917 Cal 607 : 43 C 85 : 33 Ind Cas 769 (DB).

12. Order refusing to set aside abatement or dismissal of a suit (O. 22, R. 9).

——O. 43, R. 1 (k) — 'Suit' — If includes appeal— Order under O. 22, Rr. 9 and 11 refusing to set aside abatement of appeal — If appealable.

'The word 'suit' in O. 43, R. 1 (k), C. P. Code, includes an appeal. Accordingly, an appeal lies against an order under O. 22, R. 9 read with R. 11, refusing to set aside the abatement of an appeal. AIR 1929 Cal 532 (2), Diss. from. ILR (1949) Nag 437 : 1949 NLJ 487.

——O. 43, R. 1 — Appeal from refusal to set aside abatement of appeal.

The use of the word "suit" in Cl. (k) of R. 1 of O. 43, does not exclude "appeal". An appeal lies from an order under O. 22, R. 9 refusing to set aside abatement of appeal. AIR (V 28) 1941 Mad 51 : 52 MLW 476 : (1940) MWN 1005 : (1940) 2 MLJ 562 :193 Ind Cas 832.

——O. 43, R. 1 — Under O. 43, R. 1 (k), an appeal lies from an order under O. 22, R. 9 and not from O. 22, R. 4 — Order 22, R. 9 provides a concurrent remedy of which the party aggrieved under R. 4 may avail himself. AIR (V 27) 1940 Sind 137 : 191 Ind Cas 447 (DB).

——O. 43, R. 1 — An order that an appeal abates, is appealable as a decree.

Similarly an order directing that an appeal or cross-objection abates is also appealable. AIR (Vol 26) 1939 Nag 39 : 1938 NLJ 399 : ILR (1940) Nag 324 : 181 Ind Cas 411 (DB).

——O. 43, R. 1 — Order refusing to set aside abatement of appeal is appealable under O. 43, R. 1 (k). AIR (V 26) 1939 Pat 623 : 6 BR 187 : 20 PLT 715: 185 Ind Cas 498 (DB).

——O. 43, R. 1 — An order refusing to set aside an abatement is appealable. AIR (V 25) 1938 Pat 125: 18 PLT 1014 : 4 BR 379 : 17 Pat 84 : 174 Ind Cas 40.

——O. 43, R. 1 — Order 43, R. 1 (k) expressly gives a right of appeal to a party against an order under O. 22, R. 9. AIR (V 21) 1934 Lah 315 : 147 Ind Cas 699.

——O. 43, R. 1 — An appeal against a finding that a suit has abated is not one against an order under O. 43, R. 1 (k), but is one against the decree in suit and hence a copy of the decree should accompany the memo of appeal and proper court-fee paid on it. AIR (V 20) 1933 Sind 36 : 26 SLR 81 : 141 Ind Cas 299 (DB).

——O. 43, R. 1 — No Appeal — Abatement.

No appeal lies from an order setting aside an abatement. AIR (V 13) 1926 Cal 444 : 87 Ind Cas 173 (DB).

——O. 43, R. 1 — Setting aside of.

Order setting aside the abatement and allowing substitution of heirs of deceased party cannot be questioned in appeal from the decree in the suit whether such order is passed before, or simultaneously with the decree, such an order not being one which affects the decision of the case with reference to its merits within S. 105. AIR (V 12) 1925 Cal 473 : 85 Ind Cas 100 : 40 CLJ 588 (DB).

——O. 43, R. 1 — Competency of appeal — Abatement.

Suit abating against one of the defendants — Application for setting aside abatement — Court dismissing applicatoin for setting aside abatement and holding that consequently suit abated in toto in special circumstances of the case — Former adjudication is appealable under O. 43, R. 1 (k) and latter adjudication is appealable as a decree. AIR (V 12) 1925 Lah 456 : 86 Ind Cas 104 : 26 PLR 32 (DB).

——O. 43, R. 1 — An appeal lies from an order refusing to set aside the abatement of an appeal, since O. 22, R. 11 makes the order apply to appeals. AIR (V 12) 1925 Pat 162 : 85 Ind Cas 1010 : 2 Pat LR Civ. 279 (DB).

——O. 43, R. 1 — Applications by rival claimants for coming on record as legal representatives of plaintiff were made; one application was allowed and the other was dismissed as being out of time.

Held, on appeal lies under O. 43, R. 1 (k) or S. 96 against order of dismissal. AIR (V 11) 1924 Mad 622 : 46 MLJ 129 : 79 Ind Cas 860 : 19 MLW 113 : 1924 MWN 58 (DB).

——O. 43, R. 1 (k) — Punjab Courts Act (XVIII of 1884), S. 70 (1) (a).

No appeal lies under O. 43, R. 1 (k) if there has been no application to set aside an abatement. An order of abatement cannot be interfered with in revision if a person fails to set it aside. 95 PR 1911 : 262 PWR 1911 : 13 Ind Cas 963.

13. Order for setting aside or refusing to set aside sale (O. 21, Rr. 72, 90 or 92).

——O. 43, R. 1 (j) — Order dismissing application under O. 21, R. 90 for default— Appeal.

An appeal lies from an order dismissing an application for setting aside a sale under O. 21, R. 90, C. P. Code, default of appearence of the applicant. (1949) 53 Cal WN (1 D.R.) 28.

——O. 43, R. 1 — An order under O. 21, R. 92, upon an application under R. 90 of that order is appealable under O. 43, R. 1 (j). AIR (V 29) 1942 All 257: (1942) ALJ 416 : 1942 AWR (HC) 155 and 103 : 1942 RD 760 : ILR (1942) All 237 : 203 Ind Cas 93 (DB).

——O. 43. R. 1 — Under O. 43 R. 1 (j) it is the refusal to set aside the sale that is made appealable and not a mere order confirming the sale. AIR (V 29) 1942 Cal 480 : 46 CWN 773 : 202 Ind Cas 163 (DB).

——O. 43, R. 1 (j) — An order of Court declining to entertain an application under O. 21, R. 90, Civil P. C., proviso, falls under O. 43, R. 1 (j). AIR (Vol 26) 1939 Mad 482 : 49 MLW 158 : (1939) MWN 154: ILR (1939) Mad 349 : (1939) 2 MLJ 132 : 184 Ind Cas 60.

——O. 43, R. 1 (j) — Execution sale — Decree-holder allowed to bid for and set-off purchase-price — Decree-holder failing to deposit 25 per cent. —Court ordering setting aside of sale:

Held, that the order was appealable under O. 43, R. 1 (j), as the decree-holder was a party to the proceedings. AIR (V 26) 1939 Lah 46 : 41 PLR 286.

(Reversed in AIR (V 26) 1939 Lah 210 : 186 Ind Cas 152).

——O. 43, R. 1 — Order refusing to add party under O. 22, R. 10 — Appeal lies under O. 43, R. 1 (j) which is not confined to the case of substitution of parties. AIR (V 18) 1931 Cal 594 : 35 CWN 296: 134 Ind Cas 307 (DB).

——O. 43, R. 1 — No appeal — Sale.

Where a sale is confirmed and no application is made to set it aside, no appeal lies from the order and definitely no second appeal is permitted. AIR (V 16) 1929 Lah 778 : 120 Ind Cas 165 (DB).

——O. 43, R. 1 — Competency of appeal — Sale — Application under O. 21, R. 90 — Dismissal for default.

Where a person applies under O. 21, R. 90 but the application is dismissed for his non-appearance, and the opposite party is present and ready to contest, the order dismissing the application is, an order under O. 43, R. 1 (j) and is, therefore, appealable. AIR (V 15) 1928 Cal 25 : 55 Cal 616 : 104 Ind Cas 759 (DB).

——O. 43, R. 1 — O. 21, R. 90 — There is no appeal against an order refusing to set aside the dismissal of an application under O. 21, R. 90, for default AIR (V 14) 1927 Cal 938 : 45 CLJ 60 : 100 Ind Cas 343 (DB).

——O. 43, R. 1 — O. 21, R. 90 — Where a proceeding under O. 21, R. 90 was compromised with a condition that the judgment-debtor should pay to the decree-holder a certain sum within a certain period but the judgment-debtor failed to pay the amount within the prescribed time and his application to set aside the sale was disallowed and the sale confirmed without his allegations being gone into.

Held, appeal lay under O. 43, R. 1. AIR (V 11) 1924 Pat 346 : 79 Ind Cas 594 : 4 PLT 735 (DB).

——O. 43, R. 1 — O. 21, R. 92 — Auction-purchaser.

An execution sale cannot be set aside without notice to the auction-purchaser, and if the original Court has passed an order adverse to the interest of the auction-purchaser, he is entitled to appeal and test the legality of the order in the superior tribunal. AIR (V 8) 1921 Lah 156 : 3 LLJ 463.

——O. 43, R. 1 (j) — Execution sale — Order setting aside — Second Appeal.

There is no second appeal against an order setting aside a sale on the ground of fraud under O. 21, R. 92 of the C. P. C. AIR (V 7) 1920 Lah 377: 168 PR 1919 : 2 Lah LJ 41 : 54 Ind Cas 941 (1).

——O. 43, R. 1 (j) and O. 50, R. 1 (a) — Order under O. 21, R. 92, Execution of small cause decree transferred to the original side — Appealability.

An appeal lies under O. 43, R. 1 (j) from an order under O. 21, R. 92 (2) in execution of a small cause decree transferred to the original side for execution. AIR (V 7) 1920 Mad 290 : 10 LW 556 : (1920) MWN 151 : 27 MLT 130 : 53 Ind Cas 958.

——O. 43, R. 1 (j) — Dismissal for default of an application under O. 21, R. 90 — Appeal.

An order dismissing for default, an application under O. 21, R. 90 is appealable. AIR (V 5) 1918 Cal 474 : 38 Ind Cas 63 (DB).

——O. 43, R. 1 (j) and O. 21, Rr. 90 and 92 — Dismissal for default.

An appeal lies against an order on an application under O. 21, R. 90 to set aside a sale, which is dismissed for default, this dismissal amounting to an order under S. 92. But no appeal lies against an order under S. 90 dismissing an application to set aside the dismissal. AIR (V 4) 1917 Cal 815 : 25 CLJ 163 : 38 Ind Cas 598 (DB).

——O. 43, R. 1 (j) — Order under O. 21, R. 89 — Appeal if lies from.

An appeal lies from an order refusing to set aside a sale under O. 21, R. 89 whether the purchaser is a decree-holder himself or stranger. (1912) MWN 756 : 14 Ind Cas 326 (DB).

——O. 43, R. 1 (j) — Order refusing leave to bid under O. 21, R. 72 C. P. C. — Not Appealable.

An order refusing leave to a decree-holder to bid under O. 21, R. 72 of the C. P. C. is not appealable. 38 C 717 : 15 CWN 862 : (1911) 2 MWN 449 : 13 Bom LR 694 : 14 CLJ 241 : 8 ALJ 1117 : 6 LBR 26: 4 Bur L T 257 : 11 Ind Cas 545 (PC).

——O. 43, R. 1 (j) — Order refusing deposit under O. 21, R. 89 — Appeal.

An appeal lies under O. 21 R. 92 and O. 43, R. 1 (j) against an order passed by an executing court refusing to receive the amount of decree and costs from a mortgage under O. 21, R. 89 C. P. C. 178 PWR 1911 : 12 Ind Cas 733.

——O. 43, R. 1 (j) (S. 588, Cl. 16, old Code) (S. 244, old Code) — Order setting aside a sale on the ground of 'fraud' — Appealability.

S. 588, Cl. 16, does not apply to a case where a sale is set aside on the ground of fraud. S. 244

applies and the order is appealable. (1900) 28 C. 116 (117) (DB).

14. Pronouncing judgment against party (O. 8, R. 10).

——O. 43, R. 1 (b) — Order under O. 8, R. 10.

Where although the judgment did not say specifically that it was being pronounced against defendant No. 1 (appellant) under O. 8, R. 10 yet referred not only to the failure of defendant No. 1 to file his written statement in time but also to the fact that on the next date he did not appear, it was held that the judgment must be regarded as essentially passed against him because he did not file his written statement as called upon to do by the Court and the Court's action must be construed as taken under O. 8, R. 10 and the appeal under O. 43, R. 1 (b) was, therefore, competent. AIR (V 32) 1945 Mad 299 : (1945) 1 MLJ 394 : 1945 MWN 225 : 58 MLW 179 : ILR (1945) Mad 866 (DB).

——O. 43, R. 1 — Refusal to amend decree.

Court amending decree under S. 151 — Appeal lies against amended decree — Court refusing to amend decree — Refusal does not amount to a decree and order is not appealable. AIR (V 27) 1940 Bom 10 : 41 Bom LR 1170 : ILR (1939) Bom 708 : 186 Ind Cas 70.

——O. 43, R. 1 — Under O. 43, R. 1 (b), Civil P. C. an appeal lies only from an order pronouncing judgments against a party under O. 8, R. 10, Civil P. C. No appeal lies under the said rule from an order holding that the particulars supplied by a party are sufficient and rejecting an application by the opposite party for striking off his pleadings, AIR (V 18) 1931 Lah 77 : 31 PLR 946 : 131 Ind Cas 129.

15. Parties.

——O. 43, R. 1 (s) — A Receiver cannot appeal from an order removing him from the office, though the order can be appealed from by the parties to the suit. AIR (V 20) 1933 Cal 52 : 36 CWN 903 : 60 Cal 162 : 57 CLJ 408 : 142 Ind Cas 79 (DB).

——O. 43, R. 1 — Addition of.

Where in the case of devolution of an interest during the pendency of a suit the Court orders addition of parties under O. 22, R. 10, the proper remedy of the party dissatisfied with such order is to prefer an appeal under O. 43, R. 1 (l) and not to invoke the aid of S. 115. 104 Ind Cas 842 : 54 Cal 716 : AIR (V 14) 1927 Cal 844 (DB).

——O. 43, R. 1— Appointment of Receiver.

If a Receiver is appointed, an appeal from interlocutory order, the only person materially prejudiced thereby would be the person entitled to present possession. Where there is no suggestion that any of the defendants is entitled to present possession, held, that it is not necessary to have them on the record in the appeal. 77 Ind Cas 783 : 24 CWN 86 : AIR (V11) 1924 Cal 456 (DB).

——O. 43, R. 1 (j) — Auction purchaser's right to appeal.

An auction purchaser can appeal against an order setting aside the sale on the ground of irregularity even if the decree holder has compromised his claim with the judgment debtor. He is a party to the proceedings and has a right to appeal. (1911) 13 CLJ 535 : 15 CWN 685 : 10 Ind Cas 148 (DB).

——O. 43, R. 1 (s), O. 40 R. 1 Cl. (b) Ss. 588 Cl. 24, 503 (b), old Case — Appeals from orders — Order directing receiver to take possession — Appeal by stranger in possession :

Appeal lies by a stranger in possession from an order directing a receiver to take possession even though no appeal was preferred from an order appointing the receiver, the stranger being no party to the original order. (1909) 13 CWN 654 (658) : 36 Cal 713 (DB).

16. Power of Court.

——O. 43, R. 1 (u), O. 41, R. 23, S. 151 — Order of remand under O. 41, R. 23 — order under inherent power.

Rule 23 of O. 41, applies to an order of remand where an Appellate Court has reversed a decree and all the questions arising in the case have not been decided by the Court of first instance. Where all the questions were decided by the Court of first instance, the order of remand passed by the Appellate Court is not one under O. 41, R. 23, but only under its inherent powers and no appeal lies from such an order. AIR (Vol 30) 1943 Oudh 35 : 1942 OWN (CC) 520 : 1942 RD 764 : 1942 AWR (CC) 322 (2) : 203 Ind Cas 236 (DB).

——O. 43, R. 1 (a) — Section 12, Court Fees Act relates to valuation and not to the decision of jurisdiction on question or principle — Consequently the Court has power to decide the question of jurisdiction in an appeal filed under O. 43, R. 1 (a), from an order returning the plaint for presentation to the proper Court. AIR (V 25) 1938 Nag 481: 1938 NLJ 214 : 178 Ind Cas 97.

——O. 43, R. 1 — Order of remand pased by lower appellate Court under inherent powers under S. 151, before the amendment of Cl. (u), is not appealable, though the appeal comes on for hearing after the amendment, the amendment of Cl. (u) not being restrospective. 8 LRA Rev. 188 : 101 Ind Cas 687 : AIR (V14) 1927 All 496.

——O. 43, R. 1 (u) and O. 41, Rr. 23 and 25 — Remand — Inherent power — No appeal.

An Appellate Court has, apart from Rr. 23 and of 25 of O. 41 of the C.P.C., inherent power under S 151 of the C.P.C to remand a case for re-trial. No appeal lies against such an order. The power of remand should, however, be exercised with the very great caution. 3 PLJ 253 : 4 PLW 450 : 43 Ind Cas 959 : AIR (V 5) 1918 Pat 505 (DB).

Also 39 MLJ 536 : 12 LW 667 : AIR (V7) 1920 Mad 759.

17. Revision

——O. 43, R. 1 (a) — Applicability — Order under O. 32, R. 2, directing plaint filed by minor without next friend to be taken off the file — Appeal — Revision — Competency — S. 115.

An order under O. 32, R. 2, C.P, Code, directing a plaint to be taken off the file on the ground that the plaintiff therein was a minor suing without a next friend as required by O. 32, R. 1, C. P. Code, is not an order falling under O. 7, R. 10, C. P. Code, and hence no appeal lies from an order. A revision application is therefore competent against such an order under S. 115. AIR (V39) 1952 Cal 381.

——O. 43, R. 1 — Failure to object to maintainability of appeal does not make the appellate order valid. But the party's failure can be taken into account by the High Court in considering whether it should interfere in revision filed by the aforesaid party against the appellate order. AIR (Vol 28) 1941 Mad 17 : 1940 MWN 833 : (1940) 2 MLJ 374 : 52 MLW 375.

——O. 43, R. 1 — The Appellate Court's order under O. 43, R. 1 (a), is not immune from the operation of S. 115. AIR (Vol 28) 1941 Nag 278 : ILR (1941) Nag 543 : 1941 NLJ 245 : 198 Ind Cas 34 (DB).

——O. 43, R. 1 — A wrong order returning an appeal for presentation to proper Court is revisable. (1940) 42 PLR 364.

——O. 43, R. 1(u), O. 1, R. 10 — Order of Appellate Court adding a party to suit — Revision.

An order of a lower Appellate Court adding a party to the suit, made under O. 1, R. 10(2), read with S. 107, is not appealable as it does not find a place in O. 43, R. 1. It is also not one which can be assailed in revision because it is clearly an interlocutory order. AIR (Vol 26) 1939 Oudh 102 : 1939 OWN (CC) 181 : 14 Luck 447 : 179 Ind Cas 1004 (DB).

——O. 43, R. 1(m) — Compromise — Trial Court holding there was compromise — No separate order as to compromise recorded — Party appealing — Appellate Court holding decree to be consent decree dismissing appeal — No finding as to compromise — Appeal is under O. 43, R. 1(m) — Second appeal is not maintainable — Revision lies against appellate order. AIR (Vol 23) 1936 Lah 963 : 168 Ind Cas 328 (DB).

——O. 43, R. 1(j) — Where the Court confirms the sale on the very day on which the declaration is made about the decree-holder being the purchaser without postponing it till the expiry of 30 days to enable the judgment-debtor to take advantage of the provisions of O. 21, Rr. 89 and 90, Civil P. C. the Court's order must be set aside in revision even if the order is not open to appeal under O. 43, R. 1(j), Civil P. C. AIR (Vol 21) 1934 Oudh 25 : 11 OWN (CC) 18 : 9 Luck 393 : 147 Ind Cas 1077 (DB).

——O. 43, R. 1(m) and (w) — Filing of compromise petition by pardanashin lady — Court accepting it — Subsequent denial by the lady — Order re-called and parties asked to proceed with case:

Held, that no appeal lay and that no interference in revision or under S. 151 was called for. AIR (Vol 21) 1934 Pat 41 : 146 Ind Cas 933.

——O. 43, R. 1 — District Munsif passing erroneous order from which no appeal lies — Appeal erroneously entertained by District Judge — In revision High Court will set aside the appellate order and revise the order of the District Munsif. AIR (Vol 19) 1932 Mad 714 : 36 MLW 646 : (1932) MWN 1244 : 139 Ind Cas 167.

——O. 43, R. 1 — Revision.

Wallace, J.—Order granting an application praying that the abatement of a suit to set aside on the ground that O. 22, R. 3 did not apply, but O. 22, R. 10 applied, is merely an order that there has been no abatement and does not purport to give or refuse to give leave to continue the suit under O. 43, R. 1, Cl. (e) and therefore revisable. AIR (Vol 15) 1928 Mad 914 : 55 MLJ 253 : 51 Mad 701 : 28 MLW 164 : 1928 MWN 434 : 112 Ind Cas 116. (FB).

——O. 43, R.1 — Where an appellate Court dismisses an appeal from an order of the lower Court setting aside an execution on sale, the dismissal is not open to revision. AIR (Vol 12) 1925 All 264 : 6 LRA Civ 63 : 85 Ind Cas 660 (DB).

——O. 43, R. 1 — O. 21, R. 90.

The effect of the dismissal of an application under R. 90 even for default is to confirm the sale under R. 92 and hence an appeal lies against the order and the High Court has no jurisdiction to interfere with the order in revision. AIR (Vol 12) 1925 Cal 510 : 41 CLJ 286 : 79 Ind Cas 351 (DB).

——O. 43, R. 1 — Order of an appellate Court returning a plaint being appealable, no revision lies from such an order. AIR (Vol 12) 1925 Oudh 70 : 79 Ind Cas 1024.

——O. 43, R. 1(s) — Receiver in execution of a mortgage decree — Third party — Appeal — Revision.

Where a Receiver is appointed in execution of a mortgage decree overruling the objections of a third party, the latter has no right of appeal but he can prefer a revision to the High Court. AIR (Vol 5) 1918 Pat 364 : (1918) Pat 138 : 4 PLW 414 : 45 Ind Cas 177 (DB).

——O. 43, R. 1(t) — Appeal — Order refusing to restore application.

No appeal lies against an order refusing to restore an application to set aside an appellate decree which has been dismissed for default. But where there has been a serious miscarriage of justice revision lies. AIR (Vol 4) 1917 All 397 : 40 Ind Cas 336 (DB).

——O. 43, R. 1, Ss. 104 and 115 (Ss. 622 and 588, old Code) — Scope — Erroneous order rejecting insolvency petition — Remedy — Appeal — Revision.

Where a Judge rejects an insolvency application holding wrongly that he has no jurisdiction there is no appeal under S. 588 but the High Court can interfere under S. 622. (1910) 14 CWN 143 : 2 Ind Cas 856.

——O. 43, R. 1 (a) — Return of plaint — Small Cause.

In a Small Cause suit of below Rs. 2,500 invalue, no further appeal lies even where the Appellate Court reverses the first Court's order returning the plaint to be presented to a Court having jurisdiction therein. But the appeal itself can be treated as an application for revision. 96 PLR 1909 : 108 PWR 1909 : 4 Ind Cas 977.

——O. 43, R. 1 (a) (Ss. 588 cl. (6), 57, 582, old Code) — Order of Appellate Court returning appeal to be returned to proper Court — Appeal.

No appeal lies from the order of an appellate Court returning an appeal memorandum to be presented to the proper Court, though an appeal will lie from such order of the Appellate Court returning a plaint, but is properly the subject of revision by the High Court under S. 622, C. P. C. 14 M 462, diss. from. (1904) 31 C 344 (348).

18. Return of memo of appeal, and returning a plaint to be presented to proper Court (O. 7, R. 10).

——O. 43, R. 1 (a) — Order returning plaint by first appellate Court — If appealable.

Under O. 43, R. 1 (a), C. P. Code, an appeal lies from an order returning the plaint for presentation to proper Court, although it is made by the first Court of appeal. AIR (V 36) 1949 Ajmer 41.

——O. 43, R. 1 — Where the Court returns the plaint for presentation to the proper Court and the plaintiff represents it there, the mere fact that he has already presented the plaint in that Court does not disentitle him to prosecute an appeal filed by him against the decision of the lower Court returning the plaint, when he has complied with the orders in order to save limitation and to safeguard his position in case his appeal is dismissed. AIR (V 26) 1939 Lah 18 : 40 PLR 975 : 181 Ind Cas 396.

——O. 43, R. 1 — O. 7, R. 10 is not restricted only to those cases in which, the Court for want of territorial jurisdiction returns the plaint. A plaint returned on the ground of pecuniary jurisdiction is also to be considered as returned under this provision and not under S. 151. Such an order returning the plaint for want of pecuniary jurisdiction and for presentation to proper Court is appealable. AIR (V 25) 1938 Sind 124 : ILR (1939) Kar 50: 175 Ind Cas 684.

——O. 43, R. 1 (a) — Order returning application to sue in forma pauperis for presentation to proper Court.

An order returning for presentation to the proper Court a petition for permission to sue in forma pauperis is not an order returning a plaint and is not, therefore, appealable. AIR (V 22) 1935 Mad 1043 : 42 MLW 647 : (1935) MWN 1135 : 158 Ind Cas 1012.

——O. 43, R. 1 — No appeal — Return of memorandum.

No appeal lies from an order of an appellate Court returning a memorandum of appeal to be presented to the proper Court. AIR (Vol 17) 1930 Lah 832: 31 PLR 536 (DB).

——O. 43, R. 1 — Appeal memorandum returned.

An order returning a memorandum of appeal for presentation in proper Court is not an appealable order. (1929) 117 Ind Cas 849: 32 CWN 693 (DB).

——O. 43, R. 1 — Competency of appeal — Return of plaint.

Appeal lies from an order of an appellate Court returning a plaint. AIR (Vol 12) 1925 Oudh 70: 79 Ind Cas 1024.

——O. 43, R. 1 — No appeal lies from an order of a District Judge returning a memorandum of appeal on the revenue side for presentation to the appellate Court on the Revenue side. AIR (Vol 8) 1921 All 177 : 63 Ind Cas 951 : 19 ALJ 868 (DB).

——O. 43, R. 1 (a) — "Plaint" — Memo. of appeal.

The word "plaint" in R. 1 (a) of O. 43 of C. P. C. does not include a memo. of appeal. No appeal lies against an order returning the memo. of appeal for presentation to proper Court; revision however is competent. AIR (Vol 7) 1920 Lah 120: 2 Lah LJ 366: 56 Ind Cas 865.

——O. 43, R. 1 (a) and O. 7, R. 10 — Appeal — Forum — Order returning plaint — Compliance with, effect of.

Where a Sub-Judge returns a plaint for over Rs. 5,000 for presentation to the Court of the Dt. Munsif holding it to be grossly overvalued, an appeal against the order lies to the High Court and not to the District Court. The forum of appeal depends not upon the value as adjudged but upon the value as accepted by the plff. after adjudication. 34 Cal 954 Foll. The mere fact that the plff. obeyed the order of the Sub-Judge by presenting the plaint in the Munsif's Court did not deprive him of his right of appeal. AIR (Vol 6) 1919 Cal 447: 23 C WN 942: 53 Ind Cas 1001 (DB).

——O. 43, R. 1 (a) — Right to appeal — Not lost by presentation to court directed.

Plff. does lose his right to appeal against order of a munsif returning the plaint, by electing to file the plaint in the court to which he is directed. AIR (Vol 6) 1919 Mad 1062: 41 Mad 721: 34 MLJ 397: 45 Ind Cas 89 (DB).

——O. 43, R. 1 (a) — Rejecting plaint under O. 7, R. 11.

An order rejecting a plaint under O. 7, R. 11 is not appealable when such order is based on a question of valuation pure and simple. AIR (Vol 6) 1919 Pat 270 : 4 Pat LJ 57 : 49 Ind Cas 442.

——O. 43, R. 1 (a) — Order for return of plaint — Confirmed on appeal — Second appeal — Revision, if lies.

No second appeal lies against an Appellate order confirming the order of the trial court returning a plaint for presentation to the proper Court. The fact that in the exercise of his jurisdiction, the Dt. Judge commits an error does not give any right of revision of the order. AIR (Vol 5) 1918 All 415: 16 ALJ 535: 46 Ind Cas 99 (DB).

——O. 43, R. 1 (a) — Order returning memo. of appeal for presentation to proper Court — Appeal.

No appeal lies against the order of an Appellate Court returning a memo. of appeal to be presented to the proper Court. AIR (Vol 5) 1918 All 96: 40 All 659: 16 ALJ 630: 47 Ind Cas 16 (DB).

19. Rejecting application to set aside decree passed ex parte (O. 9, R. 13).

——O. 43, R. 1 (d) — Scope of words "Case open to appeal" — Ex parte decree in terms of award — Order refusing to set aside — Applicability.

A "case open to appeal" in O. 43, R. 1 (d), Civil Procedure Code, means not only a case in which an appeal is always provided, but also a case where appeal is provided on certain grounds. Where a Court refuses to set aside an ex parte decree passed in terms of an award an appeal would lie against such an order under O. 43, R. 1 (d), Civil Procedure Code, inasmuch as an appeal would lie on certain grounds under S. 17 of the Arbitration Act. AIR (Vol 37) 1950 Mad 295: (1950) 1 MLJ 483: 1950 MWN 51.

——O. 43, R. 1 (d) — Application under O. 9, R. 13 for restoring proceeding under S. 26-F of B. T. Act dismissed ex parte — Order if appealable.

No appeal is provided by the C. P. Code, against an order dismissing an application under O. 9, R. 13 for restoring a proceeding under S. 26-F of the B. T. Act disposed of ex parte. The decision under S. 26-F of the B. T. Act is not a decree and consequently the rejection of application under O. 9, R. 13, C. P. Code, is not appealable under O. 43, R. 1 (d) of the Code there being no ex parte decree. (1949) 53 CWN (1 D. R.) 61.

——O. 43, R. 1 (d) — Appeal Competency — Rejection of application to set aside ex parte order in a reference under S. 30 of the Land Acquisition Act. See AIR (Vol 35) 1948 Mad 416: (1948) 1 M LJ 119.

——O. 43, R. 1 (d) — Order rejecting an application.

On an application to set aside an ex parte decree the Court ordered the petitioners to pay certain costs as a condition precedent before the trial of the suit which was restored to file and posted peremptorily to a certain date. The direction ended thus, "In default the petition do stand dismissed with costs". On the day to which the suit was adjourned, as the petitioners had not complied with the said order, the Court passed the following order, "As the direction given in the order in the petition is not obeyed, the order operates and the decree passed already stands":

Held, that the subsequent order was nothing but the recording of the legal position, and that an appeal under O. 43, R. 1 (d) was maintainable against the first order which was the one and the only order in the case. AIR (V 31) 1944 Mad 383 : 1944 MWN 296 : ILR (1945) Mad 203 : 57 MLW 292 : (1944) 1 MLJ 381.

——O. 43, R. 1 (d) — Ex parte order directing execution to proceed — Application under O. 9, R. 13 rejected.

No appeal lies under O. 43, R. 1 (d), Civil P. C., against an order rejecting an application under O. 9, R. 13 to set aside an ex parte order directing execution to proceed as O. 9, R. 13 has no apcation to execution proceedings. The proper remedy of the aggrived party is to appeal against the order directing execution to proceed. AIR (Vol 31) 1944 Sind 216: ILR (1944) Kar 39: 216 Ind Cas 223 (DB).

——O. 43, R. 1 (d), O. 9, R. 13 — "In a case open to appeal" — Rent suit valued at less than Rs. 50, decreed ex parte, by Munsif having final jurisdiction — Application to set it aside, rejected by Munsif having no such power — Appeal.

The words " in a case open to appeal" in O. 43, R. 1 (d), are general words and have no reference to the appeal against the decree actually passed. If there could be no appeal under any circums-

tances against a decree that could be passed in the suit or proceeding, there would be no appeal against an order to set aside the ex parte decree passed in such a suit or proceeding by virtue of the limiting words of O. 43, R. 1, Cl. (d).

But an appeal against a decree in a simple rent suit (i. e. when the proviso to S. 153, Ben Ten. Act does not come into play) valued at Rs. 50 or less would not lie under only one circumstance, namely, when the Munsif has been vested with final jurisdiction and would lie under all other circumstances. Where, therefore, such a suit is decreed ex parte by a Munsif vested with final jurisdiction and an application for setting aside the ex parte decree is subsequently rejected by another Munsif not vested with final jurisdiction, an appeal lies under O. 43, R. 1, Cl. (d), against the order rejecting the application. AIR (Vol 23) 1936 Cal 485: 63 CLJ 277: 40 CWN 992: ILR (1937) 1 Cal 135: 166 Ind Cas 103.

——O. 43, R. 1 (d) — Order of remand — Case disposed of by trial Court on one issue only.

Where case is disposed of by the trial Court on one issue only leaving other issues undisposed of, the appeal against order of remand is competent under O. 43, R. 1 (d). AIR (Vol 21) 1934 Lah 907 (2).

——O. 43, R. 1 — Application to set aside ex parte decree dismissed for default of appearance — Appeal is maintainable under O. 43, R. 1 (d) and not because the order amounts to decree. AIR (Vol 21) 1934 Rang 202 : 149 Ind Cas 777.

——O. 43, R. 1 (d) and (u) — Ex parte decree — Appellate order setting aside order of trial Court dismissing application for restoration, whether appealable.

When an order dismissing an application to set aside an ex parte decree is set aside on appeal and the Court of first instance is directed to proceed with the suit, the order is not an order of 'remand' within the meaning of Cl. (u) of O. 43, R. 1, and is not appealable. AIR (Vol 19) 1932 All 113: 53 All 519: 135 Ind Cas 231 (DB).

——O. 43, R. 1 — Competency of appeal — Ex parte decree — Final decree passed.

An appeal from an order refusing to set aside an ex parte preliminary decree in a mortgage suit is competent, even though a final decree has been passed before the filing of the appeal. AIR (Vol 15) 1928 Cal 720: 117 Ind Cas 557: 48 CLJ 28: 32 CWN 858 (DB).

——O. 43, R. 1 — An appeal lies from an order rejecting the application for an order to set aside a decree passed ex parte, when the order is made because the conditions which were lawfully imposed on the defendants were not complied with. 28 Bom LR 578, Over. AIR (Vol 14) 1927 Bom 1: 99 Ind Cas 384: 51 Bom 67: 28 Bom LR 1245 (FB).

——O. 43, R. 1 — Application to set aside.

An appeal lies under O. 43, R. 1 (d) against an order dismissing for default an application to set aside an ex parte decree and there is no authority for discriminating for the purpose of O. 43, R. 1 (d) between a dismissal on the merits and a dismissal for default. AIR (Vol 14) 1927 Pat 240: 101 Ind Cas 753: 8 PLT 604: 6 Pat 474 (DB).

——O. 43, R. 1 — O. 9, R. 13 — Per Sulaiman and Daniels, JJ. — In an appeal from an order rejecting an application to set aside an ex parte decree, the appellate Court cannot go beyond the provisions contained in O. 9, R. 13 for reasons for setting aside the decree. AIR (V 12) 1925 All 610 : 90 Ind Cas 180 : 6 LRA Civ. 601 : 24 ALJ 56 : 48 All 175 (FB).

——O. 43, R. 1 — Conditional order of restoration.

On an application to set aside an ex parte decree an order was passed by the Court that the decree will be set aside if the petitioner will pay to the plaintiff his costs and deposit the decretal amount into Court within a certain period. A note was made on the order that the petition will be called for final disposal on a certain date. On the date on which the application was taken up for final disposal, petitioner applied for permission to give immovable property as security for decretal amount. The Court dismissed the application to set aside the ex parte decree on the ground that the money had not been deposited in Court.

Held, that the first order of the trial Court was merely conditional and that, therefore, it was not open to the petitioner to prefer an appeal against that order, and that the final order dismissing the application to set aside the ex parte decree was appealable under O. 43, R. 1 (d). AIR (Vol 12) 1925 Mad 1182: 88 Ind Cas 196.

——O. 43, R. 1 — Ex parte decree.

An appeal from the ex parte decree does not affect the appeal from an order rejecting an application for setting aside the ex parte decree. AIR (Vol 11) 1924 Lah 224: 72 Ind Cas 900.

——O. 43, R. 1 — No appeal — Ex parte decree — Petition to set aside.

Where an application to set aside a decree was dismissed for default and the court refused to set aside the order of dismissal and restore the application. Held: no appeal lies against the order. AIR (Vol 9) 1922 All 337: 67 Ind Cas 320: 20 ALJ 519 (DB).

——O. 43, R. 1 — A Munsif rejected the application to set aside the ex parte decree passed by a Munsif, having Small Cause powers, who was succeeded by the former who had no Small Cause powers.

Held, no appeal lies to the District Judge. AIR (V 9) 1922 All 50 : 65 Ind Cas 967 : 20 ALJ 208.

——O. 43, R. 1 (d) and O. 9, R. 13 — Order granting application — Applicability.

An order granting an application under O. 9, R. 13 of the C. P. C. is not appealable. AIR (Vol 6) 1919 All 426: 17 ALJ 1052: 52 Ind Cas 901 (1) (DB).

——O. 43, R. 1 (d) and O. 9, Rr. 3 and 13 — Dismissal for default of application to set aside ex parte decree.

No appeal lies from an order purporting to be made under O. 9, R. 13, C. P. C. dismissing an application for restoration of an application to set aside an ex parte decree. AIR (Vol 6) 1919 Cal 125: 49 Ind Cas 745 (DB).

——O. 43, R. 1 (d) and O. 9, Rr. 13 and 14 — Decree ex parte — Application for setting aside — Dismissal for default.

An order dismissing for default an application to set aside an exparte decree is appealable. AIR (Vol 4) 1917 Cal 548: 36 Ind Cas 798 (DB).

——O. 43, R. 1 (d) — Dismissal for default of application to set aside ex parte decree.

An appeal is allowed from an order of summary dismissed for default of an application to set aside an ex parte decree. AIR (Vol 3) 1916 Cal 391: 21 CLJ 628: 30 Ind Cas 45 (DB).

——O. 43, R. 1 (d) — Order absolute.

An application to set aside an ex parte order absolute foreclosure is not appealable if refused under cl. (9), S. 588. (1909) 2 Ind Cas 67 (Cal) (DB).

20. Remand (O. 41, R. 23).

(a) Appeal would lie.
(a-1) Conditions laid down by O. 41, R. 23 to be complied with.
(b) Court fees.
(c) Inherent powers.
(d) No appeal would lie.
(e) Small cause nature.

(a) Appeal would lie.

——O. 43, R. 1 (u) — Applicability — Appellate decision in suit for contribution determining the liability of parties and sending the case to trial Court for passing final decree after working out the arithmetical result — If appealable as an "order". See (1947) 2 M L J 532.

——O. 43, R. 1 (u) — Order of remand.

The trial Court set aside an award on one of the several grounds urged and decided the suit on merits. On appeal the Appellate Court disagreed with the finding of the trial Court on the question of the award and remanded the suit as the other objections to the award were not decided by the trial Court.

Held, that an appeal lay under O. 43, R. 1 (u), Civil P. C., against the order of remand. A I R (Vol 30) 1943 Oudh 128 : 1942 O W N (CC) 685 : 1942 A W P (CC) 350 : 204 Ind Cas 257 (DB).

——O. 43, R. 1 (u), O. 41, R. 23 — Order under O. 41, R. 23.

Where the operative portion of the appellate order is "I set aside the judgment and decree of the lower Court and allow the appeal of plaintiff No. 3 with costs. The case will be sent back and retried according to law from the stage where it has been left by the learned Munsif", the order is an order of remand contemplated by O. 41, R. 23 and an appeal lies against such order under O. 43, R. 1 (u). A I R (Vol 27) 1940 Oudh 314 : 1940 A W R (CC) 316 : 1940 O W N (CC) 662 : 15 Luck 636 : 187 Ind Cas 889.

——O. 43, R. 1 — According to the practice of the Nagpur Judicial Commissioner's Court, if a Court purports to pass an order of remand under O. 41, R. 23, even if the order was wrongly passed under that rule, an appeal will lie. A I R (Vol 23) 1936 Nag 8 : 31 N L R 72 Sup : 160 Ind Cas 202 (DB).

(Overruled in AIR (V 27) 1940 Nag 349 : ILR (1940) Nag 538 : 191 Ind Cas 566 (DB).)

——O. 43, R. 1 and O. 41, R. 23 — Competency of appeal — Remand.

The plaintiff, a mortgage-decree-holder was resisted in obtaining delivery of possession of the properties. He brought a suit to recover possession from the defendants who claimed their right from the Government. An issue was raised in the case if the plaintiff was entitled to an unconditional decree for possession or if the Government who had not been impleaded in the previous mortgage-suit and who claimed an interest in the property, was entitled to redeem the plaintiff. The Sub-Judge differing from the Munsif held the Government was so entitled and remanded the suit to the lower Court for working out the figures.

Held, the order of remand was on a preliminary issue and therefore appealable. A I R (Vol 17) 1930 Mad 1017 : 60 M L J 72 : 1930 M W N 1021 : 32 M L W 843 (DB).

——O. 43, R. 1 — Competency of appeal.

The plaintiff sued on a promissory note dated 23rd December, 1925 executed by the defendant in favour of his step-mother S, alleging that he was her only heir. On the defendant's objection that S had a daughter, he found that he had no case on the plaint and sought by application dated 13th February, 1929 to amend the plaint by alleging that his step-mother managed his estate and advanced the money to get the promissory note executed in her name for his benefit. The trial Court rejected the application and dismissed the suit. On appeal, the lower appellate Court held that plaintiff's application ought to have been allowed and remanded the suit under O. 41, R. 23, C. P. Code. Against this order defendant appealed. Plaintiff took a preliminary objection that no appeal lay as the remand order could not be treated as one made under O. 41, R. 23 when there was no preliminary point before the lower appellate Court which could attract the application of that rule.

Held, overruling the objection, that the appeal was maintainable as the point on which the lower appellate Court determined the case was a preliminary point. A I R (Vol 17) 1930 Nag 295.

——O. 43, R. 1 — Presumption — O. 41, R. 23.

Where the lower appellate Court did not say anywhere in its judgment under what provisions of law it purported to pass an order of remand, the High Court refused to hold that the order was not passed under the provisions of O. 41, R. 23 of the C. P. Code. To hold otherwise would be to curtail the right to appeal which should not be done except upon very clear proof of circumstances justifying such curtailment. The High Court, assuming that the lower Court made the order under the provisions of O. 41, R. 23, although it might not be that the provisions of that rule strictly justified the order in question, held that an appeal lay to itself from the order. A I R (Vol 12) 1925 Cal 1157 : 87 Ind Cas 575 (DB).

——O. 43, R. 1 — Part of the plaintiff's case dismissed — Appeal as to that part.

The Lower Appellate Court accepted an appeal in part and remanded that part of the case for trial on the merits. As for the remaining portion of the case the Court agreed with the decision of the trial Court dismissing the case. The plaintiff coming up on second appeal regarding this latter portion of his case.

Held, that the plaintiff was a person aggrieved by an order of remand and had a right of appeal under O. 43, R. 1 (u). A person who has lost a portion of his case in a Lower Appellate Court must be considered a person aggrieved by the decision. With respect, moreover, to the portion in which the plaintiff has been unsuccessful, he is precluded from questioning the decision in any way other than by an appeal against the order of remand, as is clear from the provisions of Section 105 (2). A I R (Vol 8) 1921 Lah 154 : 63 Ind Cas 776 : 2 Lah 252 : 3 L L J 426 : 89 P L R 1921 (DB).

——O. 43, R. 1 (u) — Remand — Appeal — Point of law.

An appeal to the Chief Court against the order of remand is competent under O. 43, R. 1 (u) if there is a point of law involved. A I R (Vol 1) 1914 Lah 509 : 8 P R 1915 : 195 P L R 1915 : 28 Ind Cas 441 (DB).

——O. 43, R. 1 (u) — Remand — Appeal — Test of.

Where a question affecting the final result of the case has been decided against a party and the suit is remanded under O. 41, R. 23, the order of remand is appealable. 158 P W R 1913 : 279 P L R 1913 : 20 Ind Cas 788.

——O. 43, R. 1 (u) and 41, Rr. 23 and 25 — Remand — Order under wrong rule clerical mistake.

An order of remand passed initially under O. 41, R. 23 but by a clerical mistake purporting to be under O. 41, R. 25 is appealable. (1911) 9 Ind Cas 431 (Oudh).

——O. 43, R. 1 (u) — Remand — Small Cause — Claim for mesne profits — Order of remand by Appellate Court — Appeal against order of remand.

Plff. who obtained an ejectment decree against deft. sued him for mesne profits. The first Court dismissed the suit as barred but on appeal the Dt. Judge held it as not barred and remanded it for disposal on the merits. On second appeal the High Court held, that as the claim for mesne profits was exempted from the cognizance of the small Cause Court under Cl. (31) of the Pro. Sm. C. C. Act an appeal would have lain if the suit was decided on the merits, an appeal to the High Court against the order of remand, was competent. The suit was not governed by the Art. 100 of the Lim. Act, but being in the nature of an action for damages for trespass, Art. 39 applied. 24 C. 413, not appr. 9 M L T 35 : (1910) M W N 614 : 8 Ind Cas 162 : 34 Mad 502 (DB).

(a 1) Conditions laid down by O. 41, R. 23 to be complied with.

——O. 43, R. 1—Appellate Court framing additional issue and remanding the case reversing the decree instead of calling for a finding retaining the case on its file — Order of remand — Appeal.

—— Whether an order of remand is appealable or not should depend on whether the conditions laid down by O. 41, R. 23, have been complied with and not on whether appellate Court purported or did not purport to make the order under R. 23. AIR (V 14) 1927 Cal 850 : 47 CLJ 69 : 103 Ind Cas 864 : 55 Cal 219 (DB).

(b) Court-fees.

——O. 43, R. 1 (u) — Order of remand.

An appeal against an order of remand should be filed only as a miscellaneous appeal under O. 43, R. 1 (u) and a court-fee of Rs. 2 is sufficient for the appeal memorandum. AIR (Vol 20) 1933 Oudh 191 : 10 O W N (CC) 143 : 17 R D 147 : 8 Luck 676: 144 Ind Cas 967 (DB).

——O. 43, R. 1 (u) — Remand — Inherent power —Appeal from order of remand—Court-fee.

An appeal against the order of remand by the Lower Appellate Court not made under O. 41, R. 23, C. P. C. is a second appeal and ad valorem Court fee should be paid theron. AIR (Vol 16) 1919 Pat 478 : 50 Ind Cas 367.

(c) Inherent powers.

——O. 43, R. 1 (u) — Subordinate Court disposing of case not on preliminary point but on all points arising in case. In appeal District Judge being of opinion that points were not properly dealt with remanding case under inherent power:

Held, that the order of remand did not fall under O. 41, R. 23, and was therefore clearly not appealable under O. 43, R. 1, Cl. (u). A I R (Vol 29) 1942 Pat 195 : 8 BR 186 : 197 Ind Cas 13 (DB).

(Overrules AIR (V 7) 1920 Pat 738 : 58 Ind Cas 909.)

——O. 43, R. 1 — An order of remand under S. 151, not amounting to decree is not appealable. (1940) 72 C L J 383.

——O. 43, R. 1 — An order under the inherent power of the Court under S. 151 of the C. P. Code and not under O. 41, R. 23, is not appealable. A I R (Vol 11) 1924 Lah 487 : 78 Ind Cas 408 : 6 L L J 153.

——O. 43, R. 1 — Where a case is remanded for retrial, not under O. 41, R. 23 but under inherent powers of Court, an appeal lies from the remand order not under O. 43, R. 1 (u) but under S. 96 read with S. 100, as an appeal from a decree. A I R (Vol 10) 1923 Cal 606 : 74 Ind Cas 1038 : 71 Ind Cas 453 : 37 C L J 491 (DB).

——O. 43, R. 1 — An order of remand passed not under O. 41, R. 23 but in the exercise of the inherent jurisdiction of the Court is not appealable. A I R (Vol 8) 1921 Mad 716 : 69 Ind Cas 826 : 16 M L W 515 (DB).

——O. 43, R. 1, (u) — Remand — Inherent power — Not falling under O. 41, R. 23 — Appeal.

No Appeal lies against an order passed by an Appellate Court remanding a case otherwise than under O. 41, R. 23 of the C. P. C. AIR (V 7) 1920 Cal 124 : 31 C L J 357 : 23 C W N 1049 : 55 Ind Cas 96 (DB).

——O. 43, R. 1 (u) — Remand — Inherent power — Case not within O. 41, R. 23, C. P. C. — Appeal.

O. 41, R. 23, C. P. C. does not contemplate a case decided upon the whole evidence and upon all the issues which were raised. In such a case an Appellate Court thinks that the burden of proof has been cast on the wrong party and remands the case for re-trial in the light of the evidence already taken and authorises the taking of fresh evidence, the rule has no application and consequently the order of remand is not appealable. A I R (Vol 7) 1920 Pat 666 : 55 Ind Cas 484 (DB).

(d) No appeal would lie.

——O. 43, R. 1 — Court of first instance deciding all issues — Remand order is not appealable under O. 43, R. 1 (u). (1943) 209 Ind Cas 357 : 1943 O W N (CC) 310.

——O. 43, R. 1 — Where the Court retains seisin of the case and remits issues to the trial Court whose findings on such issues are awaited the order is in no sense an order of remand but one under O. 41, R. 25. An appeal from such order is incompetent under O. 43, R. 1. A I R (Vol 24) 1937 All 580 : (1937) A L J 797 : 1937 A W R (HC) 674 (2) : 171 Ind Cas 224.

——O. 43, R. 1 (u) — (as amended by Allahabad High Court) — Order remitting only certain issues to the lower Court.

Under O. 43, R. 1 Cl. (u), as amended by the Allahabad High Court, only those orders are appealable where the entire case has been transferred from the first Appellate Court to the trial Court and not where only certain issues have been remitted. The amendment does not make every order appealable by which proceedings even for a short time have been sent back to the trial Court. A I R (Vol 21) 1934 All 455 (1) : 56 All 655 : 147 Ind Cas 437 (DB).

——O. 43, R. 1, O. 41, R. 23 — Person not affected by order of remand — Right to appeal.

Where a person has not been adversely affected by an order of remand it is doubtful if he can appeal from that order. A I R (Vol 18) 1931 Oudh 242 : 8 O W N (CC) 243 : 132 Ind Cas 78 (DB).

——O. 43, R. 1 — A party who is prejudiced by an order of remand can appeal against such order. But where a party has himself asked for a remand and obtained an order of remand he cannot appeal merely because the ground covered by it is not so wide as that which he himself desired. A I R (Vol 16) 1929 Oudh 398 : 116 Ind Cas 55 (DB).

——O. 43, R. 1 — When appealable.

Although the Court ordering the remand may have had no jurisdiction under R. 23 to pass the order, nevertheless, if the order of remand as made purports to be an order under O. 41, R. 23 and appears to be in form and substance an order under that rule, it is to be regarded as an order of remand passed under R. 23 and, therefore, subject to appeal. Where the lower appellate Court in a case which was not decided on a preliminary point, instead of retaining the appeal in his Court and referring merely an issue to be determined by the trial Court, illegally and without jurisdiction remanded the case to the trial Court for the issue of limitation to be determined and the case disposed of by that Court.

Held, no appeal would lie as the lower appellate Court did not purport to act under R. 23. A I R (Vol 14) 1927 Cal 642 : 104 Ind Cas 422 : 31 C W N 878 (DB).

——O. 43, R. 1 — O. 41, R. 23 — Order 43, R. 1 (u) gives right of appeal against an order under O. 41, R. 23, but that rule applies only when the trial Court has disposed of the suit on a preliminary point. Where the appellate Court set aside the trial Court's decree on the ground of non-joinder of a necessary party and remanded the case for a fresh trial with the addition of such party.

Held, that this is not disposing of the suit on a preliminary point, and so neither under O. 41, R. 23, nor O. 43, R. 1 (u) applied. A I R (Vol 12) 1925 Rang 320 : 92 Ind Cas 368 : 4 Bur L J 159 : 3 Rang 490 (DB).

——O. 43, R. 1 (u) — Remand — Appeal.

No appeal lies against an order of remand by the Appellate Court to the trial Court for its fresh decision on the reversal of its previous decree on the merits though an appeal is maintainable on the decree of the Appellate Court reversing the decree of the trial Court. A I R (Vol 7) 1920 Pat 738 : 58 Ind Cas 909.

——O. 43, R. 1 (u) — Remand — Appeal — Execution sale.

An order of remand, made on an appeal from an order setting aside or refusing to set aside an execution sale, is final under S. 104 (c) and no appeal lies therefrom. A I R (Vol 6) 1919 Lah 422 : 2 P W R 1919 : 29 P L R 1919 : 50 Ind Cas 610.

——O. 43, R. 1 — Remand.

If the order is simply an order of remand, not falling within O. 41, R. 23, it is not appealable under O. 43, as sub-cl. (u) only refers to an order under R. 23 of O. 41, remanding a case. The powers conferred by O. 41, R. 23 are not exhaustive. A I R (Vol 9) 1922 Mad 112 : 42 M L J 372 : 68 Ind Cas 869 : 1922 M W N 269 : 15 M L W 537 : 45 Mad 449 : 30 M L T 217 (DB).

(e) Small cause nature.

——O. 43, R. 1 (u) — Small cause nature — Remand — No appeal.

There is no second appeal in a suit of a small causes nature of the value below Rs. 500 and an order of remand in such a suit is not open to appeal. A I R (Vol 6) 1919 All 6 : 2 U P L R (HC) 69 : 18 A L J 167 : 54 Ind Cas 432 (DB).

——O. 43, R. 1 (u) — Remand — Appealability — Small cause nature.

A remand order in a suit of a small cause nature is not appealable for the decree itself would not be open to further appeal. (1913) 11 A L J 599 : 21 Ind Cas 638.

21. Rejecting application to set aside dismissal of a suit. (O. 9, Rr. 4 and 9).

——O. 43, R. 1 (c) — Applicability — Preliminary decree — Application for final decree in suit for account — Dismissal for default — Order dismissing application for restoration — Appealability.

Quaere: — Whether an order refusing to restore an application for restoration of an application for a final decree, dismissed for default, is appealable as an order on an application for restoration of a suit within the meaning of O. 43, R. 1 (c), C. P. Code. ILR (1950) A 65 (DB).

——O. 43, R. 1 (c) — Applicability — Suit dismissed for default — Application to restore — Dismissal for default — Application for restoration of — Order rejecting — Appeal.

No appeal lies from an order dismissing for default an application under O. 9, R. 9, C. P. Code, for setting aside the dismissal of a suit for default and for restoring it to file. AIR (Vol 34) 1947 Bom 328: ILR (1947) Bom 24: 49 Bom LR 155.

——O. 43, R. 1 (q) — Dismissal of application under O. 34, R. 6.

An order dismissing an application for a personal decree under O. 34, R. 6 has a force of a decree & is appealable under S. 96 and not under O. 43, R. 1 (q). AIR (Vol 32) 1945 Nag 289: ILR (1945) Nag 643: 1945 NLJ 409 (DB).

——O. 43, R. 1 (c), O. 9, R. 9 — Application to set aside dismissal of suit for default allowed on condition of payment of costs within week — Costs offered one day late — Court holding it had no jurisdiction to extend time — Order, held fell within purview of O. 43, R. 1 (c).

An application of the plaintiff for setting aside the dismissal of his suit for default was allowed by the Court on condition of plaintiff's payment of costs of Rs. 25 within one week. The costs were offered a day late with the application praying to the Court to accept them. The Court held that it had no jurisdiction to extend the time and dismissed the application for restoration:

Held, that the order was, in substance, one under O. 9, R. 9 and fell within the purview of O. 43, R. 1 (c) and was appealable. AIR (V 32) 1945 Oudh 273: 1945 OWN (CC) 132: 1945 AWR (CC) 106: 20 Luck 427 (DB).

——O. 43, R. 1 — Dismissal of restoration application.

An order passed on an application for restoration of a previous application for restoration which has been dismissed for default, is appealable under O. 43, R. 1 (c) by invoking the aid of S. 141. AIR (Vol 24) 1937 Oudh 344 : 1937 OWN (CC) 372 : 13 Luck 246: 168 Ind Cas 47.

——O. 43, R. 1 — Dismissal for non-payment of process-fees.

Under O. 43, R. 1, Cl. (c) an order under O. 9, R. 9, rejecting an application (in case open to appeal) for an order to set aside the dismissal of a suit is appealable. AIR (Vol 23) 1936 All 737: (1936) ALJ 305: 1936 AWR (HC) 445: 161 Ind Cas 840 (DB).

——O. 43, R. 1 (c) — An application for grant of probate can be dismissed for default and restored. An appeal would thus lie under O. 43, R. 1, Civil P. C. AIR (Vol 23) 1936 Lah 863: 38 PLR 973: 167 Ind Cas 526.

——O. 43, R. 1 — An appeal lies against an order refusing to set aside the dismissal of an application under S. 84 of the Madras Hindu Religious Endowments Act for default. AIR (Vol 21) 1934 Mad 258 (1): 66 MLJ 247: 39 MLW 197: 57 Mad 297: (1934) MWN 671 (1): 148 Ind Cas 168 (1).

——O. 43, R. 1 — Restoration under O. 9, R. 9.

An order rejecting an application to set aside dismissal of suit under O. 9, R. 9 (in case open to appeal), is open to appeal under O. 43, R. 1 (c) — But an order allowing such an application is not open to appeal. Orders allowing such applications should be sparingly interfered with. AIR (Vol 21) 1934 Oudh 491: 11 OWN 1373: 152 Ind Cas 110.

——O. 43, R. 1 (c) — No appeal lies from an order rejecting an application to set aside the dismissal of

an application for restoration of a suit dismissed in default. AIR (Vol 19) 1932 Nag 101: 28 NLR 83: 139 Ind Cas 296 (DB).

(Overrules AIR (V 10) 1923 Nag 293 : 19 NLR 119 : 75 Ind Cas 519.)

——O. 43, R. 1 — No appeal — Dismissal for default — Petition for Restoration.

An order dismissing for default an application to set aside the dismissal of a suit under O. 9, R. 9 is not covered by R. 1 (c) of O. 43 and, therefore, it is not appealable. AIR (Vol 15) 1928 Pat 335: 109 Ind Cas 264: 7 Pat 333: 9 PLT 669 (DB).

——O. 43, R. 1 — Petition for Restoration.

Clause (c) of R. 1 of O. 43 allows an appeal from an order under R. 9 of O. 9 rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit. The clause applies therefore only in cases when a "suit" has been dismissed. It is clear that while the order dismissing the petitioner's first application remains in force, no fresh application can be made to set aside the dismissal of the suit. The order dismissing the second application is not an order refusing to set aside the dismissal of a suit within the meaning of clause (c) of R. 1 of O. 43. S. 141 cannot operate to give an appeal from an order not otherwise appealable under order. AIR (V 9) 1922 Cal 572 : 69 Ind Cas 1003 : 36 CLJ 184 (DB).

——O. 43, R. 1 (c) — Dismissal of application for restoration.

A dismissal of suit for default is under O. 9, R. 8 and the dismissal of application for restoration is appealable under O. 43, R. 1 (c). AIR (Vol 7) 1920 All 219 : 57 Ind Cas 245 (1) (DB).

——O. 43, R. 1 (c) and O. 9, R. 4 — Refusal to set aside dismissal of suit — No appeal.

No appeal lies against an order refusing to set aside a dismissal of a suit under O. 9, R. 4 of the C. P. C. AIR (Vol 5) 1918 Cal 164: 27 CLJ 117: 43 Ind Cas 374 (1) (DB).

——O. 43, R. 1, Cl. (c) and O. 9, R. 9 — Dismissal of petition to restore for default — Appeal.

There is no appeal from an order passed under O. 9, R. 9, C. P. C., dismissing for default a petition to restore a suit dismissed for default. AIR (V 5) 1918 Pat 612 : 2 PLW 221 : 2 PLJ 720 : 43 Ind Cas 54 (DB).

——O. 43, R. 1 (c) — Appeal — Single Judge of High Court.

Per curiam An order of a Judge of the High Court in original jurisdiction rejecting an application under O. 9, R. 9, C. P. C., for the restoration of a suit dismissed for default, is appealable under O. 43, R. 1 cl. (c) as the Code and rules made under it apply to an appeal from a decision of a Judge of the High Court on the Original Side. AIR (V 3) 1916 Cal 361: 20 CWN 594: 23 CLJ 443: 43 C 857: 34 Ind Cas 634 (FB).

——O. 43, R. 1 (c) — Execution sale — Setting aside.

An application to set aside a sale is a proceeding leading to an adjudication such as referred to in S. 2 and so it is a suit within O. 43, R. 1 (c). AIR (Vol 3) 1916 Cal 221: 20 CWN 1203: 33 Ind Cas 581 (DB).

——O. 43, R. 1 (c) — Execution sale — Application to restore an application for a reversal of a sale — Dismissal — Appeal.

Under O. 43, R. 1 (e), C. P. C., no appeal lies against an order rejecting an application under O. 9, R. 9 for revival of an application for reversal of a sale, which had been dismissed for default of appearance of the judgment-debtor. AIR (Vol 2) 1915 Cal 539 : 19 CWN 25 : 27 Ind Cas 492 (DB).

——O. 43, R. 1 (c) — Second appeal — Order of Appellate Court setting aside order of first court dismissing suit for default.

An order of the Appellate Court setting aside the order of the first court dismissing the suit for default of appearance of parties is not appealable. (1913) 11 ALJ 615: 35 All 427: 20 Ind Cas 145 (DB).

——O. 43, R. 1 (c) — Order rejecting application for restoration — Appeal.

Where an application for restoration is returned for presentation to proper Court owing to want of jurisdiction, the order is one rejecting the application and is appealable. (1912) 10 ALJ 41: 15 Ind Cas 34.

——O. 43, R. 1 (c) — Unsuccessful application — Dismissal of application for restoration — Appeal.

If an application under S. 102, C. P. C. (1882) has been dismissed for non-appearance & a subsequent application under S. 103 for reviving the application is unsuccessful, this rejection of application under S. 103 is not appealable. (1910) 14 CWN 573: 13 CLJ 153: 5 Ind Cas 493 (DB).

——O. 43, R. 1 (S. 588, Old Code) — Maintainability after disposal of suit.

The right of appeal given by S. 588, C. P. C.. from orders specified in that section ceases with the disposal of the suit. (1905) 9 CWN 895: 32 C 1023 (DB).

22. Receiver — (O. 40, Rr. 1, 3 and 4).

(a) Appointment.
(b) Enforcement of duties.
(c) Letters Patent Appeal.
(d) Removal

(a) Appointment.

——O. 43, R. 1 (s) — Order giving effect to order appointing Receiver — Appeal.

Where an order for the appointment of a Receiver has already been made a subsequent order giving effect to it is not appealable under O. 43, R. 1 (s), C. P. Code, when it does not come within the ambit of any of the clauses of sub-R. (1) of O. 40, R. 1, C. P. Code. AIR (Vol 33) 1946 Lah 462: 48 PLR 180: 228 Ind Cas 491.

——O. 43, R. 1 (s), O. 40, R. 1 (1) (a) — Appointment of new Receiver — Appeal.

An order appointing a Receiver in place of one who has resigned is appealable. AIR (Vol 32) 1945 467: 24 Pat 457: 27 PLT 62 (DB).

——O. 43, R. 1 (s), O. 40, R. 1 — Attachment of wakf property — Objection by judgment-debtor mutawalli — Objection allowed and Receiver appointed.

An appeal lies under O. 43, R. 1 (s), from an order allowing the objection of the judgment debtor to the attachment of certain property as wakf property and appointing a Receiver of the same. Such an order is one under O. 40, R. 1.

The property was wakf property and was not liable to be attached or sold at all. There were provisions in the deed of wakf enjoining upon the mutwalli the performance of certain religious duties:

Held, that the appointment of a Receiver in execution of a decree against the mutawalli to take charge of the entire property, which did not belong to the judgment-debtor, would be contrary to the provisions of O. 40, R. 1 (2), and would amount to a dispossession of the trustee. The Court could not therefore appoint a Receiver to take possession of the entire property itself. AIR (Vol 25) 1938 All 3: (1937) ALJ 1103 : ILR (1938) All 35 : 1937 AWR (HC) 903 : 173 Ind Cas 127.

——O. 43, R. 1, Cl. (s), O. 40, R. 1 — Where a Receiver is appointed but he refuses to act, an appeal on the point whether a Receiver can be appointed or not can be entertained. AIR (Vol 25) 1938 Lah 10: 176 Ind Cas 919.

——O. 43, R. 1 (s), O. 40, R. 1 (a) — Even if no application under O. 40, R. 1 (a) is made, when the order for appointment of Receiver is passed under O. 40, R. 1 (a), the order is appealable under O. 43, R. 1 (s). AIR (Vol 23) 1936 Oudh 337: 1936 OWN (CC) 1134: 12 Luck 635: 163 Ind Cas 204 (DB).

——O. 43, R. 1 (s) — Where an order is made in a case that a Receiver is to be appointed, the order is appealable under O. 43, R. 1 (s) even though no particular individual is named as a Receiver. AIR (Vol 19) 1932 Pat 360: 13 PLT 525: 142 Ind Cas 300 (DB).

——O. 43, R. 1 — Competency of appeal — Receiver.

An order refusing to appoint a Receiver is an order under O. 40 and hence under O. 43, R. 1 (s) it is appealable. AIR (Vol 13) 1926 Cal 1006: 95 Ind Cas 632 (DB).

——O. 43, R. 1 — Discretion — Appointment of receiver.

After the death of a Mahant of a shrine there was a scramble between two persons each of whom claimed succession to the office and each of whom got himself elected as successor. There was something to be said for the claim of each party and if one of them was put into possession and appointed de facto Mahant during the pendency of the suit it would have given him a great advantage over the other.

Held, that there was pre-eminently a case for the appointment of a Receiver and the High Court would not interfere with the order of the lower Court. A Court of appeal will not, except in an extreme case, disturb the appointment or selection of a Receiver by the Court below, unless there be some overwhelming objection in point of propriety or choice or some fatal objection in principle. AIR (Vol 11) 1924 Lah 421 : 69 Ind Cas 361.

——O. 43, R. 1 — An order dismissing an objection to the appointment of a Receiver of a property, the objector not being a party, falls under Order 40, rule 1 of the C. P. Code and is appealable. AIR (Vol 11) 1924 Nag 165 : 78 Ind Cas 1031.

——O. 43, R. 1 — An order of a Court that a Receiver should be appointed in a case, without appointing anybody by name as Receiver, and ajourning the case to a later date for so appointing one is an order under O. 40, R. 1 and appealable under O. 43, R. 1 (s). AIR (V 10) 1923 Lah 48 : 72 Ind Cas 569.

——O. 43, R. 1 — An order of a Court that a Receiver should be appointed in a case (without appointing anybody by name as Receiver) and adjourning the case to later date for so appointing one is an order under O. 40, R. 1, and can be appealed from under O. 43, R. 1. AIR (Vol 9) 1922 Pat 577: 69 Ind Cas 929 : 1 Pat 625 : 1922 PHCC (Sup) 250 : 4 PLT 210: 1 Pat LR 161 (DB).

——O. 43, R. 1 — Where a Court passes an order passing the accounts submitted by the Receiver, the order is appealable as such order comes within O. 40, R. 4. AIR (Vol 8) 1921 Bom 427: 59 Ind Cas 421: 45 Bom 99 (DB).

——O. 43, R. 1 (s) and O. 40, R. 1 — Order for appointment of a Receiver — Appealability.

An order for the appointment of a Receiver without actually appointing anyone to that office is not appealable. O. 40, R. 1. C. P. C. contemplates an order appointing a Receiver. 40 M 18 (FB) Diss. AIR (Vol 7) 1920 All 149: 18 ALJ 212: 2 UPLR (HC) 95: 54 Ind Cas 520 (DB)

——O. 43, R. 1 (s) — Order construing order — Whether appealable.

An order construing an order of appointment does not fall under either rule. R. 1 or R. 4 of O. 40, C. P. C., and is not appealable. AIR (Vol 7) 1920 Pat 703: 5 Pat LJ 97: (1920) Pat HCC 121: 55 Ind Cas 15.

——O. 43, R. 1 (s) — Order appointing Receiver provisionally — Right of appeal.

Where on an application for appointing a Receiver the Court allowed the application provisionally and called on parties to put in their application showing their views regarding the person and powers of the Receiver and the income, if any, to be paid by him, held that the order did not amount to an appointment of a Receiver but was only an expression of opinion that a Receiver should be appointed and therefore no appeal lay. AIR (Vol 2) 1915 All 129 : 13 ALJ 79 : 27 Ind Cas 646 (DB).

——O. 43, R. 1 (s) — Order providing for appointment of Receiver, if appealable.

An order merely directing that a proper person should be appointed as a Receiver is not appealable under O. 43, R. 1 (s). AIR (Vol 2) 1915 Bom 41: 17 Bom LR 510: 29 Ind Cas 504 (DB).

——O. 43, R. 1, cl. (s) — Order appointing Receiver.

An interlocutory order for the appointment of a Receiver in the terms "the property in suit will be better managed if a Receiver is appointed" is not appealable. It is only the final order that is appealable. (1911) 13 Cr LJ 157: 9 Ind Cas 582 (Cal) (DB).

——O. 43, R. 1 — Appeal — Receiver — Refusal of sanction for appointment.

An order of District Judge to accord sanction to the appointment of receiver under S. 505 is not appealable. (1910) 20 MLJ 78: 5 Ind Cas 991.

(b) Enforcement of duties.

——O. 43, R. 1 (s) — Scope — Order on receiver's accounts directing him to pay amount due by him and making payment out of deposit made by him and standing to his credit — Appeal — O. 40, R. 4.

An order directing a receiver to pay certain amounts due from him on accounts submitted by him, which amounts are paid out of the deposits made by the receiver and standing to his credit, is an order falling under R. 4, O. 40, C. P. Code, being in effect an order attaching his property and paying the amount from that property and is therefore open to appeal under O. 43, R. 1 (s). AIR (Vol 37) 1950 Pat 241 (DB).

——O. 43, R. 1 — Directions to Receiver for payment of fees to auditor — If appeal lies.

Held, order by Court to the Receiver to pay the auditor's bill is a direction under O. 40, R. 1 (1) (a), Civil P. C., and hence is appealable under O. 43, R. 1 (s), Civil P. C. (1946) 25 Pat 342: AIR (Vol 34) 1947 Pat 5 (DB).

——O. 43, R. 1 — No appeal — Receiver.

An order directing a Receiver to pay a sum of money by way of damages is not appealable as it does not come within the operative part of R. 4. AIR (Vol 12) 1925 Rang 266: 92 Ind Cas 631: 4 Bur LJ 91: 3 Rang 318 (DB).

——O. 43, R. 1 — No appeal lies against an order giving directions to the Receiver to pay a certain sum of money into Courts, which is not followed up by an order of attachment of his property. AIR (Vol 9) 1922 Mad 234: 65 Ind Cas 403: 1921 MWN 806 (DB).

——O. 43, R. 1 (s) and O. 40, R. 1 (d) — Appeal — Order directing Receiver to pay.

An order of Court directing a Receiver appointed in the suit to pay money to a person pending disposal of the suit is appealable by the combined operation of O. 43, R. 1 and O. 40, R. 1. (1912) 11 MLT 383: 14 Ind Cas 277 (DB).

——O. 43, R. 1 (s) — Receiver's accounts — Appeal.

Orders of Court in passing Receiver's accounts are not appealable. (1911) 14 CLJ 445: 12 Ind Cas 780 (DB).

——O. 43, R. 1, Cl. (s) — Direction as to disposal of rents — O. 40, R. 1, C. P. C.

An order of Court directing disposal of rents and profits of property under O. 40, R. 1 after the appointment of Receiver agreed to by the parties, is appealable under O. 43, R. 1, Cl. (s). (1910) 14 CWN 183: 5 Ind Cas 69 (DB).

——O. 43, R. 1 (s) O. 40 Rr. 1-3 (Ss. 588, Cl. 24, 503 Old Code) — Receiver's accounts, orders in passing — Appeal.

The directions which a Court gives in passing a receiver's accounts are not appealable under Cl. 24 of S. 588, C. P. C., (1908) 12 CWN 648 (649) : 35 C 568 (DB).

——O. 43, R. 1 (s), (S. 588, Old Code) — Appeal — Order of discharge of receiver and for rendition of accounts.

No appeal lies from an order directing discharge of receiver appointed during the pendency of a suit subsequently compromised and also directing the rendition of accounts in terms of the compromise. 1903 AWN 67 (68) (DB).

(c) Letters Patent appeal.

——O. 43, R. 1 (s), S. 105, (Ss. 588, 591, old Code) — Do not govern Letters Patent Art. 15.

Sections 588 and 591 of C. P. C. do not restrict Art. 15 of Letters Patent. (1901) 11 MLJ 346 : 25 M 555 (557) (DB).

(d) Removal.

——O. 43, R. 1 (s) — Scope — Order refusing to discharge or remove receiver — Appeal.

An order refusing to discharge a receiver is not appealable.

Quaere: Whether there is a right of appeal when a Court appointing a receiver under O. 40, R. 1, C. P. Code, removes him from office? AIR (Vol 34) 1947 Pat 418: 25 Pat 779 (DB).

——O. 43, R. 1 — O. 40, R. 1 and O. 43, R. 1 (s) — Dismissal of Receiver — Appeal.

Obiter: An order dismissing the Receiver must be held to be an order passed under O. 40, R. 1. That being so, the order is appealable under O. 43, R. 1 (s). AIR (Vol 32) 1945 All 371: 1945 AWR (HC) 95: 1945 RD 271 : ILR (1945) All 506 : (1945) ALJ 415 : 1945 OWN HC 102 (DB).

——O. 43, R. 1 (s), O. 40, R. 1 — Order dismissing application to remove Receiver.

Order 40, R. 1, must be regarded as giving authority to the Court to remove the Receiver, and if an application is made to remove the Receiver, then the dismissal of that application must be regarded as an order passed under O. 40, R. 1, and such order is appealable under O. 43, R. 1 (s). AIR (Vol 25) 1938 Rang 387: 1938 Rang LR 586: 178 Ind Cas 924.

——O. 43, R. 1 (s) — An order removing a Receiver is not appealable. AIR (Vol 18) 1931 All 72: (1931) ALJ 13: 134 Ind Cas 454.

23. Review Application.

(a) Application where granted.
(b) Application where rejected. (Under O. 47, R. 4.)
(c) Order granting review only on the grounds mentioned in O. 47, R. 7.

(a) Application where granted.

——O. 43, R. 1 — The powers of the Appellate Court under O. 43, R. 1 (w) of the Civil P. C., to hear an appeal from an order under R. 4 of O. 47, granting an application for review are limited by R. 7 of O. 47. An order granting review is therefore open to attack on the grounds mentioned in O. 47, R. 7, Civil P. C. AIR (Vol 21) 1934 Lah 617: 37 PLR 34: 148 Ind Cas 1126.

——O. 43, R. 1 — Appeal from order granting review without appeal from revised decree itself is competent. AIR (Vol 19) 1932 Cal 552: 36 CWN 212: 55 CLJ 98: 138 Ind Cas 713 (DB).

——O. 43, R. 1 — Order granting.

The provision of O. 43, R. 1 (w) are to be read subject to the provisions of O. 47, R. 7, and an order granting a review can be appealed against only on one of the grounds set out in O. 47, R. 7. AIR (Vol 14) 1927 Mad 641: 50 Mad 891: 39 MLT 11: 103 Ind Cas 377: 26 MLW 277: 1927 MWN 806: 52 MLJ 682 (DB).

——O. 43, R. 1 — No appeal — Restoration. — O. 47, R. 3.

The marginal note to O. 47, R. 3 describes the rule as one really relating to the form of application and the rule itself says that the provisions of the appellate rules shall apply to forms in applications for review. That does not extend the right of the party who goes for a review and give him a right of appeal simply because under R. 1 (t) O. 43 an order under R. 19 of O. 41, i.e., an ordinary appellate order, is made appealable. AIR (Vol 12) 1925 All 57: 80 Ind Cas 649: 47 All 1: 5 LRA Civ 608 (DB).

——O. 43, R. 1 (a) and (w) and O. 7, R. 11 — Order rejecting plaint — Incidental decision — Valuation — Question of jurisdiction — Court-fees Act, S. 12 — Review of — C. P. C., S. 115 — Government of India Act, S. 107.

An order rejecting a plaint under O. 7, R. 11 is not appealable when such order is based on a question of valuation pure and simple. When the order necessarily involves a decision of the category or class under which a suit falls even though it incidentally decides a question of calculation the order is appealable. In cases where the order involves a question of jurisdiction, the High Court may interfere either under S. 115 of the C. P. C., or under S. 107 of the Government of India Act. Before or after an order of remand fructifies by non-compliance into a recorded order of rejection, the Court contemplated in S. 12 of the Court Fees Act may, for good and sufficient reasons, review its own order AIR (Vol 6) 1919 Pat 270 : 4 Pat LJ 57 : 49 Ind Cas 442 (DB).

——O. 43, R. 1 (w), O. 47, R. 7 and O. 9, R. 9 — Appeal — Review.

Where there were in order (1) an order of dismissal of an application for execution of a decree for default (2) restoration of the application under O. 9, R. 9, (3) application of judgment-debtors for review of the restoration order followed by the Court's granting the review (4) application by decree holder for review of the original order dismissing execution petition for default, it was held that the Application No. 4 was not in effect for reviewing the order in petition No. (3) and that order (1) above was liable to independent review. AIR (Vol 5) 1918 Mad 1011: 5 LW 124: 21 MLT 297: 37 Ind Cas 229 (DB).

——O. 43, R. 1 (w) — Review — Appeal — When competent.

An appeal lies against an order granting a review only in cases provided in O. 47, R. 7 (1) C. P. C. 24 MLJ 93: 1913 MWN 52: 18 Ind Cas 549 (DB).

(b) Application where rejected (under O. 47, R. 4).

——O. 43, R. 1 (w), O. 47, R. 7 — O. 43, R. 1 (w) must be read subject to O. 47, R 7.

The provisions of O. 43, R. 1 (w) must be read subject to O. 47, R. 7. The two orders read together make it clear that an order granting review under O. 47, R. 4 on the ground that there is an error apparent on the face of the record is not appealable. AIR (Vol 32) 1945 Oudh 183: 1945 OWN (CC) 108: 1945 AWR (CC) 76 (1): 20 Luck 380 (DB).

——O. 43, R. 1 — Competency of appeal — Review — Order granting appealability.

Order 43, R. 1 (w) has to be read subject to O. 47, R. 7. And so where a Court amends its own error upon the ground that the judgment was wrong or unfair to one of the parties the remedy of person aggrieved by the review of judgment lies by an appeal from the decree passed on review and not by an appeal from the order granting the review under the circumstances. The sufficiency or otherwise of the reason for granting of a review outside the limit of O. 47, R. 7 does not invest the person aggrieved with a right under C. P. Code, to appeal. AIR (Vol 17) 1930 All 126: 122 Ind Cas 184 (DB).

——O. 43, R. 1 — Order refusing to grant review is not appealable. (1929) 113 Ind Cas 92 (Mad) (DB).

——O. 43, R. 1 — No appeal — Review.

—An order granting review is not appealable in Bombay under Cl. (w) R. 1, as that clause has been deleted by a rule made by the High Court under S. 122; 27 Bom LR 1446 is no longer authority. AIR (Vol 14) 1927 Bom 599: 29 Bom LR 1355 (DB).

——O. 43, R. 1 — O. 47, R. 3 — A refusal to restore an application for review when the application to restore has been heard on the merits, is not appealable. AIR (Vol 12) 1925 All 57 : 80 Ind Cas 649 : 7 All 1 : 5 LRA Civ 608 (DB).

——O. 43, R. 1 — Order granting.

The right of appeal under R. 1 (w) is subject to conditions laid down by O. 47, R. 7 and therefore an appeal not coming under this rule cannot be maintained. AIR (Vol 7) 1920 All 112 : 42 All 626 : 18 ALJ 838: 60 Ind Cas 81: 2 UPLR (All) 283 (DB).

——O. 43, R. 1 (w) — Review — Appeal.

An order, granting a review of a judgment, itself not appealable, is appealable, subject to O. 47, R. 7. There can be no appeal against an order granting a review merely for sufficient grounds. AIR (Vol 3) 1916 Pat 370: 1 PLJ 193: 35 Ind Cas 15.

(c). Order granting review only on the grounds mentioned in O. 47, R. 7.

——O. 43, R. 1 (w), O. 47, R. 4 (1) — Appeal under O. 43, R. 1 (w), if subject to O. 47, R. 7.

The right of appeal granted by O. 43, R. 1 (w), is subject to the grounds set out in O. 47, R. 7. AIR (Vol 27) 1940 Pat 7: 18 Pat 777: 20 PLT 859: 6 BR 248: 185 Ind Cas 769 (DB).

——O. 43, R. 1, O. 47, R. 7, S. 115 — Clause (w) of O. 43, R. 1 is to be read along with and subject to O. 47, R. 7 and there is no appeal against an order of review. AIR (Vol 24) 1937 Nag 385: ILR (1938) Nag 395: 172 Ind Cas 433 (DB).

(Overrules AIR (V 16) 1929 Nag 73 : 25 NLR 104 : 116 Ind Cas 645.)

——O. 43, R. 1 (w), O. 47, R. 7 — Right of appeal under O. 43, R. 1.

The general right of appeal given in O. 43, R. 1 (w), must be held to be subject to the specific provisions of O. 47, R. 7, as regards the grounds on which an appeal can lie. The grounds on which an appeal under O. 47, R. 7, can lie are: (a) in contravention of the provisions of R. 2 (b), in contravention of the provisions of R. 4, or (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause. AIR (Vol 24) 1937 Oudh 513: 1939 OWN (CC) 978: 13 Luck 597: 171 Ind Cas 286 (DB).

——O. 43, R. 1 (w), O. 47, R. 7 — Appeal from order granting review — When competent.

The provisions of O. 43, R. 1 (w), are to be read subject to the provisions contained in O. 47, R. 7. An order granting a review can, therefore, be appealed from only on one or other of the grounds specified in O. 47, R. 7. AIR (Vol 20) 1933 Cal 727 (1): 37 CWN 705 (1): 146 Ind Cas 530 (1).

——O. 43, R. 1 — O. 47, R. 7 — Right of appeal given by O. 43, R. 1 (w) against the acceptance of review is qualified and limited by O. 47, R. 7. AIR (V 16) 1929 Lah 26 : 116 Ind Cas 221.

——O. 43, R. 1 — O. 47, R. 7 — The right of appeal conferred by Order 43, rule 1 (w) is not an unlimited right, but is subject to the conditions of Order 47, rule 7. AIR (Vol 12) 1925 All 552 : 88 Ind Cas 653 : 47 All 881 : 23 ALJ 534 : 6 LRA Civ 454 (DB).

——O. 43, R. 1 — O. 47, R. 7 — O. 47, R. 7 (1) restricts the scope of O. 43, R. 1 (w) as regards grounds of appeal from an order granting review of judgment. AIR (Vol 12) 1925 Oudh 266 : 84 Ind Cas 515 : 11 OLJ 682 : 28 OC 4.

——O. 43, R. 1 — O. 47, R. 7 — Although O. 43, R. 1 (w) allows an appeal against an order granting a review, that clause must be read with R. 7 of O.

47 by which the grounds on which an order granting a review can be set aside on appeal are limited. AIR (Vol 8) 1921 Cal 66 : 66 Ind Cas 909 : 25 CWN 884 (DB).

——O. 43, R. 1 (w) and O. 47, R. 7 — Order granting review — Appeal.

An order granting a review of judgment, though appealable under the provisions of O. 43, R. 1 (w) of the C. P. C., is subject to the limitations mentioned in O. 47, R. 7 of the Code namely, that there can be an appeal only upon the grounds mentioned in that rule. AIR (Vol 6) 1919 Cal 1072: 47 Ind Cas 850 (DB).

——O. 43, R. 1 (w) and O. 47, Rr. 1, 4 and 7 — Appeal from order granting review.

Order 43, R. 1 (w) C. P. C. allows an appeal from an order granting an application for review only on the grounds mentioned in O. 47, R. 7 of the Code and on no other. AIR (Vol 6) 1919 Cal 94: 30 CLJ 250: 52 Ind Cas 29 (DB).

——O. 43. R. 1 (w) and O. 47, R. 7 — Order granting review — Appeal — Grounds for.

The right of appeal against an order granting an application for review is restricted by the provisions of O. 47, R. 7. There is no general right of appeal against such an order. AIR (Vol 6) 1919 UB 19 : (1918) 3 UBR 104 : 49 Ind Cas 57.

——O. 43, R. 1 (w) and O. 47, R. 7 — Appeal — Grounds for.

A right of appeal under O. 43, R. 1 (w) against an order granting a review is restricted in its scope by O. 47, R. 7. AIR (Vol 5) 1918 Cal 618: 45 Cal 60: 21 CWN 1076: 26 CLJ 187: 42 Ind Cas 484 (DB).

——O. 43, R. 1, Cl. (w) and O. 47, R. 7 — Appeal — Grounds for.

Clause (w) of R. 1 should be read with O. 47, R. 7; the one allows an appeal and the other shows the grounds on which an order granting a review can, in appeal, be impeached. AIR (Vol 5) 1918 Mad 1066 : 31 MLJ 827 : 5 LW 472 : 38 Ind Cas 373 (DB).

——O. 43, R. 1 (w) and O. 47, R. 7 — Appeal from order granting review.

Order 43, R. 1 (w) is merely inserted in order that the rule in question may contain a complete list of those orders from which an appeal lies. It must be read subject to O. 41, R. 7 by which the right of appeal from an order granting an application for review is limited and defined. Thus an appeal is allowed only on grounds in O. 47, R. 7. AIR (Vol 4) 1917 All 76: 15 ALJ 505: 41 Ind Cas 886.

——O. 43, R. 1 (w) and O. 47, R. 7 — Appeal — Madras Estates Land Act (I of 1908), S. 195.

No appeal lies to the Dt. Court against the order of a Revenue Court granting a review in a summary suit. AIR (Vol 3) 1916 Mad 378: 2 LW 62: 26 Ind Cas 831 (DB).

——O. 43, R. 1 (w) and O. 47, R. 7 — Order granting review — Appeal.

O. 43, R. 1 (w) C. P. C. must be read subject to O. 47, R. 7 and an order granting review is appealable only on grounds mentioned in O. 47, R. 7. AIR (Vol 2) 1915 Cal 283: 41 Cal 746: 25 Ind Cas 903 (DB).

——O. 43, R. 1, Cl. (w) — Appeal — Order granting review.

No appeal lies from an order granting a review except on any of the grounds mentioned in O. 47, R. 7, C. P. C. AIR (Vol 1) 1914 Cal 632: 22 Ind Cas 773 (DB).

——O. 43, R. 1 (w) and O. 47, R. 7 — Appeal — Grounds.

An order granting review can be appealed against only on the specific grounds mentioned in O. 47, R. 7. The right of appeal under O. 43, R. 1 (w) is a right subject to the restrictions laid down in O. 47, R. 7. No right of appeal on merits against the final order after review is given to a party aggrieved. 81 PR 1910: 148 PLR 1910: 127 PWR 1910: 7 Ind Cas 1015 (DB).

24. Scope.

——O. 43, Rr. 1 and 3 (Oudh) — 'Miscellaneous case' in R. 3 — If covers case of an order under S. 4, Provincial Insolvency Act — Filing of appeal without copy of formal order — If proper presentation.

Where an order is passed under S. 4 of the Provincial Insolvency Act, it comes within the expression 'miscellaneous case' as used in R. 3 of O. 43 (Oudh) and hence an appeal against such an order has to be presented with a copy of the formal order. Otherwise it is no presentation at all. AIR (Vol 33) 1946 Oudh 242 : 223 Ind Cas 238 : 1946 A W R (CC) 89 : 1946 O W N 117 : 1946 O A (CC) 89 : 1946 A L W (CC) 109.

——O. 43, R. 1 — An order interpreting a scheme framed under S. 92 deciding general questions concerning the rights of parties is not an order specified in O. 43. A I R (Vol 28) 1941 Cal 618 : 73 C L J 532 : 199 Ind Cas 841 (DB).

——O. 43, R. 1 — On the original side of the High Court, the Judge directed the compromise to be recorded under O. 23, R. 3. Same was recorded by the Deputy Registrar, who, however, was of opinion that no fresh decree could be drawn up.

In this procedure adopted by the Deputy Registrar, the defendants also acquiesced.

Held, that the order that no fresh decree could be passed did not come under O. 43, R. 1 (m), Civil P. C. A I R (Vol 28) 1941 Rang 316 : 1941 Rang L R 774 : 198 Ind Cas 404 (DB).

——O. 43, R. 1 — Interlocutory order by consent.

A decree by consent is not appealable but an interlocutory order passed by consent may be appealable under certain circumstances. A I R (Vol 27) 1940 Rang 153 : 189 Ind Cas 446 (DB).

——O. 43, R. 1 — An appeal against an appellate decision of the District Judge under the Oudh Rent Act if there could be an appeal would be under S. 119-B of the Oudh Rent Act, and not under O. 43 R. 1, Civil P. C. A I R (Vol 26) 1939 Oudh 278 : 1939 R D 515 : 15 Luck 36 : 1939 O W N (CC) 823 : 1939 A W R (CC) 152 : 184 Ind Cas 14 (DB).

——O. 43, R. 1 — An appeal lies from the amended decree though not from the order amending the decree. A I R (Vol 25) 1938 Lah 331 : 40 P L R 100 : 181 Ind Cas 28 (DB).

——O. 43, R. 1 — When an application for review has been made, the subsequent filing of appeal will not render the application for review incompetent. But if the application for review is granted during pendency of appeal, the appeal cannot be heard and must be dismissed. The reason is obvious; the order appealed from has been superseded by the order passed after review. A I R (Vol 25) 1938 Mad 307 : 47 M L W 51 : (1938) M W N 656 : 183 Ind Cas 33 (DB).

——O. 43, R. 1 — In the case of an unclassed suit the mere fact that it arises out of a suit which was of a Small Cause nature does not make it a small cause suit. Hence an appeal against the order in the unclassed suit is not barred. A I R (Vol 24) 1937 Lah 454 : 38 P L R 1154 : 170 Ind Cas 422.

——O. 43, R. 1 — Order directing execution to be dismissed for non-prosecution.

No appeal lies with reference to an order directing an execution case to be dismissed for non-prosecution. Such an order does not fall within the scope of those sections of the Civil P. C. which

relate to appealable orders and in no circumstances can it be held to be a decree and in any event, having regard to the provisions of S. 2 (2), the order from its very nature is an order for dismissal for default. A I R (Vol 23) 1936 Cal 267 : 162 Ind Cas 777 (DB).

——O. 43, R. 1 — Order 43, R. 1 (4) cannot apply where the adjudication of the Court of first instance does not amount to a decree. A I R (Vol 22) 1935 Mad 574 : 158 Ind Cas 252.

——O. 43, R. 1 — Decree on basis of compromise entered by Pleader not authorised by plaintiff by vakalatnama to compromise, is not binding on the plaintiff. A suit to set aside decree and compromise is maintainable. It is not necessary to appeal under O. 43, R. 1. A I R (Vol 21) 1934 Oudh 417 : 11 O W N (CC) 1030 : 150 Ind Cas 838.

——O. 43, R 1 — Revenue cases.

Order 43, R. 1, is not applicable as a whole to cases under the Agra Ten Act. A I R (Vol 19) 1932 All 47 : (1931) A L J 854 : 15 R D 681 : 133 Ind Cas 406 (DB).

——O. 43, R. 1 — Order 43, R. 1, is controlled by the provisions of O. 47, R. 1, and an appeal from an order granting an application for review can be supported only on one or other of the grounds set forth in that order, viz., that the application must be either in contravention of the provisions of Rr. 2 or 4 or after the expiration of the period of limitation prescribed and without sufficient cause therefor. A I R (Vol 19) 1932 Nag 177 : 28 N L R 221 : 140 Ind Cas 409.

——O. 43, R. 1 — An order allowing the plaintiffs to withdraw their suit as against certain of the defendants is not appealable. A I R (Vol 17) 1930 All 863 (DB).

——O. 43, R. 1 — Rule by Oudh Chief Court.

The alteration was intended to and does cover by its language such orders of remand also as are not specifically made under O. 41, R. 23, but may fall to be made by a Court in the exercise of its inherent jurisdiction ex debito justitiae or under the provisions of S. 151, C. P. Code. A I R (Vol 17) 1930 Oudh 366 : 7 O W N 594 (DB).

——O. 43, R. 1 — O. 47, R. 7 — Although an appeal lies against an order granting a review application that appeal can only be entertained on one of the grounds set forth in R. 6, O. 47. AIR (Vol 16) 1929 Rang 105 : 7 Rang 187 : 118 Ind Cas 120.

——O. 43, R. 1 — (S. 588 Old Code) — The appeal provided for by Cl. (18) of S. 588 of the Code of 1882 against an order of abatement under S. 368 has not been taken away by the new Code. 1917 P L R No 129 p. 361.

——O. 43, R. 1 — Appeal — Formalities of — Revenue Court.

A second appeal preferred to a Rev. Court under the provisions of a special enactment like the Oudh Rent Act should not be dismissed on the ground that is unaccompanied by a copy of the Lower Court's judgment or on the ground that it is accompanied by a copy of the lower judgment which is incomplete in a suit as it refers to another main judgment not filed with the memo of appeal, inasmuch he is not required by law to file such a copy. (1916) 3 O L J 209 : 34 Ind Cas 706.

——O. 43, R. 1 (c) — Setting aside ex parte decree.

An order setting aside an ex parte decree passed in a resumption suit, although not appealable under O. 43, R. 1 of the C. P. C. is, however, appealable in view of the provisions of the Oudh Rent Act. (1916) 3 O L J 229 : 34 Ind Cas 702.

——O. 43, R. 1 — Appeal — Order not a decree.

Orders appealable under O. 43, R. 1 are not decrees, though coming under S. 47 or the definition of decree in S. 2. (1912) 8 N L R 177 : 17 Ind Cas 884.

25. Second appeal.

——O. 43, R. 1 (u) — Scope — Rejection of plaint under O. 7, R. 11 — Appeal — Reversal of order and remand for further proceedings — Second appeal — Competency. See A I R (Vol 35) 1948 East Punj. 9 : 50 P L R 14.

——O. 43, R. 1 — Trial Court dismissing suit on ground that plaint disclosed no cause of action — Appellate Court holding that the suit was maintainable and remanding case.

Held, that the decision of the trial Court could not be regarded as a rejection of the plaint, but must be taken to be adjudication on matters raised by the defence. Nor could it be said that the Appellate Court had remanded the suit for admission of the plaint. Second appeal was, therefore, competent from order of the Appellate Court. AIR (V 29) 1942 Lah 179 : 44 PLR 236 : 201 Ind Cas 619.

——O. 43, R. 1 (a), O. 7, R. 10, Ss. 100 and 115 — No second appeal lies against an order dismissing an appeal against order returning plaint for presentation to proper Court. Revision, however, is maintainable. A I R (Vol 29) 1942 Oudh 480 : 1942 O W N (CC) 494 : 1942 A W R (CC) 322 (1) : 202 Ind Cas 378.

——O. 43, R. 1 (u) — Redemption suit — First Appellate Court's order of remand — Competent.

Where the mortgagor mortgaged his immovable property for Rs. 8 and subsequently sold the equity of redemption for Rs. 25,000, in a suit for redemption by the purchaser.

Held, that a second appeal being competent under S. 31 (1) (b), N.-W. F. P. Courts Regulation, the first Appellate Court's order of remand was appealable under O. 43, R. 1 (u), Civil P. C. AIR (Vol 28) 1941 Pesh 28 : 193 Ind Cas 871 (DB).

——O. 43, R. 1 (j) — Officer conducting sale merely stating that sale would be resumed "within an hour or so" — Failure of the officer to record his reasons for the adjournment.

Held, that the failure of this kind did not amount to material irregularity and the proceedings did not fall under O. 43, R. 1 (j) and hence no second appeal lay. A I R (Vol 25) 1938 Nag 107 : I L R (1938) Nag 436 : 172 Ind Cas 465 (DB).

——O. 43, R. 1 — Order rejecting memorandum of appeal.

It cannot be said as a universal proposition that an order rejecting a memorandum of appeal is appealable. Only in those cases in which it finally disposes of the disputes between the parties would it be appealable. A I R (Vol 25) 1938 Pat 461 : 17 Pat 245 : 4 B R 814 : 177 Ind Cas 326 (DB).

——O. 43, R. 1 (u), O. 41, R. 23 — Order of remand.

An order setting aside the decree of the trial Court and remanding the case for taking an account on the principle laid down and to pass a decree accordingly is not appealable. A I R (Vol 21) 1934 Pat 97 (2): 14 PLT 735: 149 Ind Cas 311.

——O. 43, R. 1 — No second appeal lies from order of abatement. But order may be questioned in second appeal under S. 105 if it affects the decision of the case. An order setting aside abatement does not affect the merits of the case, because the result is that parties are before the Court and the Court adjudicates in the presence of the parties. A I R (Vol 20) 1933 All 294 : (1933) A L J 561 : 144 Ind Cas 133 (DB).

——O. 43, R. 1 (u) — Partial remand.

So far as the right of appeal under O. 43, R. (1) (a) is concerned, there is no distinction between a partial and total order of remand. A I R (Vol 20) 1933 Lah 615 : 34 P L R 1085 : 146 Ind Cas 939.

——O. 43, R. 1 — **Remand otherwise than under O. 41, R. 23.**

It happens that an order of remand is made from time to time which does not come within the four corners of the language of R. 23, O. 41, and yet such an order is justified. It is to cover a case like that the High Court of Allahabad changed the language of Cl. (u), so as to cover all possible orders of remand. But it cannot be said that a second appeal could be permitted from orders from which no second appeal is otherwise allowed. AIR (V 17) 1930 All 122 : 121 Ind Cas 545 : 1930 ALJ 454 (DB).

——O. 43, R. 1 — Where an order granting an application for rehearing of a case is not appealed against, that order cannot be questioned in second appeal from the decision in that suit. A I R (Vol 15) 1928 Oudh 405 : 110 Ind Cas 702 : 5 O W N 713.

——O. 43, R. 1 — **Order under O. 7, R. 10 — Remand order.**

An order returning the plaint under R, 10 of O. 7 is not a decision of the case on a preliminary point and an appeal is provided against such an order under O. 43, R. 1 Cl. (a) and as the order passed by the appellate Court becomes final under S. 104, Cl. (2), S. 105 does not preclude the aggrieved party from disputing the correctness of the remand order in second appeal if he is otherwise entitled to do so. A I R (Vol 13) 1926 Mad 900 : 51 M L J 119 : 97 Ind Cas 790 : 1926 M W N 613 : 24 M L W 630 (DB).

——O. 43, R. 1 — **Suit transferred under S. 23, Small Cause Courts Act.**

The transfer of a suit under S. 23 does not and cannot change its nature and it is the nature of the suit which is the test under S. 102, C. P. C. and O. 43, R. 1 (v) C. P. Code. A first appeal is, therefore, valid under S. 102, C. P. Code, a second appeal is barred. A I R (Vol 13) 1926 Mad 622 : 94 Ind Cas 77 (DB).

——O. 43, R. 1 — **Setting aside sale.**

No appeal can lie from an appellate order, setting aside a sale, because S. 104, sub-S. (1), Cl. (ii) read with O. 43, Cl. (j), of the Code allows only a single appeal from the order passed by the Court executing the decree under O. 21, R. 92. A possessory mortgagee holds an interest in immoveable property sufficient to justify the application of O. 21, R. 89, of the Code of Civil Procedure to his case. AIR (Vol 9) 1922 Oudh 146 : 66 Ind Cas 929 : 25 O C 78 : 9 O L J 50.

——O. 43, R. 1 — O. 47, R. 7 — There is no second appeal against an order granting a review. (1922) 64 I C 568 (2) (Cal) (DB).

——O. 43, R. 1 — A second appeal will not lie in an execution matter if a second appeal would not have laid in the suit itself. A I R (Vol 8) 1921 All 55 : 60 Ind Cas 831 : 43 All 403 : 19 A L J 72 (DB).

——O. 43, R. 1 — No second appeal lies from an order under O. 43, Cl. (j). AIR (Vol 8) 1921 Lah 156 : 62 Ind Cas 986 : 3 L L J 463.

——O. 43, R. 1 — O. 47, R. 4 — An appeal allowed under O. 43, R. 1 (w) is only an appeal from the order granting the application for review and not an appeal from the final decree passed in the suit and therefore it would be absurd to allow a second appeal on the merits against a decree passed in a Small Cause suit of the value of less than Rs. 500, merely because the decree is one which has been passed in review. AIR (Vol 8) 1921 Lah 124 : 60 Ind Cas 259 : 3 L L J 166.

——O. 43, R. 1 (a), (4) — **Order returning plaint — Appeal — Remand order if applicable.**

An order passed in appeal under O. 43, R. 1 (a) setting aside an order under R. 10 of O. 7 and remanding the case for trial on merits is not appealable. (1920) 2 Lah LJ 587.

——O. 43, R. 1 (a), O. 41, R. 33 and O. 7, R. 10 — **Return of plaint — For presentation to proper Court — Appeal.**

An order passed by an Appellate Court directing the plaint filed in the case to be returned for presentation to the proper Court is appealable to the High Court. A I R (Vol 6) 1919 Cal 65 (1) : 46 Cal 438 : 52 Ind Cas 801 (DB).

——O. 43, R. 1 (a) — **Appellate Court — Returning plaint for presentation to proper court.**

An appeal lies from an order of a first Appellate Court returning a plaint for presentation to the proper court. A I R (Vol 1) 1914 All 128 : 36 All 58 : 12 A L J 21 : 22 Ind Cas 614 (DB).

——O. 43, R. 1 (u) — **Case open to appeal — Order of remand — Appeal when lies.**

An appeal lies from an order of remand in a case where if the Appellate Court which passed that order, had passed instead a decree reversing that of the Lower Court, an appeal would lie from such decree. A I R (Vol 1) 1914 Lah 328 : 162 P L R 1914 : 120 P W R 1914 : 85 P R 1914 : 23 Ind Cas 817 (DB).

——O. 43, R. 1 (u), S. 102 (Ss. 588 Cl. 28, 586 Old Code) — **Appeal from order of remand in a Small Cause nature.**

An appeal from an order of remand passed by the Appellate Court is specifically given by Cl. 28 of S. 588, C. P. C., and S. 586. C. P. C, which bars a Second appeal in suits of a Small Cause nature of below Rs. 500 in value does not exclude an appeal from an order of remand passed in such a suit. (1907) 11 C W N 862 (865) (DB).

26. Temporary injunctions and Interlocutory Order (O. 39, Rr. 1, 2, 4 or 10).

——O. 43, R. 1 — Where an order for injunction has been passed, an application may be made under O. 39, R. 4, Civil P. C., to discharge that order. If that application succeeds clearly appeal lies, because it results in an order being discharged. And even if the application is dismissed, still the order is made under O. 39, R. 4 which attracts O. 43, R. 1 (r) which makes that order appealable. AIR (Vol 27) 1940 Nag 45: 1939 NLJ 483: ILR (1941) Nag 578: 184 Ind Cas 570 (DB).

——O. 43, R. 1 — When temporary injunction has been granted and would remain in force till it is cancelled, the appeal is competent from the order granting the injunction. AIR (Vol 20) 1933 Lah 282: 149 Ind Cas 642.

——O. 43, R. 1 — Application for attachment before judgment — Defendant undertaking not to sell — Sale in breach of undertaking — Application to take proceedings for contempt — Order on application whether appealable:

Held, that the undertaking given by the defendants, read in conjunction with the order of the Court had the effect of an injunction, and the order being one under O. 39, R. 2, Civil P. C., was appealable under O. 43, R. 1, Civil P. C. AIR (Vol 18) 1931 Bom 509: 33 Bom LR 1109: 134 Ind Cas 1165.

——O. 43, R. 1 — **No appeal — Injunction.**

An order merely ordering notice under O. 39, R. 3, C. P. Code, is not appealable. AIR (Vol 11) 1924 Mad 857: 20 MLW 556 (DB).

——O. 43, R. 1 — **Competency of appeal — Injunction.**

An appeal lies from an order granting an injunction as well as from an order refusing an injunc-

tion. An order refusing an application for a temporary injunction until the disposal of the main application for injunction pending the disposal of the suit is an order under O. 39, R. 1 and is appealable under O. 43, R. 1 (r). AIR (Vol 11) 1924 Pat 713 : 1924 PHCC 169 : 6 PLT 201 : 83 Ind Cas 48 (DB).

——O. 43, R. 1 — An order under O. 39, R. 1, issuing injunction though subject to a condition, is open to appeal. AIR (Vol 9) 1922 All 441: 66 Ind Cas 509.

——O. 43, R. 1(r) and O. 39, R. 1 — Order refusing or granting injunction — Appeal.

An appeal lies from an order granting as well as from an order refusing to grant an injunction under O. 39, R. 1, as either case is covered by O. 43, R. 1 (r). (1913) 11 ALJ 613: 35 A 425: 20 Ind Cas 653 (DB).

——O. 43, R. 1, O. 39, R. 2 (Ss. 588, 493 Old Code) — Order under S. 588 final.

A filed a petition to commit B for disobedience to an injunction. The first court dismissed the petition on appeal under S. 588, C. P. C. The lower appellate court reversed the order and remanded the petition to the Munsif. Held, that every order under S. 588 is final, and no appeal lay. (1901) 24 M 447 (DB).

27. Where the defendant shows cause or furnishes security. (O. 38, R. 6 (2)).

——O. 43, R. 1 — Application for attachment before judgment — Interim attachment ordered — Defendant showing cause — Order rejecting plaintiff's application falls under O. 38, R. 6 (2) and is as such appealable under O. 43, R. 1 (v). AIR (Vol 30) 1943 Bom 24: 44 Bom LR 855: 205 Ind Cas 100 (DB).

——O. 43, R. 1 (q) — An order rejecting the application for attachment before judgment is not such an order as is made appealable by O. 43, R. 1 (q). AIR (Vol 22) 1935 Pat 219: 14 Pat 1: 16 PLT 291: 1 BR 672: 156 Ind Cas 981 (DB).

——O. 43, R. 2.

——O. 43, R. 2 and O. 41, R. 1 — Appeal against order under S. 47 — Necessary papers — Judgment and decree.

The memorandum of appeal, that may be filed against an order, must be accompanied by a certified copy of the decree and a certified copy of the judgment, unless the Court exempts the appellant from the necessity of filing a certified copy of the judgment. In the case of an order passed in execution under S. 47, C. P. Code, if there is a judgment stating the grounds of decision and separate order is also drawn up embodying the formal expression of the decision copies of both the documents must be filed along with the memorandum of appeal. In other cases where there are no two separate documents it is enough if the judgment alone is filed. In the former cases time taken in obtaining the copies of both the documents can be excluded for purposes of calculating the time for filing an appeal and in the latter case time would run from the date of the judgment. AIR (Vol 35) 1948 Cal 134: ILR (1948) 2 Cal 1.

——O. 43, R. 2 — Non-compliance. — O. 41, R. 1.

While preferring appeal against O. 7, R. 10 appellant filed along with memo. of appeal the plaint returned to him with the endorsement made thereon but failed to file a certified copy of the separate order made prior to the endorsement. He was under the belief that the production of the endorsement made in the plaint was a sufficient compliance within the provisions of O. 43, R. 2, read with O. 41, R. 1. It was objected that the appeal should be dismissed as it was not properly presented within the period of limitation.

Held, that under the circumstances, the technical non-compliance with R. 2, O. 43, might well be condoned under S. 5, Limitation Act. AIR (Vol 17) 1930 Sind 252 (DB).

——O. 43, R. 7.

——O. 43, R. 7 — Where an application for review is made on the ground that there was a mistake or error apparent on the face of the decree and the Judge has not found that there was a mistake or error apparent on the face of the record, but merely that there was an error of that nature, no appeal lies from the order. AIR (Vol 20) 1933 All 778 : 17 RD 921 : 146 Ind Cas 231.

——O. 44.

See also Civil P. C., O. 33.

——O. 44 — Order refusing leave — Discretion.

Whether there may be a right of appeal against an order rejecting an application for leave to file a memorandum of objection in forma pauperis or not, the appellate Court should not interfere. The question is one of the exercise of discretion and when the determination complained of is merely the result of the exercise of discretion on the part of the Judge in a matter, which was a proper subject for the exercise of that discretion the appellate Court would rightly decline to interfere. AIR (Vol 13) 1926 Mad 656: 94 Ind Cas 45: 23 MLW 511: 1926 MWN 255: 50 MLJ 426 (DB).

——O. 44, R. I.

1. Application for leave.
2. Applicability.
3. Cross-appeal or cross-objection.
4. Costs.
5. Court-fee.
6-7. Leave.
8. Limitation.
9. Letters Patent.
10. Proviso.
See also Note 12.
11. Person.
12. Procedure.
See also N. 10.
13. Pauperism.
14. Proper presentation.
15. Power of Court.
16. Revision.

1. Application for leave.

——O. 44, R. 1 — Proceeding prior to the admission of the appeal are proceedings under O. 44 and are not governed by the U. P. Encum. Estates Act. AIR (Vol 29) 1942 Oudh 240: 1942 OWN (CC) 106: 1942 RD 181: 1942 AWR (CC) 79: 17 Luck 628: 199 Ind Cas 614.

——O. 44, R. 1 — Whole suit dismissed — Appeal against an order.

Where the whole suit has been dismissed, the plaintiff can file a petition to appeal in forma pauperis only against the decree as a whole and not against any order which does not dispose of the case. AIR (Vol 23) 1936 Lah 406 : 38 PLR 1119 : 163 Ind Cas 366 (DB).

2. Applicability.

——O. 44, R. 1 — The provisions of O. 33, Civil P. C., apply to application for appealing in forma pauperis by virtue of O. 44, R. 1, Civil P. C. AIR (Vol 23) 1936 Pesh 69: 161 Ind Cas 954.

——O. 44, R. 1 — Applicability.

Order 44, R. 1, Civil P. C., does not apply to appeals to His Majesty in Council and the High Courts have no power to grant leave to appeal to His Majesty in Council in forma pauperis. AIR (Vol 23) 1936 Pesh 36: 161 Ind Cas 192 (1) (DB).

——O. 44, R. 1 — Where the Subordinate Judge rejected the plaint holding that it was an application for leave to sue in forma pauperis which was not presented in person an appeal would lie from his order. (1933) MWN 197.

——O. 44, R. 1 — Decree altered in material particular.

In the particular case Rs. 4,604-15-0 was allowed to the appellant by the decree and there was also a passage in the judgment of the trial Court saying that the allowance that was granted to the appellant should be granted to the appellant from the date of the suit till life. Subsequently the amendment was made not by the Judge who passed the decree but by the successor on the ground that "though there is no prayer in the plaint for arrears of maintenance nor is there any order allowing the arrears, the decree allows to the plaintiff Rs. 4,605-15-0 as arrears of maintenance and so the decree allowing arrears is wrong."

Held, that it was a fit case in which leave could be granted to appeal in forma pauperis. (AIR (Vol 17) 1930 Pat 142: 117 Ind Cas 187 (DB).

——O. 44, R. 1 — The proviso to O. 44, R. 1, is not applicable unless it should be found that the applicant is a pauper. AIR (Vol 11) 1924 Lah 536: 80 Ind Cas 649: 6 LLJ 205.

——O. 44, R. 1, — S. 110 — Leave to appeal in forma pauperis.

The High Court has no jurisdiction to grant leave to appeal to the Privy Council in forma pauperis. AIR (Vol 5) 1918 Pat 303: 3 Pat LJ 179: 44 Ind Cas 731 (DB).

(Also AIR (V 5) 1918 Mad 18 : 42 Mad 32 : 35 MLJ 258: 24 MLT 207: 8 LW 460: 47 Ind Cas 646 (DB).

——O. 44, R. 1 — Privy Council — Appeal — In forma pauperis — If High Court can grant leave.

The High Court has no power to grant leave to prosecute an appeal to the Privy Council in forma pauperis. The petitioner must apply in England. (1913) 17 CLJ 381: 18 Ind Cas 129 (DB).

3. Cross-appeal or cross-objection.

——O. 44, R. 1 — Cross-appeal by respondent in forma pauperis.

There is no special provision in the Code relating to the filing of cross-objections in forma pauperis, but when a respondent files cross-objections, he is in fact filing a cross-appeal and the same principle as is to be found in O. 44, R. 1, Civil P. C., must be applied. The Court should have reason to think, upon a perusal of the application and of the judgment and decree appealed from, that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. AIR (Vol 28) 1941 Mad 833 (1): (1941) 2 MLJ 187: 54 MLW 171: 1941 MWN 794: 199 Ind Cas 542 (DB).

——O. 44, Rr. 1, 2 — Findings as to pauperism — Whether can be challenged by respondent during hearing of appeal.

It is open to the respondent to argue that the appellant is not a pauper and that the decree is not contrary to law, etc., even though there has been a preliminary finding to that effect, and the reason for this should be based on the principle that an order passed behind the back of a party should not operate to the prejudice of that party. AIR (Vol 24) 1937 Nag 150: ILR (1937) Nag 463: 169 Ind Cas 260.

——O. 44, R. 1 — Objection to leave — Memo of — Objections.

Where notice of an application to file cross-objections in forma pauperis has been ordered to be issued, it is not open to the appellant to say that the requirements of the proviso to O. 44, R. 1, have not been complied with, especially when notice of the application was issued to appellant at the time of its presentation. AIR (Vol 16) 1929 Pat 31: 7 Pat 827: 10 PLT 387: 119 Ind Cas 900 (DB).

4. Costs.

——O. 44. R. 1 — Costs — One of defendants not joining in appeal to enable rest to appeal as paupers — Practice.

The practice whereby one of the defendants who is clearly possessed of assets abstains from joining in an appeal in order that other defendants may prosecute the appeal as paupers must be condemned. Such conduct would be sufficient to deprive the non-appealing defendant of his costs if he is subsequently impleaded under O. 41, R. 33, Civil P. C., and the appeal is allowed. AIR (Vol 30) 1943 Mad 263: 1943 MWN 9 : 56 MLW 15 : (1943) 1 MLJ 90 : 207 Ind Cas 89 (DB).

——O. 44, R. 1 — Conditions for granting leave — Duty of Court to state reasons — Security for costs.

On the question as to security for costs being ordered where leave to appeal has been granted, it is permissible for the Court to peruse the judgment which is being appealed against and to see whether there are circumstances which would justify an order for security for costs.

The fact that a person is a pauper is not alone a reason for not ordering him to give security for costs. AIR (Vol 20) 1933 Mad 519: 37 MLW 425: 64 MLJ 433: 56 Mad 323: (1933) MWN 579: 144 Ind Cas 940 (DB).

——O. 44, R. 1 — Conditions for granting leave — Duty of Court to state reasons — Security for costs.

Order 44, Civil P. C. is mandatory and only contemplates a perusal of the application, the judgment and the decree and nothing else, and unless in the opinion of the Court the decree is contrary to law or otherwise erroneous or unjust, the Court is bound to dismiss the application. Order 44, R. 1 does not say that the Court shall reject the application unless the appeal raises a substantial question of law or unless the appellant has prima facie a good case.

Where leave to appeal in forma pauperis is granted the reasons of the Court for granting such leave should be briefly stated. AIR (Vol 20) 1933 Mad 519: 37 MLW 425: 64 MLJ 433: 56 Mad 323: (1933) MWN 579: 144 Ind Cas 940 (DB).

5. Court-fee.

——O. 44, R. 1, S. 149 — Application for leave to appeal as pauper, rejected on ground that proviso to R. 1, O. 44, was not satisfied under S. 149, to pay Court-fee.

Where an application for leave to appeal in forma pauperis is rejected on the ground that the provisions of the Proviso to O. 44, R. 1, were not complied with, the Court cannot use its discretion under

S. 149, and grant time to the applicant for paying the court-fees on the memorandum of appeal. AIR (Vol 26) 1939 Rang 25: 1938 Rang LR 651: 180 Ind Cas 374.

——O. 44, R. 1 — Where, although an order in terms of O. 33, R. 10, Civil P. C. had been made by the trial Judge when he passed the decree in favour of the plaintiffs, and no such order was made by the High Court on appeal, the application by Government under R. 12 for such an order is quite competent, and the Government's right to obtain such an order for the recovery of the Court-fees is not lost, because there was no such order incorporated in the decree of the Appellate Court. AIR (Vol 25) 1938 Cal 776: 43 CWN 164: ILR (1939) 1 Cal 94: 179 Ind Cas 4 (DB).

——O. 44, R. 1 — Review application from judgment in appeal — Whether maintainable without payment of court-fee.

An application for review of judgment passed on appeal must, under the law, be considered to be in continuation of the appeal itself which was in forma pauperis; and both sound reason and obvious justice demand, that such an application must be held to be maintainable without payment of court-fees, at the time of filing the same, as in the case of the memorandum of appeal allowed to be presented without payment of adequate court-fees. AIR (Vol 23) 1936 Cal 752: 40 CWN 1407: 170 Ind Cas 688 (DB).

——O. 44, R. 1, S. 149 — Application for leave to appeal in forma pauperis — No copies of decree or judgment — Application rejected — Appeal if pending — Value of appeal beyond jurisdiction of Single Judge — Dismissal — Appeal insufficiently stamped — Single Judge if can decline to review it.

A Single Judge has no jurisdiction to dismiss an application for leave to appeal on the ground that it is barred by limitation, if the valuation of the appeal is such that it is beyond his pecuniary jurisdiction.

It is, therefore, open to a Single Judge to decline to receive the document which is insufficiently stamped on the ground that he cannot receive it. But where the document has been received and has been accepted as having been properly presented, a Single Judge should not reject the document later on, on the ground of insufficiency of court-fees, unless the matter were within the jurisdiction of a Single Judge. If a Division Bench alone can reject the appeal on the ground of insufficiency of court-fees, then the matter should be laid before such a Division Bench. AIR (Vol 22) 1935 All 620 (2): (1935) ALJ 681 : 1935 AWR (HC) 743 : 57 All 983 : 157 Ind Cas 347 (FB).

——O. 44, R. 1 — Appeal — Court-fees.

On rejecting an application to appeal in forma pauperis, the Court is not bound to give time for the payment of court-fee on the appeal. AIR (Vol 22) 1935 Pesh 22: 154 Ind Cas 943.

——O. 44, R. 1, O. 33, R. 15 — Dismissal of application for leave to appeal in forma pauperis — Time to pay stamp duty must be granted — Such application dismissed on ground that decree was not contrary to law.

Whenever an application to appeal as a pauper is rejected, the Court should automatically pass an order granting time to the would be appellant to pay the stamp due on the memorandum of appeal.

The applicant filed a suit for Rs. 15,000, damages for malicious prosecution. His suit was dismissed. He then applied for leave to appeal in forma pauperis against this decree, and his application was rejected under O. 44, R. 1, as the Court saw no reason to think that the decree was contrary to law or otherwise erroneous or unjust. The applicant then applied for an opportunity to be allowed to amend his memorandum of appeal by reducing the amount claimed, and then to be allowed time to stamp it on a new valuation:

Held, that there was no subsisting appeal before the Court of which the memorandum could be stamped with reduced court-fee. AIR (Vol 22) 1935 Rang 336: 13 Rang 50: 159 Ind Cas 468 (DB).

——O. 44, R. 1 — Leave to appeal in forma pauperis — Refusal of — Applicant if entitled to prosecute appeal on payment of Court fee.

The dismissal of an application for leave to appeal in forma pauperis presented along with the memo. of appeal does not amount to the dismissal of the appeal. The Court refuses to exercise its jurisdiction if it declines to allow Court fees to be paid on the memo. of appeal. AIR (Vol 5) 1918 All 194: 40 All 381: 16 ALJ 309: 45 Ind Cas 29 (DB).

6-7. Leave.

——O. 44, R. 1 — Leave to appeal in forma pauperis — If can be restricted to a part of the subject-matter of the appeal.

Leave to appeal in forma pauperis cannot be restricted to a part of the subject-matter of the appeal. The decree sought to be appealed from cannot be severed, and the Court cannot treat the decree so far as a part of the subject-matter is concerned as notionally a separate decree in respect of which alone an order may be made. AIR (Vol 36) 1949 Mad 151 : 1948 MWN 620 : 61 LW 623 : (1948) 2 MLJ 201 (DB).

——O. 44, R. 1, O. 33, Rr. 2, 5 — Where leave to appeal in forma pauperis is obtained by practising fraud upon the Court by not disclosing all the assets as required under O. 33, R. 2 read with R. 5 (a), the leave must be cancelled. AIR (Vol 32) 1945 Mad 296: (1945) 1 MLJ 53: 58 MLW 21: 1945 MWN 97: ILR (1945) Mad 628 (DB).

——O. 44, R. 1 — Under O. 33, R. 2, an application to sue in forma pauperis has to be signed and verified as a plaint but a memo. of an appeal does not require to be verified, and it is a matter of at least considerable doubt, whether the provisions that an application for permission to sue as a pauper, which is virtually a plaint, and contains various allegations of facts should be verified as a plaint, is a provision that may suitably be applied to an application for leave to appeal in forma pauperis which contains merely a bare statement in Form No. 10 of Appendix C. AIR (Vol 24) 1937 Nag 108: ILR (1938) Nag 245: 169 Ind Cas 894.

——O. 44, R. 1 — The question of granting leave to appeal in forma pauperis is not one of public revenue alone but is also intended to prevent frivolous litigation by persons who have nothing to lose. AIR (Vol 22) 1935 Mad 51: (1934) MWN 1029: 40 MLW 862: 68 MLJ 51: 58 Mad 298: 153 Ind Cas 476 (2) (DB).

——O. 44, R. 1 — Leave when granted.

The Court must reject an application for leave to appeal in forma pauperis where the appellant has entered into any agreement with reference to the subject-matter of the appeal under which any other person has obtained an interest in such subject-matter, even though such agreement was entered into after the commencement of the suit. (1930) 122 Ind Cas 831 (Pat) (DB).

8. Limitation.

——O. 44, R. 1 — Section 5, Limitation Act, has not been made applicable to an application under O. 44, R. 1, Civil P. C. (1940) 186 Ind Cas 161: 1940 OWN (CC) 172: 1940 AWR (CC) 89 (1): 15 Luck 390.

——O. 44, R. 1 — Application for leave held time-barred — Application to extend time for payment of court-fees — Time extended — Effect.

In a mortgage suit, a preliminary decree was passed in favour of the mortgagee. The mortgagor judgment-debtor appealed in forma pauperis to the High Court. On April 30, 1936, her application to appeal in forma pauperis was dismissed as barred by time. On the same day, she applied under S. 151 O. 7, R. 11 and S. 107, Civil P. C., for extending time for paying court-fee on the memorandum of appeal filed along with the application to appeal in forma pauperis. On June 12, 1936, a Division Bench permitted her to pay court-fee and printing fee by June 29, 1936, otherwise the appeal was to stand dismissed. The court-fee was duly paid. A preliminary objection was taken that, in the circumstances, the appeal was barred by time, because at the date of the order extending time there was no appeal before the Court at all but only an unstamped piece of paper, the memorandum of appeal; therefore no time could be extended and that anyhow the appeal remained barred by time even if the Court passed an order extending time:

Held, that the order of the Division Bench of June 12, 1936, impliedly held that there was an appeal and that time should be extended up to June 29, 1936. This order was not ex parte and, therefore, bound the parties. AIR (Vol 24) 1937 Lah 819: 39 PLR 660: 172 Ind Cas 568 (DB).

——O. 44, R. 1, O. 7, R. 11 — Allahabad High Court Rules, R. 1, Cls. (ix) (x) — Rejection at preliminary stage — Validity — Subsequent application for extension of time — Maintainability — Limitation Act (IX of 1908), S. 5.

An order rejecting an application for leave to appeal as a pauper on the ground of limitation at the preliminary stage before it is actually judicially considered by the Court under O. 44, R. 1, Civil P. C. is technically an order rejecting a motion to present an application and not an order rejecting the application itself under O. 44, R. 1, and where an application is rejected at that stage the Court cannot subsequently entertain an application under S. 5, Limitation Act, for extension of time.

Obiter: — In such a case it may be that an appeal could still be presented if the proper court-fee is paid, and if it is accompanied by an application under S. 5 of the Limitation Act. AIR (Vol 20) 1933 All 308 : (1933) ALJ 585 : 144 Ind Cas 79.

——O. 44, R. 1 — Time for paying Court-fee.

When an appeal is instituted with an application for leave to appeal in forma pauperis the terms of R. 1 of O. 44 make it clear that the judgment and decree are appealed from and the rejection of the application has no effect on the appeal. There is an appeal before the Court which was presented within the time and the Court may in its discretion allow the payment of the Court-fee at a later stage and payment is then made it will give the same effect as if it had been made in the first instance.

Held also, that it was a proper case for the application of S. 5, Limitation Act. (1929) 115 Ind Cas 678: 9 PLT 613 (DB).

——O. 44, R. 1 — Mistake as to court-fee.

R filed an appeal on a payment of a Court-fee of Rs. 2 on an order arising out of an application for restitution. The office reported that the appeal was against the decree and that the Court-fee was an ad valorem fee. The applicant took time to pay the deficiency in Court-fee, but ultimately made an application praying that he may be permitted to appeal as a pauper. There was an oral application, also that if necessary, time might be extended for making such an application.

Held, that the application was a bona fide one and that if the applicant had been advised beforehand that he could not appeal on a Rs. 2 stamp he would have come at once and within the time allowed by the Limitation Act. The permission, therefore, to appeal, as a pauper should be granted and time should be extended. AIR (Vol 15) 1928 All 499: 26 ALJ 847: 111 Ind Cas 655 (DB).

——O. 44, R. 1—Order to make up Court-fee — Pauper suit and appeal.

An order dismissing the application to appeal as a pauper does not affect the fact that the appeal has been preferred within the prescribed period of 30 days, if the appellant has paid the Court-fee in obedience to the Court's order and the presentation of the appeal cannot be held to be after the expiry of limitation and the appellant is entitled to have the appeal heard. There is a distinction between applications to sue as a pauper and applications to appeal as such. In the former the plaint is an integral portion of the application in the latter the memorandum of apeal is a separate document. A person who wishes to sue as a pauper is expected to put in his application in sufficient time to allow of a suit being filed within limitation, if and after his application to sue has been rejected. AIR (Vol. 9) 1922 Lah. 225: 65 Ind. Cas. 741: 3 Lah. 35: 26 PWR 1922 (DB).

——O. 44, R. 1 — Appeal in forma pauperis — Lim. Act, Art. 170.

An appeal was filed in the High Court long after 30 days had expired from the decision of the Courts below and the appellant expressed his inability to pay the Court fee and asked the Court to take the appeal in forma pauperis. Held, that the appeal having been filed beyond 30 days of the decision of the Court below, could not be treated as an application to appeal in forma pauperis, and was barred by limitation. 29 Ind Cas 1003 : AIR (Vol. 2) 1915 All 310 : 13 ALJ 635 (DB).

9. Letters Patent.

——O. 44, R. 1 (S. 592 Old Code)—"May be allowed to appeal" — Judgment — Letters Patent, S. 15.

The words "may be allowed to appeal" in S. 592 C. P C., implies a discretion and the exercise of a discretion is no judgement within the meaning of S. 15 of the Letters Patent. (1903) 26 M 437 (438) (DB).

10. Proviso.

See also Note 12.

——O. 44, R.1, Proviso — Scope — Leave to appeal as pauper — Order granting — Omission to record reasons — If makes order bad.

The proviso to R. 1 of O. 44, C. P. Code, does not in terms say that a judge granting leave to appeal in forma pauperis should give reasons for granting leave. It is, however, desirable that a Judge while admitting a pauper appeal should express and record briefly the reasons on which leave proceeded. But the omission to state the reasons or to record them in the order granting leave does not make the order bad. AIR (V 35) 1948 Bom 317 : 50 Bom LR 133 (DB).

——O. 44, R. 1, Proviso — Duty of Court under.

Where in an order on an application for permission to appeal as a pauper the Judge says that he has read the judgment of the Court below, but does not say that he has perused the application also, it cannot be said that the Judge did not know or did not do, what, according to the law, that is, proviso to O. 44, R. 1, Civil P. C, was his duty, namely to read the application. AIR (Vol 29) 1942 All 45 : (1941) ALJ 733 : 1941 AWR (HC) 357 : ILR (1941) All 793 : 198 Ind Cas 275.

——O. 44, R. 1, Proviso — Court not bound to hear applicant before rejecting application.

Although it is not necessary in law for the Judge to hear a person who files an application for an order permitting him to file an appeal in forma pauperis before passing orders of rejection yet it will tend to maintain confidence, if Judges do give applicants an opportunity of being heard, being careful, of course, not to allow them to travel beyond the documents referred to in the proviso to R. 1 of O. 44. AIR (V 29) 1942 Mad 478 (1) : 55 MLW 211 : 1942 MWN 282 : (1942) 1 MLJ 435 : ILR (1942) Mad 746 : 201 Ind Cas 773.

——O. 44, R. 1 — Application for leave to appeal in forma pauperis cannot be rejected without hearing applicant.

An application under O. 44, R. 1, Civil P. C., is a judicial proceeding and the order made therein should be based upon the exercise of a judicial discretion exercised on a proper consideration of the relevant material. An application for leave to appeal in forma pauperis cannot be rejected without hearing the applicant or giving him an opportunity of being heard. AIR (V 28) 1942 Mad 49 : ILR (1941) Mad 389 : (1940) 2 MLJ 570 : 52 MLW 514 : (1940) MWN 1026 : 195 Ind Cas 867.

——O. 44, R. 1 — Consideration — Difficulty created by order under S. 7, U. P. Encumbered Estates Act (XXV of 1934) — Property disposable with permission of Collector — Applicant held not pauper.

In an application under R. 1 of O. 44 of the Civil P. C. for permission to appeal as a pauper, the first question which has to be considered is whether Court sees reason to think that the decree sought to be appealed against is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. AIR (V 27) 1940 Oudh 208 : 1940 OWN (CC) 258 : 1940 AWR (CC) 140 : 1940 R D 111 : 15 Luck 397 : 186 Ind Cas 789 (DB).

——O. 44, R. 1 — Notice issued to respondent — Right of respondent to be heard on merits of appeal.

The wording of the proviso to O. 44, R. 1, Civil P. C., directs the Court to reject the application unless upon a perusal thereof and of the judgment and decree, certain matters appear to the Court. The word "perusal" implies that this is not to be the subject of argument by Counsel and that there is no right of Counsel to argue on the merits of the proposed appeal. The amendment of the Allahabad High Court directing notice to issue to the respondent does not give him any right to be heard on the point. All that he can argue is on the question of whether the proposed appellant is or is not a pauper. AIR (V 26) 1939 All 715 : (1939) ALJ 996 : 1939 AWR (HC) 653 : ILR (1939) All 917 : 185 Ind Cas 406 (DB).

——O. 44, R. 1 — Application to appeal as pauper — Notice to opposite party and Government Pleader issued — Whether it is open to them at final hearing, to show that case does not satisfy proviso to R. 1; O. 44.

When an application for leave to appeal in forma pauperis is admitted and the Court orders notice to issue to the opposite party and the Govt. Pleader, it is open to them at the final hearing of the rule to show that the case does not satisfy the Proviso to R. 1 of O. 44, Civil P. C., and the Court has to consider the question whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. AIR (V 26) 1939 Rang 25 : 1938 Rang L R 651 : 180 Ind Cas 374.

——O. 44, R. 1, Proviso — All that is necessary under this provision of the law is that the Judge of the Appellate Court should peruse the application for leave to appeal as pauper and the judgment and decree appealed from. He need not hear arguments in support of an application for leave to appeal in forma pauperis. (1938) 1938 OWN (C C) 1246.

——O. 44, R. 1 — An Appellate Court does not act illegally in disposing of an application for leave to appeal as a pauper in chambers in a summary manner without hearing the applicant and without giving him time for the payment of the deficient court-fee, though the general practice of the Court is to give the pauper appellant an opportunity to show that the decree against which he wishes to appeal is contrary to law. AIR (V 23) 1936 Mad 101 : 42 MLW 831 : (1935) MWN 1262 : 69 MLJ 781 : 59 Mad 805 : 159 Ind Cas 718.

——O. 44, R. 1, Proviso — Order issuing notices passed in absence of respondent.

Any order which has been passed behind the back of the party should not operate to the prejudice of that party. So, where an order issuing notices is passed in the absence of the respondents they cannot be precluded, as a result of that order from arguing before the Court that "the decree sought to be appealed against was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust." AIR (V 21) 1934 Lah 72 : 15 Lah 132 : 36 PLR 447 : 152 Ind Cas 171 (DB).

——O. 44, R. 1, Proviso — Decisions as regards contents of proviso open for final disposal — Application under O. 41, R. 1 — Opposite party, if can be heard as to whether judgment was contrary to law.

In an application under O. 41, R. 1, the opposite party can be heard on the question of whether the judgment sought to be appealed against was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust, even after admission of the application if on admitting the application the Court had not given any decision as regards the contents of the proviso to O. 44, R. 1 and this question was left open for final disposal after notice had been served upon the respondents. (AIR (V 16) 1929 Pat 27 held Over-

ruled by AIR (V 18) 1931 Pat 18). AIR (Vol 20) 1933 Lah 256: 34 PLR 516: 141 Ind Cas 649.

——O. 44, R. 1 — Order issuing notice — Effect — Respondent's right to show that case does not fulfil requirements of O. 44, R. 1.

Held by the Full Bench. — After a notice is issued to show cause why the application for leave to appeal in forma pauperis should not be granted, it is open to the opposite party to show that the case did not satisfy the proviso to O. 44, R. 1, Civil P. C., in other words that it was not shown that the decree was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust.

Kulwant Sahay, J. — The order directing the issue of a notice does not decide the question finally, it only shows that the Court in issuing the notice was satisfied that there was a prima facie question which ought to be heard and decided under O. 44, R. 1 and in calling upon the opposite party to show cause, the Court could not preclude him from showing that the case did not comply with the provisions and was not a fit case in which leave ought to be granted.

Wort, J. — It would be unjust and, therefore, unlawful to finally decide in the application for the issue of a rule, the question of whether a point of law did arise and thus shut out the respondent on the hearing of the application from arguing that no such question of law arose and that therefore, the applicant should not be allowed to appeal in forma pauperis. AIR (V 18) 1931 Pat 183 : 12 PLT 156 : 10 Pat 606 : 132 Ind Cas 364 (FB).

(Overrules —
(1) AIR (V 16) 1929 Pat 27 : 7 Pat 82: 114 Ind Cas 210.
(2) AIR (V 15) 1928 Pat 118 : 6 Pat 687 : 109 Ind Cas 645.
(3) AIR (V 11) 1924 Pat 791 : 2 PLR 153 : 8 PLT 119.) .

——O. 44, R. 1 — Presumption.

Where an application for leave to appeal as a pauper is admitted, it has to be presumed that the Court admitting the application saw good reason to think that the decree was contrary to law or to some usage having the force of law and the respondent cannot, at the time of showing cause against pauperism, argue that there was no such question involved in the case. AIR (V 16) 1929 Pat 27 : 7 Pat 825 : 10 PLT 46 : 114 Ind Cas 210 (DB).

(Overruled in AIR 1931 Pat 181 (FB).)

——O. 44, R. 1, Proviso — Application for leave to appeal in forma pauperis — Order for the issue of notices to the respondents and Government Pleader — Proviso does not apply.

Where an application for leave to appeal in forma pauperis, the Court has passed an order that notice should issue to the respondent and the Government Pleader it is no longer open to the Court to examine the question whether the decree of the lower Court was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust. AIR (V 15) 1928 Pat 118 (DB).

(Overruled in AIR 1931 Pat 183 (FB).)

——O. 44, R. 1 — Discretion as to Court-fee on the rejected application.

An application for leave to appeal as a pauper and a memorandum of appeal accompanying such application must be considered to be two documents presented under R. 1 as separate and while dismissing the application to appeal as a pauper summarily under the proviso to R. 1 or after inquiry on the ground that the applicant was not a pauper the Court must pass a separate order, on the memorandum of appeal directing the appellant to pay the Court-fee within a certain time with a penalty attached, of his appeal being liable to dismissal for want of such payment. AIR (V 13) 1926 Oudh 13 : 90 Ind Cas 371.

——O. 44, R. 1 — Before notice.

An application for leave to appeal in forma pauperis can be rejected before admission if the Court is not satisfied that the judgment is contrary to law or otherwise erroneous or unjust, but when the Court has ordered that the application will be heard and notices be served upon the opposite party and Government Advocate the question as to whether proviso under O. 44, R. 1, has been complied with or not, cannot be considered subsequently. AIR (V 11) 1924 Pat 791 : 2 PLR Civ 153 : 8 PLT 119 (DB).

(Overruled in AIR 1931 Pat 183 (FB).)

——O. 44, R. 1 (S. 592 Old Code) — Proviso — Pauper appeal — Admission.

The proviso to S. 592 is a very necessary safeguard introduced by the Legislature for the benefit of litigants who find themselves opposed by paupers. The court should be careful to see that the proviso is satisfied. To provide a safeguard against the proviso being overlooked, the judge admitting a pauper appeal should not only see but express and record very briefly the reason on which the leave proceeds. (1904) 6 Bom LR 442 : 28 B. 451 (452) (DB).

11. Person.

——O. 44, R. 1 — The word 'person' in the explanation to O. 33. R. 1 and O. 44, R. 1, does not include a limited company and application by such company to sue as a pauper or to prefer an appeal as a pauper, is incompetent under O. 44, R. 1, Civil P. C. AIR (V 25) 1938 Cal 745 : 42 CWN 1164 : ILR (1939) 1 Cal 81 : 178 Ind Cas 977 (DB).

12. Procedure.

See also Note 10.

——O. 44, R. 1 — Although there is no express provision in O. 44, Civil P. C., applicable to appeals for the issue of a notice, yet the provisions, in so far as they are applicable contained in O. 33, ought to be understood to be incorporated inasmuch as it is expressly laid down in O. 44, R. 1, Civil P. C. AIR (Vol 26) 1939 All 715 : (1939) ALJ 996 : 1939 AWR (HC) 653 : ILR (1939) All 917 : 185 Ind Cas 406 (DB).

——O. 44, R. 1 — Procedure on presentation of application for leave to appeal as pauper, stated.

The correct procedure on the presentation of an application for leave to appeal as a pauper is, if the Court does not see fit to reject the application on hearing the applicant only, to issue notice (without calling for the records), in Form No. 11 of Appendix G to Civil P. C., to the respondent and the Govt. Pleader, and then to hear all parties in regard to the question raised by the Proviso to R. 1 of O. 44, Civil P. C., and come to a decision thereon and also to decide the question of pauperism if that falls to be decided under R. 2. AIR (V 26) 1939 Rang 25 : 1938 Rang LR 651 : 180 Ind Cas 375.

——O. 44, R. 1 — Notice issued on opposite party and Government Advocate — Court, if can still reject application for leave to appeal as pauper.

When notice has been issued upon an application under O. 44, R. 1 of the Code to the opposite party and the Govt. Advocate, it is still open to the Court under the proviso to that rule to reject the application unless, upon a perusal thereof, and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law

or to some usage having the force of law, or is otherwise erroneous or unjust. AIR (V 24) 1937 Oudh 222 : 1937 OWN (CC) 14 : 13 Luck 31 : 166 Ind Cas 284 (FB).

(Overrules AIR (V 24) 1937 Oudh 2 : 1936 OWN (CC) 875: 165 Ind Cas 276 (1).)

——O. 44, R. 1 — Issuing notice before considering whether judgment is contrary to law or unjust — Power of Judge to cancel order issuing notice and dismiss appeal summarily — Hearing respondent, effect of.

Where a Court issued notice to the respondent on an application for leave to appeal in forma pauperis without considering whether the judgment was contrary to law or usage or otherwise unjust or erroneous but finding out its error rescinded its prior order and holding that there was no substance in the appeal rejected it under O. 44, R. 1, Civil P. C.

Held, that the District Judge did not act wrongly in rescinding his prior order as an appeal in forma pauperis should not be admitted until the Judge is satisfied that the decree of the Court appealed against is contrary to law or is otherwise erroneous or unjust.

Held, further, that though the Pleader for the respondent had no right to be heard, the judgment could not be held to be illegal simply because the respondent was heard.

Presumably a Judge is always justified in hearing the other side in order that he may give an order which is not erroneous or unjust. AIR (Vol 23) 1936 Mad 842: 44 MLW 425: 71 MLJ 497: (1936) MWN 1027: 165 Ind Cas 741.

——O. 44, R. 1 — Question whether decree is contrary to law whether can be gone into after issue of notice to respondent — Practice of the Madras High Court.

The practice of the Madras High Court in the matter of applications for leave to appeal in forma pauperis is to consider the question whether the decree appealed against is contrary to law or is otherwise erroneous or unjust, before issuing notice to the respondent. The respondent is only entitled to show cause why the applicant should not appeal as a pauper. If there is any practice to the contrary in Mufussil Courts, it is not a proper practice and it should be stopped. AIR (Vol 23) 1936 Mad 661 : 163 Ind Cas 755.

——O. 44, R. 1 — Rejection under — Every ground, if to be discussed.

There is no reason why every ground should be discussed in an order rejecting an application to file appeal in forma pauperis. AIR (Vol 22) 1935 Pesh 22: 154 Ind Cas 943.

——O. 44, R. 1 — Issue of notice to opposite-party and Government Advocate by Court — Power of Court.

It is open to a Court, hearing an application under O. 44, R. 1, after issuing notice to the opposite party and the Govt. Advocate, to consider the question whether the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust nor is it precluded from determining that question by the fact that the order issuing notice impliedly held that the decree was not contrary to law or usage having the force of law and that it is not otherwise erroneous or unjust, and the Court is not precluded from determining such question merely because notice to the opposite party and the Govt. Advocate have been issued previously. AIR (Vol 21) 1934 All 1000 : (1934) ALJ 961 : 4 AWR (HC) 749 : 57 All 440 : 153 Ind Cas 195 (FB).

——O. 44, R. 1 — Procedure — Notice issued to respondent — Whether precludes Court from considering the question again.

When an application for permission to appeal as a pauper is made, the Court has first to consider whether prima facie there is any ground for the rejection of the application. If the application is rejected, the whole matter ends there. If it is not rejected a notice is to go to the Govt. Pleader and the respondent and when they appear the Court has to decide on hearing them whether the applicant is in a position to pay the Court-fee and further whether the decree is one which is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. The fact that the Court has allowed notice to issue to the respondent will not preclude it from considering the question again. AIR (Vol 21) 1934 All 424: (1934) ALJ 827: 3 AWR (HC) 539: 56 All 895: 148 Ind Cas 624 (DB).

——O. 44, R. 1 — Notice issued on application — Summary dismissal of application without hearing parties — Legality of.

Where a person applied under O. 44, R. 1, Civil P. C. to be allowed to appeal as a pauper and the Judge after issuing notice upon the application to the opposite party an to the Govt. Pleader dismissed is summarily without hearing the opposite party or the pauper himself.

Held, that having once come to the conclusion that there was a prima facie case to be heard, in that notice was ordered to be issued, the Court was functus officio as regards summary dismissal and the Judge was bound to hear the parties before he did anything. AIR (Vol 20) 1933 All 925: (1933) ALJ 1467: 56 All 268: 147 Ind Cas 280 (DB)

——O. 44, R. 1 — Procedure — Applicability of Proviso.

Under O. 44, R. 1, the Court should either reject the appeal filed in forma pauperis summarily or issue notice to enquire into the question of the appellant's pauperism. But where it issues notice it is not open to the Court to fall back on the proviso to O. 44, R. 1 which relates only to summary rejection upon a perusal of the judgment and decree appealed from. AIR (V 20) 1933 All 11 : 54 All 394 : 143 Ind Cas 321.

——O. 44, R. 1 Proviso — Issue of notice — Subsequent rejection by succeeding Judge under proviso — Legality.

Where the Judge before whom an application for leave to appeal in forma pauperis has been filed has issued notice on it, it must be presumed that he had applied his mind to the proviso to O. 44, R. 1, Civil P. C. and it is not open to his successor to re-consider the matter and reject the application under the proviso. AIR (V 20) 1933 Mad 658 : 38 MLW 270 : 65 MLJ 362 : (1933) MWN 1308 : 145 Ind Cas 831.

——O. 44, R. 1 — Application to appeal in forma pauperis — Right of respondent to be heard on merits — Form XI, App. G — Scope of notice.

In an application for leave to appeal in forma pauperis, the respondent is not entitled to be heard on the question whether the decree of the Court below is "contrary to law or to some usage having the force of law or is otherwise erroneous or unjust", as provided in the proviso to O. 44, R. 1. AIR (V 19) 1932 Mad 523: (1932) MWN 537 : 63 MLJ 28 : 36 MLW 33 : 55 Mad 982 : 139 Ind Cas 652.

——O. 44, R. 1 — Application of proviso — Respondent can show that the proviso to the rule is not complied with.

There is no reason why the order of admission of an application which is only an ex parte order should be binding upon the respondent and why he

should be precluded from showing that the case does not fulfil the the requirements of the law as enacted by the proviso to O. 44, R. 1. Moreover, it sometimes happens that the Court, before finally deciding the question, desires to hear the respondent, and there is no valid reason why the order of admission should prevent the Court from pronouncing its decision thereupon at the final hearing. AIR 1928 Pat 118; AIR 1924 Pat 791, Diss. from. AIR (V 16) 1929 Lah 514 : 114 Ind Cas 325.

——**O. 44, R. 1 — Evidence.**

Under O. 44, R. 1, the Court has no right to refer to the record of evidence. The Court must confine itself to the judgment and decree appealed from. AIR (V 12) 1925 Rang 249 : 88 Ind Cas 988 : 4 Bur LJ 55 (DB).

——**O. 44, R. 1 and S. 149 — Dismissal of application for leave to appeal as pauper — Effect on memorandum of appeal.**

An Appellate Court can, under S. 149, grant time to the applicant to pay Court fees on dismissing the application for leave to appeal as a pauper. The rejection of such an application does not include the rejection of the memo. of appeal. AIR (V 5) 1918 Mad 1039 : 31 MLJ 269 : 40 Mad 687 : 38 Ind Cas 617 (DB).

——**O. 44, R. 1 — Ex parte order — Extending time for leave to appeal 'in forma pauperis' — Preliminary objection at the time of hearing petition, for discharge, necessity.**

Where a Court passed an ex parte order extending time for application for leave to appeal in forma pauperis, when it had no power to do so, the proper course for the other side is to move by petition for the discharge of the order and not by way of preliminary objection at the time of hearing. (1903) 30 C 790 : 8 CWN 906 (DB).

13. Pauperism.

——**O. 44, R. 1 (All.) — Question of pauperism — Decision without hearing the other party — Legality.**

The question of the pauperism of an applicant for leave to appeal in forma pauperis cannot be decided in his favour by a Court without giving an opportunity to the other party to be heard on that question. AIR (V 35) 1948 A 323 : 1948 AWR (HC) 47 : 1948 OA (HC) 47 (DB).

——O. 44, R. 1 — The property decreed in favour of the plaintiff-appellant by the trial Court cannot be taken into account in determining the sufficiency or otherwise of the plaintiff's means to enable him to pay the court-fee on the memorandum of appeal. AIR (V 28) 1941 Oudh 113 : 1940 O W N (C C) 1188 : 1940 AWR (C C) 470 : 191 Ind Cas 722 (DB).

——**O. 44, R. 1 — Consideration — Difficulty created by order under S. 7 U. P. Encumbered Estates Act (XXV of 1934) — Property disposable with permission of Collector.**

Where the applicants under O. 44, R. 1 are free to dispose of their property, by making an application to the Collector and get out of the difficulty created by an order passed under S. 7, U. P Encum. Estates Act, they cannot be heard to say that they are paupers merely because they allege that they were unable to find a buyer for their property. AIR (V 27) 1940 Oudh 208 : 1940 OWN (CC) 258 : 1940 AWR (CC) 140 : 1940 RD 111 : 15 Luck 397 : 186 Ind Cas 789 (DB).

14. Proper presentation.

——**O. 44, R. 1 — Appeal in forma pauperis — Application for leave without copy of judgment and decree of the lower Court.**

Held, that the appeal was not properly presented. AIR (V 23) 1936 Mad 600 : 44 MLW 152 : (1936) MWN 304 : 165 Ind Cas 471.

——**O. 44, R. 1, S. 149 — Application for leave to appeal in forma pauperis — No copies of decree or judgment — Application rejected — Appeal if pending — Value of appeal beyond jurisdiction of Single Judge — Dismissal — Appeal insufficiently stamped — Single Judge, if can decline to receive it.**

Where copies of the decree and the judgment are not filed. it is impossible to regard the memorandum of appeal as constituting a complete appeal in itself. In such an event no appeal has really been preferred, but only an application for leave to appeal has been made. If that application is granted, then there are no further requisites, and the applicant would not be called upon to furnish copies of the decree and the judgment. But if the application is rejected, the whole matter falls through, and there is no longer any appeal pending before the Court An appeal can only be preferred from a decree, and when the decree is not filed, no appeal can be considered to be pending. The memorandum of appeal in such a case must be considered as a mere appendix to the application and the rejection of the application puts an end to the whole proceeding. AIR (V 22) 1935 All 620 (2) : (1935) ALJ 681 : 1935 AWR (HC) 743 : 57 All 983 : 157 Ind Cas 347 (FB).

——**O. 44, R. 1 — Leave to appeal — Oudh Court's Act, S. 8 (c).**

When the subject-matter is of the value of Rs. 10,000 or upwards, it is advisable to apply for leave to appeal as a pauper to a Bench of two Judges under S. 8 (c). 3 OLJ 694 : 38 Ind Cas 541 AIR (V 4) 1917 Oudh 103 (DB).

——**O. 44, R. 1; O. 33, R. 3 (Ss. 592, 404, old Code) — Appeal Presentation by agent Pardahnashin — Letters Patent, S. 8.**

An appeal in forma pauperis by the agent of a pardanashin woman, who is entitled to exemption from personal appearance under S. 640, C. P. C., is a valid appeal notwithstanding S. 8 of the Letters Patent. (1909) AWN 213 : 24 A 172 (173) (DB).

15. Power of court.

——**O. 44, R. 1; O. 33, R. 1 — Suit to enforce mortgage — Appeal by mortgagor — Subject-matter of suit — Value of equity of redemption.**

In a suit to enforce a mortage, the equity of redemption in the mortgagor or defendant cannot be regarded to be the subject-matter of the suit, and for the purpose of deciding the question as to whether the mortgagor is a pauper or not the value of the equity of redemption cannot be excluded by the Court from its consideration. AIR (V 28) 1941 Cal 659 : ILR (1941) 1 Cal 428 : 45 CWN 426 : 197 Ind Cas 489 (DB).

——**O. 44, R. 1 — Applicant's right to be heard.**

An application for leave to appeal in forma pauperis can be dismissed summarily without hearing the applicant if the Judge, after reading the judgment appealed against does not see reason to think that it is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. AIR (V 19) 1932 All 712 : (1932) ALJ 860 : 143 Ind Cas 856 (DB).

——**O. 44, R. 1 — Summary rejection after issue of notice to respondent, legality of.**

Under O. 44, R. 1, Civil P. C. it is open to an Appellate Court even after an application for leave to appeal in forma pauperis has been admitted and it has ordered notice to be served on the other party, to consider whether the decree is contrary to law or some usage having the force of law or is otherwise erroneous or unjust. AIR (V 19) 1932 Lah 654 : 33 PLR 1079 : 140 Ind Cas 439.

——O. 44, R. 1 — Under O. 44, R. 1, of the C. P. Code., it is unnecessary for the Appellate Court to arrive at a definite and final conclusion that the decree complained against is contrary to law or is

otherwise erroneous or unjust, before granting leave to appeal in forma pauperis ; it is enough if the Court finds that the appeal raises a substantial question of law or the appellant has a prima facie good case. 53 Mad 245 : 31 LW 76 : 122 Ind Cas 337 : 58 MLJ 195 : AIR (V 18) 1931 Mad 198 (DB).

——O. 44, R. 1 — Pauper appeal — Admission — Power of Court.

It is open for an Appellate Court, even after an application for leave to appeal in forma pauperis has been admitted, and notice on the opposite party has been served to consider whether the conditions in the proviso to O. 44, R. 1, Civil P. C. are satisfied. (1931) 133 Ind Cas 125 (Lah).

——O. 44, R. 1 — Reasons for rejection.

——O. 44, R. 1, does not require reasons for rejecting leave to appeal in forma pauperis to be stated and the absence of them does not vitiate the trial. 120 Ind Cas 413 : AIR (V 17) 1930 Nag 53.

——O. 44, R. 1 —Effect of granting leave.

——Once the leave to appeal in forma pauperis is granted it could be legitimately inferred that there was prima facie ground for holding that the case fell within the proviso to O. 44, R. 1. If a Court considers any particular case to be fit for granting the leave, the granting of the leave involves the consequence, if not expressly, at least, by necessary implication that prima facie, that case is fit to be placed outside the purview of O. 41, R. 10. 121 Ind Cas 61 : 12 NLJ 92 : AIR (V 17) 1930 Nag 28.

——O. 44, R. 1 — Proviso mandatory.

Under the proviso of O. 44, R. 1, the powers of the Appellate Court are very restricted even in a first appeal from a decree. The proviso is mandatory, and the appellate Court has no option except to reject the application, unless it is satisfied that the decree sought to be appealed against "is contrary to law . . . or is otherwise erroneous or unjust." It does not appear after a perusal of the application, the judgment and the decree that the decision of the Court is contrary to law . . . or is otherwise erroneous or unjust the Court is precluded from admitting the application for leave to appeal in forma pauperis. 114 Ind Cas 80 : AIR (V 16) 1929 Lah 539.

——O. 44, R. 1 — Forma pauperis — Application by community.

High Court cannot grant leave to appeal to His Majesty in Council in forma pauperis especially when the petition for leave is on behalf of a whole community because the whole community cannot be said poor. (1929) 115 IC 832 (Mad) (DB).

——O. 44, R. 1 — The language of O. 44, R. 1 (proviso) is imperative, and a Court of Appeal can only grant permission to the applicant, who desires to appeal in forma pauperis, if the applicant is in a position to satisfy the Court that the decree appealed from is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. (1928) 109 Ind Cas 391 (Lah).

——O. 44, R. 1 — Effect of issuing notice.

Where on an application for leave to appeal in forma pauperis, the Court has passed an order that notice should issue to the respondent and the Government Pleader, it is no longer open to the Court to examine the question whether the decree of the lower Court was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust. 6 Pat 687 : 109 Ind Cas 645 : AIR (V 15) 1928 Pat 118 (DB).

——O. 44, R. 1 — Where the decree appealed from did not appear to be contrary to law or to some usage having the force of law or otherwise erroneous or unjust, the appellate Court did not admit an application to appeal as pauper even conceding that the applicant was a pauper. 89 Ind Cas 292 : 7 LLJ 214 : AIR (V 12) 1925 Lah 391.

——O. 44, R. 1 — Correctness of decision.

The terms in the proviso merely indicate that the Court, before admitting a pauper appeal, should be satisfied that it is not merely a frivolous appeal and that there are reasonable grounds for doubting the correctness or justness of the decision of the lower Court 87 Ind Cas 960 : 22 MLW 23 : AIR (V 12) 1925 Mad 1178 : 49 MLJ 353.

——O. 44, R. 1 — The Court is entirely precluded from admitting an application under O. 44, R. 1 unless satisfied that the decree of lower Court, is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. 94 Ind Cas 814 : 4 Pat 67 : AIR (V 12) 1925 Pat 443 (DB).

——O. 44, R. 1 — Appeal to be continued in forma pauperis.

Assuming the Court has jurisdiction to allow an appellant to continue an appeal in forma pauperis (it can be exercised only if on a perusal of the judgment) and decree appealed from and the appeal memo., the Court is of opinion that decree is contrary to law. 38 MLJ 146 : (1920) MWN 277 : 10 LW 659 : 54 Ind Cas 761 : AIR (V 7) 1920 Mad 230 (DB).

——O. 44, R. 1 — Privy Council — Leave to appeal in forma pauperis.

The High Court has no power to grant leave to a party to appeal to the Privy Council in forma pauperis. 42 Mad 32 : 35 MLJ 258 : 24 MLT 207 : 8 LW 460 : 47 Ind Cas 646 : AIR (V 5) 1918 Mad 18 (DB).

——O. 44, R. 1 — Appeal in forma pauperis — Right of applicant to be heard.

An applicant applying for permission to appeal in forma pauperis is not entitled as of right to be heard either in person or by pleader before the Court exercises its power to allow or reject the application. 28 Ind Cas 957 (1) : AIR (V 3) 1916 Mad 636.

——O. 44, R. 1 — Leave to appeal.

Unless a Lower Appellate Court acts with illegality or irregularity, its order rejecting an application for leave to appeal as a pauper cannot be revised by the High Court. 2 OLJ 254 : 30 Ind Cas 86 (1) : AIR (V 2) 1915 Oudh 3.

——O. 44, R. 1 — Leave to appeal as pauper — Considerations.

In determining whether an application for leave to appeal as a pauper may or may not be granted, the Judge is not at liberty to refer to any other matter except what is contained in the application, copy of the judgment and the copy of the decree. (1910) 13 OC 302 : 8 Ind Cas 376.

——O. 44, R. 1, O. 33, R. 5 (Ss. 592, 407 Cl (d) old Code) — Grant of leave to appeal 'in forma pauperis' — Appellate Court's powers.

The question whether a person can be allowed the right to appeal in forma pauperis arises only after the appeal has been presented, and as such the grant of leave to appeal in forma pauperis is subject to the rules contained in Chap. XXVI of the Civil P. C. the High Court had directed the Subordinate Judge to hold an inquiry into the pauperism or otherwise of the appellant and make a report. The Subordinate Judge reported that the appellant was a pauper in fact, but had disqualified herself from appealing in forma pauperis by having entered into an agreement with others such as is contemplated in Cl. (d) of S. 407. Leave was refused on the ground that the appellant had at the time of presenting the appeal entered into an agreement provided for in Cl. (d) of S. 407, C. P. C.

Held, that the order of the High Court calling upon the Sub-Judge did not operate as a final disposal of the petition for leave to appeal in forma pauperis and that it was open to the High

Court upon the receipt of the report to consider whether the case was one in which leave to appeal in forma pauperis ought to be granted. (1906) 17 MLJ 447 : 30 M 547 (547 548) : 3 MLT 11 (DB).

16. Revision.

——O. 44, R. 1 — Application for leave to appeal in forma pauperis against a decree of a Special Judge under the U. P. Encumbered Estates Act — Order on, is not interlocutory order but is a "case decided" within the meaning of S. 115, Civil P. C. and hence can be revised under S.115, Civil P. C. AIR (V 29) 1942 Oudh 240 : 1942 OWN(CC) 106 : 1942 RD 181 : 1942 AWR (CC) 79 : 17 Luck 628 : 199 Ind Cas 614.

——O. 44, R. 1 — Order refusing leave — Revision.

Order refusing leave to appeal in forma pauperis can be revised. But High Court has no power to interfere on the merits of the order refusing leave to appeal in forma pauperis. 120 Ind Cas 413 : AIR (V 17) 1930 Nag 53.

——O. 44, R. 1 — Revision.

It is in very exceptional cases that the High Court will interfere in revision with an order under O. 44, R. 1. 91 Ind Cas 96 : AIR (V 13) 1926 Oudh 204.

——O. 44, R. 2.

——O. 44, R. 2, S. 109 (c) — Appellate Court ordering inquiry by Subordinate Court — Report of latter if binding on former — Appellate Court — Rejection.

Under O. 44, R. 2, Civil P. C. it is the Appellate Court which alone has power to grant leave to appeal in 'forma pauperis', and the fact that it directs an enquiry by the Subordinate Court into the applicant's pauperism does not mean that it divests itself of jurisdiction to decide whether leave should be given. The rule merely provides for an enquiry by the Subordinate Court, it does not in any way indicate that the report of that Court must be accepted, and it is entirely within the competence of the Appellate Court to accept or reject it. AIR (Vol 29) 1942 Oudh 422: 1942 OWN (CC) 305: 1942 AWR (CC) 209: 200 Ind Cas 426 (DB).

——O. 44, R. 2 — It is open to the respondent to argue that the appellant is not a pauper and that the decree is not contrary to law etc., even though there has been a preliminary finding to that effect, and the reason for this should be based on the principle that an order passed behind the back of a party should not operate to the prejudice of that party. AIR (Vol 24) 1937 Nag 150: ILR (1937) Nag 463: 169 Ind Cas 260.

——O. 44, R. 2 — Omission to state assets.

Once it is shown that the application does not set forth assets with the utmost good faith, it is open to Appellate Court to reject it 'ab initio' and not to send it down for further enquiry. AIR (Vol 17) 1930 Pat 368: 123 Ind Cas 398 (DB).

——O. 44, R. 2 — Presentation of an appeal — Payment of Court-fee.

The appeal is said to be filed on the day on which the application for leave to appeal as pauper is made though the Court fees is paid before the end of enquiry. AIR (Vol 3) 1916 LB 124: 9 Bur LT 69: 32 Ind Cas 630 (DB).

——O. 45.

See also, Civil P. C., Ss. 109 to 112.

——O. 45, R. 1.

——O. 45, Rr. 1 to 5 — Appeal to Privy Council.

A suit was decided partly in favour of the plaintiff and partly in favour of the defendant. Both parties appealed asking for different reliefs and on different grounds. The Court of Appeal passed two decrees by one judgment, by allowing the plaintiff's appeal and dismissing that of the defendant. The defendant thereafter obtained leave to appeal to the Privy Council. But his application for leave to appeal as well as the grounds of appeal taken therein referred only to the question raised in the plaintiff's appeal in the lower Court and not to the one involved in his own:

Held, that there was no appeal to the Privy Council as to the latter question and having regard to the practice and terms of O. 45, Rr. 1 to 5, Civil P. C. this question was not open to the defendant nor did their Lordships feel justified in permitting it to be raised. AIR (Vol 32) 1945 PC 13: 49 CWN 97: (1944) 2 MLJ 399: (1945) Pesh LJ PC 13: 71 IA 178: ILR (1945) All 225: 1945 ALJ 239: 12 BR 90: ILR (1945) Kar PC 50: 1945 AWR (PC) 37: 220 Ind Cas 426.

——O. 45, R. 1 — According to the practice of the Allahabad High Court it is not necessary for an applicant to obtain a copy of the judgment for the purpose of making his application. But if the applicant obtains such copy, time for obtaining it should be excluded for the purposes of limitation. AIR (Vol 21) 1934 All 367: (1933) ALJ 1631: 56 All 591: 148 Ind Cas 290 (DB).

——O. 45, R. 2.

——O. 45, R. 2 — In an appeal before Federal Court where the ground taken is not a constitutional ground at all and appellants neither have applied for nor obtained certificate under O. 45, R. 2, Civil P. C. they are not entitled to argue it as of right. Federal Court may, however, grant leave under S. 205(2), Govt. of India Act. AIR (Vol 27) 1940 FC 20: 6 BR 589: (1940) 1 MLJ 14 Sup: ILR (1940) Kar (FC) 33 Sup: 44 CWN FC 21: 72 CLJ 165: 21 PLT 1109: (1940) FCR 61: 187 Ind Cas 796.

——O. 45, R. 2 — Privy Council — Leave — Important point of law reserved for decision of High Court.

Where a petition for leave to appeal to the Privy Council is made in a case where a point of law has been reserved for the decision of the High Court, there can be no doubt that the petition is competent. AIR (Vol 22) 1935 Mad 793: (1935) MWN 5: 42 MLW 140: 68 MLJ 93 Sup: 37 Cr LJ 64: 159 Ind Cas 240 (SB).

——O. 45, R. 2 — Special leave to appeal — Criterion.

It is an ordinary criterion applicable to all petitions for special leave to appeal to the Privy Council that leave will not be granted where upon the face of the application it is plain that on the merits it is bound to fail. AIR (Vol 18) 1931 PC 111: 32 Cr LJ 727: 35 CWN 646: (1931) ALJ 448: 8 CWN 846: 53 CLJ 383: (1931) MWN 601: 32 PLR 658: 12 Lah 280: 33 Bom LR 950: 34 MLW 57: 61 MLJ 279: 58 IA 169: 131 Ind Cas 415.

——O. 45, R. 2 — Leave to appeal — Dismissal for default in furnishing list of printed papers.

Where an appeal was dismissed for default in furnishing the list of papers to be printed in the paper-book.

Held, that it was not a proper case presented for granting leave to appeal to the Privy Council. AIR (Vol 8) 1921 Pat 83: 2 PLT 112: 1921 PH CC 97: 60 Ind Cas 285 (DB).

——O. 45, R. 3.

——O. 45, R. 3 — Official Assignee not willing to litigate further after the final decision of the High Court — Motion seeking to get Court to overrule decision of Official Assignee not to litigate further when can be allowed.

Where a motion on the insolvency side of the High Court seeks to get the Court to overrule the

decision of the Official Assignee not to litigate further by directing him to lend his name to the applicant for appealing before the Privy Council, it is not sufficient for the applicant to point to a possible point which could not be raised in argument. He must satisfy the Court that the Official Assignee, in declining to give his name for the purpose of starting or continuing a litigation, notwithstanding that a full and proper indemnity has been offered to him, is not acting as a reasonable man would act if he were owner of, and not merely a trustee of the estate. AIR (Vol 29) 1942 PC 39: 8 BR 761: 55 MLW 445: (1942) ALJ 356: 46 CWN 925: (1942) 2 MLJ 343: 44 Bom LR 785: 1942 AWR PC 16: ILR (1942) Bom 740: ILR (1942) Kar (PC) 69 Sup: 69 IA 71: 200 Ind Cas 793.

——O. 45, R. 3 — The addition of the words to R. 3 of O. 45, Civil P. C. effected by Proviso (a) to R. 17, makes it clear that it is unnecessary for the Court to consider in a petition filed in compliance with O. 45, R. 2, the question whether there is a substantial question of law involved as to the interpretation of the Govt. of India Act, 1935. AIR (Vol 27) 1940 Mad 890: (1940) 2 MLJ 170: 52 MLW 240: 1940 MWN 849: ILR (1941) Mad 43: 193 Ind Cas 865 (DB).

——O. 45, R. 3 — Evidence — Admissibility — Objection not taken at any stage — Privy Council, if can allow it.

There was nothing to show that the admission of the materials of a previous suit were objected to. In any view, the trial Judge, having made use of them and having stated that they were evidence in the case, the memorandum of appeal to the Appellate Bench was found to contain no objection on this score and no objection was taken in the petition for a certificate that the case was fit to be taken on appeal to His Majesty under Ss. 109 and 110 of the Code:

Held, that the objection could not be accepted during the hearing before the Privy Council. AIR (Vol 26) 1939 PC 249: 6 BR 1: 44 CWN 66: ILR (1940) Kar (PC) 1 Sup: 183 Ind Cas 662.

——O. 45, R. 3 — Where substantial rights are in no way affected by an order, there is 'prima facie' no reason for issuing a certificate that the case is a fit one for appeal to the Privy Council.

A consideration which has to be kept in mind in granting a certificate under S. 109, Civil P. C. is that the litigation is not made oppressively expensive and the elucidation of the real issues in the case by the trial of the suit is not unduly postponed or delayed. AIR (Vol 23) 1936 Mad 311: (1935) MWN 796: 42 MLW 568: 69 MLJ 497: 160 Ind Cas 410 (DB).

——O. 45, R. 3 — Although in special cases the High Court may be able to certify under O. 45, R. 3, appeals from its own final decision which are of value of less than Rs. 10,000 yet such exceptional procedure could only be justified by exceptional circumstances. AIR (Vol 20) 1933 Oudh 394(2): 10 OWN (CC)953: 147 Ind Cas 313 (DB).

——O. 45, R. 3 — Certificate when granted — Value less than Rs. 10,000.

The High Court may be able to certify, in exceptional circumstances, under O. 45, R. 3 appeals from its final decision which are of value less than Rs. 10,000. But in an ordinary case of redemption involving a question of no general principle, as to whether certain terms of a mortgage-deed constituted a clog on the equity of redemption a certificate cannot be granted there being no exceptional circumstances to justify it. AIR (V 16) 1929 Oudh 243: 6 OWN 211: 116 Ind Cas 208 (DB).

——O. 45, R. 3 — Appeal to High Court dismissed for want of prosecution.

Where the applicant's appeal to the High Court is dismissed for want of prosecution, leave to appeal to the Privy Council cannot be granted. AIR (Vol 13) 1926 Rang 111: 3 Rang 656: 94 Ind Cas 464 (DB).

——O. 45, R. 3 — Disciplinary order — Legal practitioner.

No leave to appeal to His Majesty in Council can be granted against an order suspending a Vakil from practice, which is a disciplinary matter and not a judgment. AIR (Vol 9) 1922 Mad 440: 43 MLJ 382: 16 MLW 328: 1922 MWN 530: 31 MLT 173: 69 Ind Cas 290 (FB).

——O. 45, R. 3 — Grant based on exercise of discretion — Contents of certificate.

Certificates, when they are made in exercise of the discretion conferred, should make plain upon their face that the discretion has in fact been exercised. AIR (Vol 8) 1921 PC 128: 13 MLW 365: 1921 MWN 87: 2 PLT 132: 29 MLT 156: 62 Ind Cas 320.

——O. 45, R. 3 — Contents of certificate.

When any certificate is granted under O. 45 it is of the utmost importance that the certificate should show clearly on the face of it upon which ground it is based or if it is intended to come under S. 109 (c), that the discretion conferred by S. 109 (c), was invoked or was exercised. A I R (Vol 8) 1921 P C 25 : 60 Ind Cas 85 : 48 I A 31 : 44 Mad 293 : 19 A L J 161 : 23 Bom L R 718 : 33 C L J 277 : 25 C W N 630 : 13 M L W 321 : 1921 M W N 119 : 29 M L T 418 : 40 M L J 229.

——O. 45, R. 3 — Question of law involved — Leave to appeal to Privy Council, when can be granted.

Where many important and wide reaching questions of law are involved in a decision sought to be appealed against, the case is "otherwise a fit one for appeal to His Majesty in Council" within, R. 3. A I R (Vol 1) 1914 Mad 140 : (1914) M W N 162 : 22 Ind Cas 390 (DB).

——O. 45, R. 3 — Certificate, propriety of — Judicial discretion — Right of Privy Council to declare improper. (1901) 5 C W N 689 : 3 Bom L R 469 : 23 All 415 (419) : 28 I A 182 (PC).

——O. 45, R. 4.

1. **Scope.**
2. **Consolidation and its basis.**
3. **"Same judgment."**
4. **Inherent Powers.**
5. **Effect of Consolidation.**

1. Scope.

——O. 45, R. 4—Consolidation in respect of deposit of printing charges or furnishing security.

Order 45. R. 4 deals only with the question of consolidation as regards valuation for purposes of appeal to His Majesty in Council. There is no provision under which consolidation can be ordered in respect of deposit of printing charges or furnishing security. AIR (Vol 33) 1946 Mad 250: (1945) 1 MLJ 73: ILR (1945) Mad 672: 1945 MWN 200 (DB).

——O. 45, R. 4 — Cases not falling under O. 45, R. 4—Court, if can consolidate such appeals under R. 7, of Schedule to Rules of Indian Order in Council of February 9, 1920.

Rule 7 of the Schedule to the Rules of the Indian Order in Council of February 9, 1920, regarding Privy Council appeals invests the High Court with a power to consolidate appeals in cases not falling directly within the scope of R. 4, of O. 45, AIR (Vol 25) 1938 Lah 207: 40 PLR 658: 179 Ind Cas 53 (DB).

——O. 45, R. 4 — Two separate appeals from same suit—Appeals disposed of by one judgment on com-

mon ground—One appeal valued above Rs. 10,000 and the other below it—Latter case can be certified as fit one for appeal to His Majesty under S. 109 (c) although the requirements of S. 110 were not fulfiled Order 45, R. 4, does not in terms apply to such a case. AIR (V 23) 1936 All 832 : (1936) ALJ 1025 : 1936 A W R (H C) 883: ILR (1937) All 105: 166 Ind Cas 283 (D B).

——O. 45, R. 4 — Two parties of the defendants applied jointly for permission to appeal to His Majesty in Council. In one case, judgment of the lower Court was affirmed and no substantial question of law was involved, and in the case, of other the value of the subject-matter in dispute in appeal to His Majesty in Council was less than Rs. 10,000.

Held, the object of the joint petition is that each appeal may make good the defect in the other. R. 4 of O. 45 allows consolidation but only to make good a defect of a pecuniary valuation, and not a defect of any other kind. A I R (Vol 10) 1923 Nag 198: 69 Ind Cas 525. (D B).

——O. 45, R. 4 — Applicability of.

Order 45, R. 4 applies to appeals to the King in Council and not to appeals to the Chief Court. 17 PLR 1910 : 123 PWR 1910 : 6 Ind Cas 491.

2. Consolidation and its basis.

——O. 45, R. 4 — Order 45, R. 4, permits consolidation if the two suits are decided by the same judgment but not by separate judgments even though "they involve substantially the same questions for determination." A I R (Vol 33) 1946 All 184: 1945 A LJ 545 : 1945 AWR (HC) 383 : ILR (1946) All 221 : 224 Ind Cas 250 (DB).

——O. 45, R. 4 — Case, held fit one for consolidation.

Where the suits raised substantially the same questions and were disposed of by one judgment by the lower and the High Court, consolidation should be ordered for purposes of valuation. AIR (Vol 33) 1946 Mad 250: (1945) 1 MLJ 73: ILR (1945) Mad 672 : 1945 MWN 200 (DB).

——O. 45, R. 4 — Several suits having substantially same questions disposed of by common judgment—Valuation.

Where the questions are substantially the same in all the suits both in the lower Court and the High Court, and they are all disposed of by a common judgment, the petitioner is entitled to consolidate all the appeals for purposes of valuation. AIR (Vol 31) 1944 Mad 269: 1944 MWN 143: (1944) 1 MLJ 193: 57 MLW 158: ILR (1944) Mad 890: 218 Ind Cas 227 (D B).

——O. 45, R. 4 — Suits decided by separate judgments.

Order 45, R. 4 permits consolidation if the two suits have been decided by the same judgment but not by separate judgments even though "they involve substantially the same questions for determination." AIR (Vol 31) 1944 Sind 190: ILR (1944) Kar 163 : 220 Ind Cas 314 (DB).

——O. 45, R. 4 — One question common but other questions not so—Consolidation.

The fact that there is a common question does not entitle a petitioner to an order for consolidation when there are other questions which are not common. The basis of an order for consolidation must be that the two suits involve substantially the same question.

Order 45, R. 4, says that suits "may" be consolidated. It does not say that they shall be consolidated. Therefore the Court is not bound to grant an order for consolidation. AIR (V 26) 1939 Mad 734 : 49 MLW 470 : (1939) MWN 353 : (1939) 1 MLJ 610 : ILR (1939) Mad 593 : 184 Ind Cas 832 (DB).

——O. 45, R. 4, S. 110 — Separate suits between same parties for possession, basis of title being totally different—Suits consolidated through consent of parties — Issues different and evidence not common.

The Secretary of State filed two separate suits against the defendant for possession of two separate plots of land, the valuation being Rs. 7,800 and Rs. 6,500. The basis of the alleged title in the two suits was totally different. Both suits were tried in the same Court and after separate issues had been framed, the suits were consolidated with consent of parties. Evidence was then recorded, but none of the evidence was common to two separate matters before the Court Finally the two suits were disposed of in one judgment. In that judgment the separate issues were mentioned and the two cases were dealt with separately, the decision of one being given before the evidence regarding the other was mentioned One of the two suits was dismissed with costs and in the other a decree for possession was granted. The appeals were disposed of by separate judgments the final result being that both suits were dismissed:

Held, that there was no consolidation in the sense of production of evidence on points common to two suits or consideration of common arguments affecing them; the decrees granted were entirely separate The trial Court was one of unlimited pecuniary jurisdiction and no question of pecuniary valuation of the suits arose therein and there was no consolidation of the two suits for the purpose of pecuniary valuation for the purposes of appeal to the Privy Council. Consequently, once it had been decided that the action of the trial Court did not consolidate the two suits for the purposes of O. 45, R. 4, Civil P. C. the applicant for leave could only press his petition in respect of one out of the two suits. AIR (Vol 24) 1937 Pesh 61: 1937 Pesh LJ 61: 169 Ind Cas 926 (DB).

——O. 45, R. 4 — Applicability of the rule.

Two suits between same parties and raising same question were decided by separate judgments in the original Court. But in appeal (there were two appeals) the two cases were heard together and by consent of parties the evidence in both cases was considered as a whole. The lower Court's decree was set aside. Leave to apeal to the Privy Council was granted in one of the suits. As regards the other suit.

Held, that though the value of the suit was less than Rs. 10,000 and though no question of law was involved, it was a fit case for the application of the procedure laid down in O. 45 R 4. AIR (Vol 8) 1921 All 270: 59 Ind Cas 794: 43 All 223 (DB).

——O. 45, R. 4 — No consolidation.

The word judgment in O. 45, R. 4, refers to the judgment appealed against. Suits dealt with by separate judgments by the High Court cannot be consolidated although they were dealt by one judgment by the first Court. The important thing is that the judgment which their Lordships have to consider and from which an appeal is brought should be the same judgment in the consolidated appeals and not that they should have in the same case or in the same appeal to consider the effect of several separate judgments of the High Court. Apart from

the provisions of R. 4, consolidation cannot be ordered. AIR (V 8) 1921 Pat 97 : 60 Ind Cas 517 : 2 PLT 157: 6 PLJ 97: 1921 PHCC 145. (DB).

3. "Same judgment."

——O. 45, R. 4 — Appeal to Privy Council — Consolidation — 'Same judgment', meaning of — Valuation — Market value — Criterion — Court-fee value, how far conclusive — Similar litigation, relevancy of.

The word 'judgment' in O. 45, R. 4, means the judgment appealed against and does not refer to the judgments of the Courts below and the High Court has, therefore, power to consolidate two suits for purposes of valuation for appeal to the Privy Council if they were decided by the same judgment in the High Court even though they were not decided by a single judgment in the lower Courts.

Moreover, where there are two judgments but one is merely a copy of the other except for slight alterations, the two judgments must be regarded as the same judgment.

The presumption as regards the market value of a land is that the Court-fee value represents at least the minimum value and the Court-fee value can safely be adopted as the value for purposes of appeal to the Privy Council; the presumption becomes very strong where the other party adopts it and uses it, because both parties would then have acquiesced in that value.

The mere possibility of similar litigation will not entitle the petitioner to add to the value unless the other litigation will be affected by the doctrine of res judicata.

Per Venkatasubba Rao, J. — The defendant is not precluded as a matter of law from showing that the real value is different from the Court-fee value. AIR (Vol 19) 1932 Mad 125: 61 MLJ 692: 34 MLW 817: 55 Mad 106: 135 Ind Cas 449 (DB)

——O. 45, R. 4 — A sale deed was executed by four persons, each of whom took a separate document by which he was given an option of re-purchase. The plaintiff was one of these four persons and he brought a suit for specific performance of the agreement evidenced by the document passed in his favour. He also brought a separate suit as heir of one of the other parties, in whose favour a similar document had been passed. In the trial Court the evidence in both suits was taken in the suit brought by the plaintiff in his own right and the parties agreed to treat the evidence in that suit as evidence in the second suit. In the trial Court as well as the appellate Court, judgment were separate, but one was delivered with reference to the other, so far as the point to be raised before the Privy Council was concerned.

Held, that the suits were decided by the same judgment within the meaning of O. 45, R. 4. AIR (Vol 14) 1927 Bom 19: 50 Bom 753: 28 Bom LR 1437 : 100 Ind Cas 143 (DB).

4. Inherent powers.

——O. 45, Rr. 4 and 7 — Consolidation of appeals — Requisite conditions for ordering — Deposit of separate amounts for security and printing and translation charges in each of the appeals consolidated— If necessary.

Where several suits out of which several appeals have arisen involve the same question for determination and were in effect decided in the trial Court by almost the same judgment (though separate judgments were delivered), and by a common judgment in the First and Second Appeals and Letters Patent Appeals, the case falls directly within the scope of O. 45, R. 4. C. P. Code, and the petitioners for leave to appeal against the judgment in the Letters Patent Appeal would be entitled to an order for consolidation of the several suits for the purpose of pecuniary valuation.

The petitioners will not be precluded from showing that the real value of the subject-matter in the appeals is different from the Court-fee value.

There is no doubt no express provision of law corresponding to O. 45, R. 4, C. P. Code, permitting consolidation in respect of deposit of printing charges or furnishing security. But the proper way of looking at the matter is not to search for a special provision of law permitting consolidation for purposes of security. As after consolidation, the position is that there is only one appeal to the Privy Council or the Federal Court, the applicant or applicants can be asked to furnish security and deposit printing and translation charges only once. It may be that having regard to the number of appeals consolidated and the number of respondents in the several appeals the Court may direct security for a sum in excess of Rs. 4,000. So far as printing and other charges are concerned, except in special cases, one deposit would suffice. (1945) 1 MLJ 73 : ILR (1945) Mad 672, not approved on this point. AIR (Vol 36) 1949 Mad 739 : ILR (1950) Mad 10 : 62 LW 536 : 1949 MWN 504 : (1949) 2 MLJ 235 (FB).

——O. 45, R. 4 — Inherent power to consolidate appeals.

The High Court does not have inherent power to make order for consolidating appeals relating to appeals pending before their Lordships of the Privy Council when there is no specific provision in O. 45, R. 4 and when O. 45, R. 4 is confined to particular cases. AIR (Vol 23) 1936 All 832: (1936) ALJ 1025: ILR (1937) All 105: 1936 AWR (HC) 883: 166 Ind Cas 283 (DB).

——O. 45, R. 4 — Consolidation of appeals — Security for costs.

Order 45, R. 4, C. P. C. does not limit the inherent power of the High Court to consolidate appeals to the Privy Council for the purpose of security for costs and for saving expenses. 3 PLJ 446: (1918) PHCC 259: 45 Ind Cas 551: AIR (Vol 5) 1918 P 193 (DB).

5. Effect of consolidation.

——O. 45, R. 4 — Consolidation of appeals — Costs.

Where two or more appeals are consolidated for the purpose of hearing before the Privy Council, the security for costs is payable in respect of each of them separately. AIR (Vol 31) 1944 Bom 352: 46 Bom LR 724: 217 Ind Cas 123 (DB).

——O. 45, R. 4 — Once appeals are consolidated for whatever reason, they form in fact one appeal and the parties in that suit must be treated as the parties in one suit. AIR (Vol 10) 1923 Pat 215: 70 Ind Cas 782: 1923 PHCC 17 (DB).

——O. 45, R. 5.

——O. 45, R. 5 — Report under R. 5 made about the question of value raised in the High Court — Full information — Necessity.

When a question of value has been raised in the High Court, and when a report with reference to value has been made under O. 45, R. 5, it is desirable that full information with reference to these proceedings be included in the record in appeal

to Privy Council. AIR (V 20) 1933 PC 232 : 12 Pat 679 : 14 PLT 725 : 60 IA 366 : 146 Ind Cas 815.

——O. 45, R. 5 — Form of enquiry.

In a case remanded for enquiry and report as to the value of subject-matter of the suit the Court has discretion to determine whether there should be a local enquiry for determining value. 82 Ind Cas 744 : AIR (V 12) 1925 Cal 414 (DB).

——O. 45, R. 5 — Under-valuation — Acquiescence.

The plaintiffs valued their suit at less than Rs. 10,000 and defendants objected to the valuation but did not press their objection and the suit was decided, plaintiff's valuation being accepted. Defendants put the same value on their appeal to the District Judge and their appeal was allowed. Plaintiffs appealed to the High Court and the decree of the District Judge was reversed. Defendants applied for leave to appeal to His majesty in Council and applied for a report under O. 45, R. 5, contending that the value of the subject-matter was more than Rs. 10,000.

Held, that the defendants acquiesced in the valuation placed upon the subject-matter of the suit by the plaintiffs and obtained the advantage of an appeal to the lower appellate Court as a ground for appeal to His Majesty in Council, and having regard to the facts of the case it is not one in which High Court ought to refer the matter to the Court of first instance for a report as to the value of the subject-matter of the suit. 45 CLJ 225 : 101 Ind Cas 901 : AIR (V 14) 1927 Cal 418 (DB).

——O. 45, R. 5 — Value of subject-matter of suit.

A deft, who had consistently acquiesced in a finding as to valuation and Court-fee cannot reopen it to enable him to prefer an appeal to His Majesty in Council. 42 Bom. 609 : 20 Bom. LR 418 : 46 Ind Cas 4 : AIR (V5) 1918 Bom 224 (DB).

——O. 45, R. 5 — Reference — Delegation of inquiry.

Where a reference is made under this order to a court of first instance, the court must carry it out itself ; it should not remit the investigation to some other officer. 43 C 225 : 34 Ind Cas 203 : AIR (V 3) 1916 Cal 102 (DB).

——O. 45, R. 5 — Privy Council — Appeal to.

Plaintiff valued the subject-matter below rupees 10,000 ; deft, accepted it in his written statement and also in appeal. Held, he cannot be allowed to dispute the valuation on appeal to Privy Council although market value is the real test as to whether an appeal lies to the Privy Council. 2 OLJ 208 : 30 Ind Cas 204 : AIR (V 2) 1915 Oudh 166 (DB).

——O. 45, R. 6.

——O. 45, R. 6. — Revision.

Section 115 applies to granting or refusing to grant certificate of fitness of the case for appeal to Privy Council. AIR (V 24) 1937 Mad 930 : (1937) MWN 762 : 46 MLW 416 : 177 Ind Cas 177.

——O. 45, R. 6 (S. 601 old Code) — Refusal of certificate — Leave to appeal to Privy Council — Reasons for refusal.

It would be convenient if the High Court when it refuses leave to appeal to the King in Council gives the ground of refusal. (1906) 4 CLJ 305 : 8 Bom. LR 374 : 10 CWN 545 : 16 MLJ 160 : 29 M 194 (195) : 33 IA 67 (PC).

——O. 45, R. 6 — Judicial discretion — Leave to appeal to Privy Council — Propriety of — Right of Privy Council to declare certificate improper.

See (1901) 5 CWN 689 : 3 Bom LR 469 : 23 A 415 (419) : 28 IA 182 (PC).

——O. 45, R. 7.

1. Applicability — Scope.
2. Decree.
3. Extension of time.
4. Record of case.
5. Security and deposit.

1. Applicability — Scope.

——O. 45, R. 7 — There being a conflict between O. 45, R. 7, Civil P. C., and R. 9 of the Privy Council Rules, the latter prevails. AIR (Vol 29) 1942 Lah 279: ILR (1942) Lah 548: 45 PLR 43: 203 Ind Cas 273 (DB).

——O. 45, R. 7 (as amended in 1920) — Object of amendment, explained.

The object of the amendment of O. 45, R. 7, made in 1920 was to expedite appeals to the Privy Council by the restriction of the Court's discretion in granting extensions of time within which to comply with the provisions of the rule in regard to the furnishing of security, etc. The argument that the restriction of the discretion refers only to the period of sixty days from the date of the decree complained of and not to the six weeks from the date of the certificate, must fail. Such an interpretation would manifestly defeat the clear intention of the amendment. AIR (Vol 26) 1939 All 299: (1939) ALJ 278: 1939 OWN (HC) 366: 1939 AWR (CC) 322: ILR (1939) All 549: 181 Ind Cas 378 (FB).

——O. 45, R. 7 (S. 602, old Code) — Privy Council — Appeal by special leave — Time for depositing estimated costs — Extension.

Although S. 602 of C. P. C. only applies to a case where a certificate of leave to appeal to the Privy Council has been granted by the High Court, it has been the invariable practice of the Calcutta High Court to treat that section as applying to cases where special leave has been granted by the Privy Council. (1907) 11 CWN 1104 (1105) (FB).

2. Decree.

——O. 45, R. 7 — Decree includes a decree passed on review which modifies the first decree. 4 Lah 185: 75 Ind Cas 520: 6 LLJ 44: AIR (Vol 11) 1924 Lah 82 (DB).

——O. 45, R. 7 — Decree prior to Act — Time for deposit.

Act XXVI of 1920, S. 3 (1) does not apply in the case of an appeal to the Privy Council from a decree passed before that Act came into force. O. 45, R. 7, C. P. Code, of 1908, will apply to such a case. Where application was made for permission to deposit the amount within the period, as allowed by O. 45, R. 7, but the permission was granted after that period had expired.

Held, the deposit was duly made. 65 Ind Cas 340: 20 ALJ 51: 44 All 242: AIR (Vol 9) 1922 All 87 (DB).

——O. 45, R. 7 — Date of decree — Meaning of.

The words "date of decree" mean the date on which the decree is pronounced and not the date on which it is reduced to writing and signed. The High Court can extend time for depositing the costs in Court; but it should not do so without some strong reason. (1910) 14 CWN 420: 5 Ind Cas 844 (DB).

3. Extension of time.

(a) General.
(b) Where extension of time was not allowed.

(a) General.

——O. 45, R. 7 — Privy Council Rules, R. 9 — Time to deposit security.

Under O. 45, R. 7, Civil P. C., read with R. 9, Privy Council Rules, the High Court has power to extend the time for deposit of security beyond the period fixed in O. 45, R. 7. AIR (V 29) 1942 Lah 147 : ILR (1942) Lah 447 : 200 Ind Cas 801 (FB).

(Overrules AIR (V 22) 1935 Lah 733 : 159 Ind Cas 232 and AIR (V 25) 1938 Lah 207 : 40 PLR 658: 179 Ind Cas 53.)

——O. 45, R. 7 — Time for furnishing security beyond that prescribed by O. 45, R. 7, if can be extended — Privy Council Rules, R. 9.

Under R. 9 of the Privy Council Rules the High Court has power for cogent reasons to extend the time for furnishing security beyond that which would be allowed by O. 45, R. 7, if it were read alone. AIR (Vol 27) 1940 Rang 12: 1939 Rang LR 668: 185 Ind Cas 819 (FB).

(Overrules AIR (V 14) 1927 Rang 20 : 16 Rang 265 ; 98 Ind Cas 417.)

——O. 45, R. 7 (as amended in 1920) — High Court if has power under R. 9 of Privy Council Rules to extend time for furnishing security and making deposit beyond period mentioned in O. 45, R. 7.

The provisions of R. 9 of the Privy Council Rules which are wide and general in their terms, do confer upon the High Courts a discretion to extend the time prescribed by O. 45, R. 7, Civil P. C; a discretion however which is only to be used in exceptional circumstances, and where an extension of time beyond the time specified in O. 45, R. 7, is clearly supported by consideration of justice and equity. AIR (Vol 26) 1939 All 299: 1939 OWN (HC) 366: (1939) ALJ 278: 1939 AWR (HC) 322: ILR (1939) All 549 : 181 Ind Cas 378 (FB).

(Overrules AIR (V 20) 1933 All 241 : 55 All 432 : 143 Ind Cas 559 (DB).)

——O. 45, R. 7 — Privy Council Rules, R. 9 — Time for lodging security, if can be extended under R. 9 beyond limit specified in O. 45, R. 7.

The discretion given to the Court by R. 9 of the Privy Council Rules is a general one, which does, if the justice of the case requires it, enable the Court to extend the time for lodging security to any extent; but in exercising that discretion, the Court must have regard to the fact that under O. 45, R. 7, the extension of time for giving security is strictly limited, and it would require a strong case to induce the Court to hold that justice requires an extension of time beyond the limit specified in that rule. AIR (Vol 26) 1939 Bom 483: ILR (1939) Bom 556: 41 Bom LR 947: 185 Ind Cas 410 (DB).

——O. 45, R. 7 — Security for Privy Council appeal — Limitation for — Power of Court to extend period for making good deficiency — Privy Council Rules, R. 9.

Rule 9 of the Privy Council Rules which were passed in pursuance of the English Act of Parliament, 4 William IV should be given preference over O. 45, R. 7. Under this rule, the High Court has full discretion to extend the time for filing the security in Privy Council appeal or extend the time for ordering the applicants to make the deficiency good. AIR (V 26) 1939 Oudh 42 : 1938 OWN (CC) 1121: 1938 AWR (CC) 113: 14 Luck 335: 178 Ind Cas 389 (DB).

——O. 45, R. 7 — Order 45, R. 7 as modified by Order in Council of February 9, 1920, gives the Court power to extend time to make deposit in Privy Council appeals. AIR (Vol 26) 1939 Pat 667: 20 PLT 905: 6 BR 159: 19 Pat 123: 185 Ind Cas 353 (FB).

——O. 45, R. 7 — Delay in depositing security — Time, if can be extended.

The period prescribed by a Court for giving security under O. 45, R. 7, can be extended for cogent reasons:

Held, on facts that the delay caused in furnishing security could be condoned and the time for depositing security could be extended. AIR (Vol 25) 1938 Lah 725: 40 PLR 712: 180 Ind Cas 393 (DB).

——O. 45, R. 7 — Power of High Court under R. 9 of Privy Council Rules to extend time prescribed for security and deposit.

The High Court has power under R. 9 of the Privy Council Rules to extend the period allowed for furnishing the security & the making of the deposit required by O. 45, R. 7 beyond the periods mentioned therein, but the power should not be exercised without cogent reason. AIR (Vol 25) 1938 Mad 796: 48 MLW 35: (1938) MWN 678: (1938) 2 MLJ 128: ILR (1938) Mad 1007: 177 Ind Cas 188 (FB).

(Overrules AIR (V 11) 1924 Mad 44 : 18 MLW 29 : 74 Ind Cas 703 and AIR (V 19) 1932 Mad 484 : 55 Mad 835 : 138 Ind Cas 663.)

——O. 45, R. 7 — The High Court, under R. 9 of the Privy Council Rules, 1920, has power to enlarge the time prescribed by R. 7 of O. 45, as amended by Act XXVI of 1920, for furnishing security and making the deposit after default has been made. 51 Bom 430: 29 Bom LR 352: 101 Ind Cas 555: AIR (Vol 14) 1927 Bom 217 (FB).

——O. 45, R. 7 — It is open to the Court to grant an extension of time for cogent reasons. 4 Bur LJ 3: 94 Ind Cas 590: AIR (Vol 13) 1926 Rang 44 (DB).

——O. 45, R. 7 — Extension of time for security.

The High Court can extend time for furnishing security, but it should not do so without cogent reason. 6 OLJ 149: 1 UPLR (JC) 58: 50 Ind Cas 907: AIR (Vol 6) 1919 Oudh 304 (DB).

——O. 45, R. 7 — Security for costs — Extension of time.

A High Court has power to extend the time allowed for giving security under O. 45, R. 7 of the C. P. C. provided there is cogent reason for such extension. 4 Pat LJ 521: 49 Ind Cas 892: AIR (Vol 6) 1919 Pat 424 (DB).

——O. 45, Rr. 7 and 8 — Extension of time for security — When allowed.

The period for filing security for costs of the opposite party in a Privy Council appeal, should not be extended without cogent reasons. A misapprehension as to the extent of the Court vacation is not a cogent reason where the applicant would have easily got excellent legal advice. 71 PWR 1913: 105 PLR 1913: 18 Ind Cas 489 (DB).

——O. 45, R. 7 — Extension of time — Grounds — Poverty.

The time allowed for the deposit of security for respdt.'s costs under O. 45, R. 7 for appeal to Privy Council can be extended for cogent reasons. Where the sum of money required is large and the diligence of the petr. is shown by his having paid in three-fourths of the money in time there is sufficient reason for extension of time. 44 PR 1910: 118 PLR 1910: 70 PWR 1910: 6 Ind Cas 723 (DB).

——O. 45, R. 7 — Privy Council appeal — Security bond, extension of time to file — Power of High Court — Sufficient reasons for delay — Computation of time — Date of decree, meaning of.

The High Court has power to extend the time for depositing costs in Court but it ought not to do so without some cogent reasons.

Where a petition for filling security bond out of time stated that the delay was caused by a misapprehension of the appellants about the date of reopening of the High Court and that none of the appellants' men being present in Calcutta on that date, the bond was not filed.

Held — That these were not reasons over which the applicant had no control and that the delay was not due to a mistake which could be regarded as not unreasonable or caused by negligence; that they were therefore not cogent reasons such as to justify the extension of time.

"date of decree" in O. 45, R. 7, C. P. C., means the date on which the decree is pronounced and not that on which it is signed. (1910) 14 CWN 420: 5 Ind Cas 844 (844, 845) (DB).

——O. 45, R. 7 (O. C., S. 602) — Privy Council, appeal to — Security — Extension of time:

Held, that it is competent to the Chief Court for sufficient cause to enlarge the period prescribed by S. 602 of the Civil Procedure Code for filing security and making the deposit required by that section. (1909) PLR No. 27 P 115 (116): 1908 PR 87: 1908 PWR 153: 4 Ind Cas 919.

——O. 45, R. 7 — Extension of time for security.

On sufficient cause being shown, the Chief Court, Punjab, can enlarge the period of filing security and making the deposit required by S. 602 (Old C. P. C.) 27 PLR 1909: 157 PWR 1908: 87 PR 1908: 4 Ind Cas 919 (DB).

——O 45, R. 7 (S. 602 Old Code) — Time for depositing estimated costs — Extension.

The High Court has power to extend the time as provided by S. 602 C. P. C. for depositing the estimated cost of translating, transcribing, indexing and transmitting to the Privy Council the record of a case under appeal but it ought not to do so without some cogent reason. (1907) 11 CWN 1104 (1105) (DB).

(b) Where extension of time was not allowed.

——O. 45, R. 7 — Extension of time — Jurisdiction of High Court.

The High Court has no jurisdiction to grant an application for extension of time to make the necessary deposit under the provisions of O. 45, R. 7, C. P. Code. AIR (Vol 37) 1950 Cal. 239. (DB).

——O. 45, R. 7 — Time for furnishing security in an appeal to Privy Council cannot be extended. (1941) ILR (1941) 1 Cal 299 : 44 CWN 920.

——O. 45, R. 7 — Rule 9 of Privy Council Rules of February 9, 1920, has not been made applicable to Federal Court appeals and High Court has no power to extend the time fixed by O. 45, R. 7, Civil P. C. AIR (Vol 27) 1940 FC 26: 6 BR 543: (1940) MWN 464: 71 CLJ 327: 42 PLR 312: ILR (1940) Kar (FC) 1 Sup. : 21 PLT 309 : (1940) FCR 17 : 187 Ind Cas 670 (F C)

——O. 45, R. 7 — No power to extend period prescribed by R. 7.

Court cannot extend time for giving security beyond the period prescribed by O. 45, R. 7, Civil P. C. AIR (V 25) 1938 Lah 207 (DB).

(Overruled in AIR 1942 Lah 147 (FB).)

——O. 45, R. 7 — High Court has no power to extend time for furnishing of security beyond period allowed by O. 45, R. 7.

The High Court has no power to extend the time for the furnishing of security beyond the period allowed by O. 45 R. 7; AIR 1927 Bom 217 (FB) Diss. From; AIR (Vol 22) 1935 Lah 733. (DB).

(Overruled in AIR 1942 Lah 147 (FB).)

——O. 45, R. 7 — Civil P. C. (1908) (as amended by Act 26 of 1920), O. 45, R. 7 — High Court has no discretion to extend the time beyond 150 days from date of decree or order — Privy Council Rules, R. 9 dated 20th February, 1920.

Per King, J., and Mukerji, Ag. C. J. (Niamatullah, J. dissenting) — The Court has no discretion to extend the time beyond 150 days from date of decree or order appealed against as the language of Privy Council Rules R. 9 even though very wide, cannot override O. 45, R. 7.

Rule 9 was never intended to sanction the allowance of any further period; and O. 45 R. 7 and the Privy Council Rules should be taken as parts of the same legislative scheme and should be construed so as to avoid any inconsistency; AIR (V 14) 1927 Bom 217 (FB), Diss. from. AIR (V 20) 1933 All 241 (FB).

(Overruled in AIR 1939 All 299 (FB).)

——O. 45, R. 7 — High Court has no power to extend time for furnishing security.

The High Court has no power to extend the time for furnishing security beyond the time set out in O. 45, R. 7.

Inability to raise the necessary funds for furnishing security is not a ground for extention of time has elapsed since the date of the decree: AIR (Vol 14) 1927 Bom 217 Diss. from. AIR (Vol 19) 1932 Mad 484 (DB).

(Overruled in AIR 1938 Mad 796 (FB).)

——O. 45, R. 7 (1) — Time for giving security, extension of — Power of High Court

The Chief Court has no jurisdiction to extend the time fixed for giving security under cl. (b) of sub-R. (1) of R. 7, O. 45, Civil P.C. AIR (Vol 19) 1932 Oudh 249 (1) : 9 OWN (CC) 1 : 7 Luck 528 : 136 Ind Cas 336 (DB).

——O. 45, R. 7 — Delay in payment.

Section 3, Act XXVI of 1920 is imperative in its terms and no excuse can be accepted by the High Court for non-payment within time and no indulgence given as regards the payment of printing and translation charges. (1929) 119 Ind Cas 574: 26 ALJ 433.

——O. 45, R. 7 — An appellant to His Majesty in Council applied for leave for extension of time for furnishing the security under O. 45, R. 7.

Held, that the effect of the amendment to O. 45, R. 7, being to cut down the period of six months to ninety days and to cut down also the Court's discretion to grant an extension of that period to a further period of 60 days does lead to the necessary implication that the period of six weeks from the date of the grant of the certificate is rigid and is not to be extended. 10 Cal 537 (PC), Expl. and held no longer good law. AIR (V 16) 1929 Pat 431 (DB).

——O. 45, R. 7 — Where the maximum period of 60 days allowed by R. 7 has expired and the appellant has not taken any steps to comply with the terms of R. 7 before the expiry of that time it is not open to the High Court to extend the time any further. Ordinarily, time will not be extended beyond six weeks from the date of the certificate; but, if cogent reasons are shown, time may be extended up to the

150th day from the date of the decree. The fact that the appellant, being a resident of the Sontha Perganas, was under the impression that the period of limitation was six months from the date of the decree was held to be not a cogent reason. AIR (Vol 14) 1927 Pat 332: 103 Ind Cas 213: 8 PLT 779. (DB).

——O. 45, R. 7 — The only discretion which the High Court has under R. 7, is to extend the period of 90 days from the date of the decree to a further period of 60 days, but no discretion is given to the High Court by the rule as amended, to extend it beyond the period of six weeks from the date of the grant of the certificate. AIR (Vol 14) 1927 Pat 330: 105 Ind Cas 585. (DB).

——O. 45, R. 7 — After the amendment of the Code by Act XXVI of 1920 the High Court has no power to extend the six week's time for furnishing security. 2 Cal 272; 10 Cal 557 (PC), Not Appl.; AIR (V 14) 1927 Rang 20 : 4 Rang 265 : 93 Ind Cas 417 : 5 Bur LJ 187 (DB).

(Overruled in AIR 1940 Rang 12 (FB).)

——O. 45, R. 7 — Time for furnishing security — Extension of more than 60 days is not allowed.

High Court has no power to extend time for furnishing security for more then 60 days. AIR (Vol 11) 1924 Mad 44 (DB).

(Overruled in AIR 1938 Mad 796 (FB).)

——O. 45, R. 7 — Power is given to extend the first period of 90 days from the date of the decree up to a period of 60 days on cause shown but the Court has no power to extend the period of 6 weeks from the date of the grant of the certificate for the filing of the security and necessary costs. AIR (V 10) 1923 Oudh 50 : 70 Ind Cas 937 : 25 OC 254 (DB).

——O. 45, R. 7 — The provisions of O. 45, R. 7 of C. P. Code, as amended by S. 3 (1) of Act XXVI of 1920, limit the power of High Court to grant extension for furnishing security and making deposit for translation and other charges to "90 days or such further period not exceeding 60 days as the Court may allow" from the granting of the certificate. Having regard to the very careful drafting of the amendment, the discretion of the Court is curtailed and limited to 60 days. The High Court has therefore no power to extend the period beyond that time so as to defeat the object and intention of the amendment. AIR (V 9) 1922 All 43 : 65 Ind Cas 249 : 44 All 216 : 20 ALJ 13 (DB).

—— O. 45, R. 7 — What must be proved.

An applicant who asks for an extension of the time is bound to show that during that period he exercised due diligence in endeavouring to obtain the necessary money. The mere statement that he has been trying to raise a loan and has failed, will not be considered to be sufficient reason. AIR (Vol 8) 1921 LB 28: 65 Ind Cas 450: 11 LBR 108. (DB).

4. Record of case.

——O. 45, R. 7 — A party cannot be permitted to include in the record of an appeal to His Majesty in Council, documents and statements tendered as evidence which have not been duly proved or admitted and which are clearly inadmissible. AIR (Vol 20) 1933 Rang 212 : 147 Ind Cas 414 (DB).

5. Security and deposit.

——O. 45, R. 7 — Time for depositing security money expiring during vacation—Deposit on the reopening day—If a valid deposit.

Where a deposit required by R. 7 of O. 45, C. P. Code, is made on the re-opening day after vacation as the period within which it was to be made expired during the vacation it would be a valid deposit even though the office of the Court was open during the vacation to receive the deposits. The office cannot be said to be open while the Court was closed. AIR (Vol 36) 1949 All 209: 1949 ALJ 205: 1949 AWR (HC) 338 (2) : 1948 ALW 314 (DB).

——O. 45, R. 7 — Costs — Security for costs, application— delay, effect of.

An application for security for costs should be made without unreasonable delay. Hence an application filed long after the records in the appeal to the High Court have been printed and the case itself has appeared on the rough list cannot be granted. AIR (V 32) 1945 Mad 121 : (1944) 2 MLJ 407 : 57 MLW 621 : 1944 MWN 724 (1) : ILR (1945) Mad 562 : 220 Ind Cas 377.

——O. 45, R. 7 — Object of security—Solicitor, if can recover taxed costs by summary proceeding from amount deposited under O. 45, R. 7.

The object of the security for costs which is required as a condition precedent to the grant of a certificate to appeal to the Privy Council is obviously to secure the successful party against costs awarded to him in test of the Order in Council. The amount is in the custody of the Court and can be paid out in terms of the security and in compliance with the Order in Council. Consequently a solicitor can recover by a summary proceeding the amount of his full taxed costs from out of the deposit made in Court under O. 45, R. 7. AIR (V 26) 1939 Bom 250 : 41 Bom LR 410 : ILR (1939) Bom 307 : 183 Ind Cas 78 (DB).

——O. 45, R. 7— Proviso — Precludes the Court from granting an application for permission to furnish security otherwise than in cash or Govt. securities at a later stage. (1939) MWN 487 : 49 MLW 716 : (1939) 2 MLJ 521.

——O. 45, R. 7 — Appellant to Privy Council allowed to furnish security other than cash — S becoming surety for respondent's costs— Bond duly executed and registered within limitation — S resiling subsequently — Appellant depositing amount in cash but beyond limitation — Security — Limitation.

B obtained leave to appeal to His Majesty in Council. At the time of granting the certificate, the Court dispensed with the security in cash or in Government securities and permitted the appellant to furnish security of another kind. One S executed a hypothecation bond and became surety for the payment of Rs. 4,000, the respondents' costs in the Privy Council appeal. He hypothecated immovable property of sufficient value. The bond was duly registered and was filed well within the limitation allowed by O. 45, R. 7, Civil P. C. The Court sent the bond to the lower Court for "verification" and report. S stated that the appellant had agreed to deposit Rs. 4,000 with him to indemnify him against any possible loss that might be occasioned and that as the appellant had not fulfilled his promise, he was no longer willing to stand surety. He did not deny having executed the bond. The appellant offered to deposit Rs. 4,000 in cash to avoid all possible difficulties. This had been done but beyond limitation:

Held, that in the circumstances of the case, the security should be deemed to have been furnished on

the date when S filed the bond in the Court. The fact that subsequently he attempted to resile from his undertaking was immaterial in view of the appellant having promptly substituted cash security therefor. AIR (Vol 25) 1938 All 131: (1937) ALJ 1362: 1938 AWR (HC) 9: 174 Ind Cas 249 (DB).

——O. 45, R. 7 — Appeal to Privy Council — Security — Deposit of Government Promissory Notes in time — Endorsement in favour of Registrar a day after expiry of period — Allahabad High Court Rules, Chap. 17.

By way of security for an appeal to the Privy Council, the appellant deposited in the High Court Government Promissory Notes of the face value of Rs. 4,000 within the time fixed. But the notes were endorsed in favour of the Registrar one day after expiry of the period allowed:

Held, that the notes should be accepted as security furnished within the meaning of O. 45, R. 7, and that the rules of the High Court did not say that Government securities should be endorsed in favour of the Registrar before they are handed over to him. AIR (Vol 20) 1933 All 410 (1): (1933) ALJ 276: 145 Ind Cas 582 (1) (DB).

——O. 45, R. 7 — Security in other forms — Liability of propriety discussed.

(Per Sulaiman, Banerji and Sen, JJ) When either immovable or moveable property is offered as security, the proprietary interest of the surety is not automatically extinguished & merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered. Although the depositor cannot defeat that purpose his power of disposal of his security subject to that charge will subsist, and his interest in the surplus which may remain over is both transferable and attachable. Such an interest does not come within any of the exceptions enumerated in S. 6, T. P. Act nor is such security exempted from atttachment under S. 60, C. P. C. AIR (V 17) 1930 All 225 : 1930 ALJ 402 (FB).

——O. 45, R. 7 — Where judgment-debtor appealed to the Privy Council and Deposited necessary sum and decree-holder made an application to attach so much of the deposit as would eventually be found not to be required for the purpose for which it was entrusted to the Court but did not put any figures to suggest that there was any likelihood of there being any surplus, the application has absolutely no substance and even if the application contains such figures it would be wholly premature. AIR (Vol 16) 1929 All 794: 119 Ind Cas 5. (DB).

——O. 45, R. 7 — Attachment of deposit.

Judgment-debtor appealed to the Privy Council & deposited a sum for the costs of the Privy Council and for printing charges. The decree-holder applied to attach the amount in execution of the decree which he had obtained from the High Court. The idea underlying the application was that the decree-holder would attach and obtain the amount deposited and would then claim to be in a position to contend that the judgment-debtor had not in deposit the money he was required to deposit and to ask that the appeal should be therefore dismissed.

Held, that the manoeuvre was grossly improper and an offence to the Court. AIR (Vol 16) 1929 All 794: 119 Ind Cas 5. (DB).

——O. 45, R. 7 — Time for applying

An appellant to His Majesty in Council applied for leave to furnish security in form other than cash or Government security on the ground of special hardship.

Held, that having regard to the express terms of the amended rules which stipulate that the security must be furnished in cash or Government security and the limited terms of the proviso the Court is only empowered to apply the proviso if the application is made at the time of granting the certificate and that an application made thereafter is out of time. AIR (Vol 16) 1929 Pat 431. (DB).

——O. 45, R. 7 — Time for applying.

The Court may allow some form of security to be furnished. But this may be done only at the time of granting the certificate. After the certificate is granted only cash or Government securities are permissible. The offer of immovable property at this stage as security is not admissible. AIR (V 13) 1926 Rang 44 : 4 Bur LJ 3 : 94 Ind Cas 590 (DB).

——O. 45, R. 7 — Time for applying.

An application that on the ground of special hardship some other form of security may be allowed to be furnished, if made subsequent to the making of an order granting the certificate under R. 7 (1), is incompetent. The contention that R. 7 (1) refers not to the granting of a certificate but to the actual issue of the document called the certificate is curious and untenable. AIR (Vol 12) 1925 Mad 449: 48MLJ 134 86 Ind Cas 201 : 48 Mad 559 : 21 MLW 147 (DB).

——O. 45, R. 7 — Special leave — Security.

Order 45, R. 7 applies to the case where a certificate is granted by the High Court, but when the special power under S. 112 is exercised by the Privy Council the High Court has no jurisdiction to call upon the appellant to deposit security without any order of the Privy Council. AIR (V 12) 1925 Oudh 99 : 76 Ind Cas 335 : 11 OLJ 195 (DB).

——O. 45, R. 7 — A deposit made out of time is not one made to the satisfaction of Court within O. 45, R. 8. The periods both for security and deposit are identical and they cannot exceed either a period of 150 days from the date of the decree or six weeks from the date of the certificate whichever of these period is the longer. AIR (V 10) 1923 All 572 : 84 Ind Cas 535: 5 LRA Civ 40. (DB).

——O. 45, R. 7 — Time for applying.

While it is open to the applicant for leave to appeal to the Privy Council to move the Court to permit security in any other form than cash or Government securities, to be furnished, it is essential that the Court should be so moved before or at the time of the hearing of the application for leave to appeal, when a certificate would be granted. If no such order is obtained at the date of the grant of the certificate, security must be furnished in cash or in Government securities within the period allowed by R. 7 as amended. AIR (Vol 8) 1921 LB 55: 66 Ind Cas 548: 11 LBR 213 (DB).

——O. 45, Rr. 7 and 8 — Security — Consolidation of appeals.

When two appeals are consolidated for valuation, and a joint certificate is granted, both the appeals will be stayed if security for costs is not deposited in any of them. Security has to be furnished in respect of each appeal though consolidated. AIR (V 6)

1919 Pat 92: 4 PLJ 198: (1919) Pat HCC 139: 50 Ind Cas 511 (DB).

——O. 45, R. 7 — Security for costs — Government pro-notes.

The Government securities to the extent of Rs. 4,000 required to be deposited as security by an appellant to the Privy Council, means such securities of the nominal or face value of Rs. 4,000. (1910) 36 C 653: 13 CWN 629: 9 CLJ 560: 2 Ind Cas 844.

(But see (1910) 9 CLJ 559 : 4 Ind Cas 64 (DB).)

——O. 45, R. 7 — Securities for costs — Value.

If the security to be given by an applicant for leave to appeal to the Privy Council consists of Government securities, the market value of the securities must be Rs. 4,000 at the time of deposit. (1909) 9 CLJ 559: 4 Ind Cas 64 (DB).

——O. 45 R. 8.

——O. 45, R. 8 (b) and O. 48, R. 1 (1) — Notice to respondent under R. 8 (b) — No process fees are required.

The notice required to be given under O. 45, R. 8 (b) is not a process, and, it is also not issued on behalf of either party, but it is a mere intimation given by the Court to the respondent that the appeal has been admitted. Hence, no fee is to be levied on the notice to be given to the respondent under O. 45, R. 8 (b). AIR (Vol 33) 1946 Bom 168: 47 Bom LR 861 (DB).

——O. 45, R. 8 — No order under R. 8 — Federal Court, if can exercise jurisdiction.

Obiter — Per Varadachariar, J., Sulaiman, J., contra. — Though the scheme of O. 45 implies that till the High Court makes the order under R. 8, declaring the appeal admitted it still retains a measure of control over the proceedings, such an order is not a condition precedent to the exercise of jurisdiction by the Federal Court. AIR (Vol 28) 1941 FC 5: 7 BR 362: 22 PLT 119: 1941 MWN 136: 45 CWN (FC) 66: 53 MLW 373: 1941 OWN (CC) 372: 73 CLJ 51: (1941) 1 MLJ (FC) 49 Sup: 20 Pat 429: 1941 AWR (FC) 39: ILR (1941) Kar (FC) 1 Sup: (1940) FCR 84: 191 Ind Cas 659.

——O. 45, R. 8 — Notice of admission.

An accidental omission to give notice to the respondents of the admission of an appeal to the Privy Council is no sufficient ground for rehearing provided the respondents in fact knew of the admission. 22 Bom LR 550: 59 Ind Cas 7: 4 PWR 1921 (PC).

——O. 45, R. 9.

——O. 45, R. 9 — The only power of revoking the acceptance of the secuirty furnished under O. 45, R. 7, Civil P. C., vested in the High Court is the one given by virtue of R. 9, O. 45, Civil P. C. AIR (Vol 25) 1938 Lah 725: 40 PLR 712: 180 Ind Cas 393 (DB).

——O. 45, Rr. 9, 7 — Revoking acceptance of security — It must be before admission of appeal under R. 9.

The only power of revoking the acceptance of the security furnished under R. 7, O. 45, vested in the High Court is the one given by virtue of R. 9, O. 45, and that rule comes into play only before the admission of the appeal under R. 8 and not at any subsequent stage. AIR (Vol 25) 1938 Lah 725: 40 PLR 712: 180 Ind Cas 393 (DB).

——O. 45, Rr. 9 and 10 — Enhancement of security for costs — Application for.

An application for the enhancement of the amount of security for costs furnished by an appellant to the Privy Council can, after the admission of the appeal, be made under O. 45, R. 10 only and not under R. 9. The latter rule is applicable to applications before the admission of the appeal and not after. (1919) 49 Ind Cas 893 (N).

——O. 45, R. 13.

1. Court.
2. Inherent powers.
See also, Civil P. C., S. 151.
3. Stay till decision of Privy Council appeal.
4. Stay before grant of certificate.
5. Stay on taking security.
6. Appointment of Receiver.
7. Special leave — Stay of execution.
8. Withdrawal of deposit.
9. Compromise after leave.

1. Court.

——O. 45, R. 13 — Court — Meaning of — Whether Subordinate Judge has jurisdiction to stay execution — Exercise of powers of revision where no Second Appeal lies.

A Subordinate Judge has no jurisdiction to stay execution of a decree of the High Court. The only Court which can stay execution is the High Court. The word "Court" in the first para. of R. 13 of O. 45 means a High Court. Such an order of a Sub-Judge staying execution is revisable.. 3 Pat LW 222: (1917) Pat 285: 3 PLJ 40: 42 Ind Cas 835: AIR (Vol 4) 1917 Pat 85.

2. Inherent powers.

See also, Civil P. C., S. 151.

(a) General.
(b) "Such other directions."

(a) General.

—— O. 45, R. 13 — Stay of proceedings in suit — Inherent power of High Court.

Apart from O. 45, R. 13, C. P. Code, the High Court has inherent power to stay proceedings in a suit in respect of which a certificate for appeal to His Majesty in Council has been granted. After a certificate has been granted under S. 110, C. P. Code, an application in the suit itself made to the trial judge for stay of proceedings could be entertained and suitable orders could be made. (1948) 52 CWN 209 (DB).

——O. 45, R. 13, S. 151 — Matter not strictly falling under O. 45, R. 13 — High Court can stay execution under inherent powers. AIR (Vol 26) 1939 Cal 308: 183 Ind Cas 565 (DB).

——O. 45, R. 13, S. 151 — Powers of High Court to stay proceedings in suit — Interference, when can be refused.

The High Court has power under O. 45, R. 13, Civil P. C. to stay further proceedings in execution.

Apart from the provisions in O. 45, R. 13 there is abundant inherent power in the High Court to stay proceedings in a suit in a suitable case.

Where the Court is not satisfied that any irreparable injury will result from non-interference and on the other hand thinks that it is desirable from several points of view that such proceedings should be allowed to take their own course, interference will be refused. AIR (Vol 21) 1934 Cal 823: 38 CWN 795: 59 CLJ 440: 153 Ind Cas 272 (1) (DB).

——O. 45, R. 13 — The inherent powers of the Court to stay execution of its decree should be sparingly used and the onus is clearly on the applicant to establish good grounds for staying execution. 82 Ind Cas 739: AIR (Vol 12) 1925 Sind 216 (DB).

——O. 45, R. 13 — Intended appeal — Stay of proceedings — Inherent power.

The High Court has inherent power to stay execution in view of an intended appeal to Privy

Council. (1913) 40 Cal 955: 16 CLJ 508: 18 Ind Cas 207 (DB).

(b) "Such other directions".

——O. 45, R. 13 (2) (d) — Appeal pending before Privy Council only in respect of preliminary decree — Application for stay of execution of final decree — Necessary orders to safeguard applicant's rights, if can be passed.

Order 45, R. 13, Cl. (2) (d), Civil P. C., enables the High Court in a proper case, even though no appeal has been filed against the final decree and the appeal pending before the Privy Council is only with respect to the preliminary decree, to pass necessary orders in order to safeguard the rights of the applicants when he asks for stay of execution of the final decree. AIR (Vol 26) 1939 Mad 50: (1938) MWN 1070: (1938) 2 MLJ 764: 48 MLW 689: ILR (1939) Mad 135: 180 Ind Cas 85.

3. Stay till decision of Privy Council appeal.

(a) General.
(b) "Amendment of decree".
(c) "Ejectment proceedings after execution."

(a) General.

——O. 45, R. 13 — Application for stay of proceedings in Court below till decision of Privy Council appeal — Whether can be granted.

Order 45, R. 13, has no application where the party applies for the stay of proceedings in the Court below as distinct from the stay of the execution of a decree. Consequently under that rule the High Court cannot stay the proceedings in the Court till the disposal of appeal to the Privy Council. AIR (Vol 21) 1934 All 585: (1934) ALJ 1191 : 56 All 907 : 150 Ind Cas 446 (DB).

——O. 45, R. 13 — Stay of further proceedings — Remand.

Where a mortgage suit was directed to be reheard by the High Court and during the pendency of an appeal to the Privy Council against that order one of the parties applied for stay.

Held, that the High Court had power under O. 45, R. 13 to stay the proceeding pending disposal of the appeal. AIR (Vol 18) 1931 Cal 79 : 34 CWN 631 (DB).

——O. 45, R. 13 — Preliminary decree — Appeal to Privy Council — Stay of proceedings.

Defendants appealed to the Privy Council from a preliminary decree and applied to the High Court to stay the proceedings in the lower Court for a final decree pending the decision of the Privy Council. Held, that the further proceedings were not proceedings in execution, and the present application for stay was not justified by O. 45, R. 13. AIR (Vol 6) 1919 All 14 : 18 ALJ 142 : 1 UPLR HC 166 : 54 Ind Cas 561 (DB).

——O. 45, R. 13 — Stay of execution — Pending decision of Privy Council.

Execution of decree will not, without sufficient cause being shown, be stayed pending the decision of an appeal to the Privy Council. AIR (Vol 2) 1915 Lah 270 : 29 PLR 1915 : 244 PWR 1915 : 27 Ind Cas 572 (DB).

——O. 45, R. 13 — Stay of execution — Grounds for.

If, in the event of the appeal to the Privy Council being successful, the restoration of property as it was before execution of the decree is impossible or would be with great difficulty, the execution should be stayed and not merely because the applicant will suffer much loss. 87 PWR 1912 : 234 PLR 1912 : 15 Ind Cas 187 (DB).

——O. 45, R. 13 — (Case under old Code) — Stay of proceedings pending appeal to Privy Council.

If after the High Court has refused to grant leave to appeal to His Majesty, special leave has been granted by the Judicial Committee, the High Court cannot entertain an application for an injunction staying certain proceedings in execution pending disposal of the appeal by the Privy Council. (1910) 7 Ind Cas 188 (All) (DB).

(b) "Amendment of Decree."

——O. 45, R. 13 — High Court can amend its decree even after leave to appeal to the Privy Council has been granted. AIR (Vol 16) 1929 Lah 427 : 30 PLR 258 : 116 Ind Cas 459 (DB).

(c) "Ejectment proceedings after execution."

——O. 45, R. 13 — In execution of a decree of a High Court under appeal to the Privy Council possession was obtained by the decree-holder. He sued in the Revenue Court to eject the defendant from certain sir and khudkasht lands. On an application in the High Court to stay the proceedings,

Held, that the proceedings in the Revenue Court did not come within proceedings in execution of the decree, but were consequential on the decree of the High Court and on the fact that possession was obtained.. The matter was not within O. 45, R. 13 of the C. P. Code. (1922) 64 Ind Cas 152 (All) (DB).

4. Stay before grant of Certificate

——O. 45, R. 13 — Stay of execution proceedings.

Where certificate was granted for leave to appeal to the Privy Council from an order that the suit was maintainable passed on a preliminary issue as to the maintainability of the suit and the defendant applied for stay of proceedings,

Held, that the application to stay proceedings should not be acceded to as the prejudice to the plaintiff, should proceedings be stayed, would be considerable. AIR (Vol 15) 1928 Bom 159 : 30 Bom LR 126 : 109 Ind Cas 139.

——O. 45, R. 13 — Power of Court.

The wording of O. 45, R. 13 clearly shows that the Court has power to stay execution after grant of a certificate and though no power has been specifically conferred on the Court under O. 45, R. 13 to stay execution prior to that stage, the Court has power to stay even before the grant of a certificate if not under this rule, under S. 151. 6 SLR 86, not Foll. 82 Ind Cas 739 : AIR (Vol 12) 1925 Sind 216 (DB).

——O. 45, R. 13 — Stay of execution (case under old Code).

An application for stay of execution under O. 45, R. 13 cannot be entertained by the Court till the certificate for appeal to the Privy Council is granted. The presentation of a petition under O. 45, Rr. 2 and 3 is not an appeal. The powers of the Court under O. 45, R. 13, C.P.C. could be exercised, even though there is no decree for execution, for granting a relief to the plaintiff whose suit was dismissed and who has obtained the certificate. 2 W.R. Diss. 23 not applied. (1912) 6 SLR 86 : 16 Ind Cas 845 (DB).

——O. 45, R. 13 (2) (c) (case under old Code) — "Stay of execution of the decree appealed from" — Privy Council appeal — Stay of execution.

Until the admission of the appeal, no decree can be said to have been "appealed from" ; and, consequently the Court can only stay execution under O. 45, R. 13 (2) (c) after the grant of a cetrificate for the admission of the appeal. (1910) 20 MLJ 140 : 4 Ind Cas 106 (107) : 6 MLT 309 (DB).

——O. 45, R. 13, (S. 608 old Code) — Stay of execution — Privy Council appeal not admitted.

An application for stay of execution under S. 608, C. P. C., cannot be granted before an appeal to the Privy Council is finally admitted under S. 603, C. P. C. (1901) 5 CWN 562 (563) (DB).

5. Stay on taking security.

——O. 45, R. 13 — Stay of execution pending appeal to Privy Council — Security directed to be furnished within a time.

While directing stay of execution of a decree which is being appealed against to his Majesty in Council the Court must specially define the time within which the security must be tendered and give such further directions as may be necessary to ensure the intention of the Court being carried out to its satisfaction. 24 CWN 265 : 57 Ind Cas 382 : AIR (Vol 7) 1920 Cal 644 (FB).

6. Appointment of Receiver.

——O. 45, R. 13 — Appeal after execution — Security from respondent — Enforcement of order as to .

If a decree has been executed, and thereafter an appeal to the Privy Council is admitted, the Court may direct security from the respondent for the due performance of any order which may be made by His Majesty in Council in consequence of the appeal. 10 M.I.A. 196, Foll. There is a difference between a decree which directs the payment of money and a decree which directs possession of property to be handed over to a successful party. In the case of a decree for money which has been duly executed, if the respondent has recovered the money by execution and declines to give security, the Court can deal with him in contempt. With regard to a decree for possession of property, it would be competent to the Court, if no security is furnished according to the order made, to appoint a Receiver of the property and so take the property in its own charge. 50 Bom 453 : 96 Ind Cas 245 : 28 Bom LR 659 : AIR (V 13) 1926 Bom 425 (DB).

——O. 45, R. 13 (d) — Receiver — Privy Council appeal.

It is competent to the High Court to appoint a Receiver to an estate which is the subject matter of an appeal for which special leave has been granted by the Privy Council. 4 PLJ 482 : 52 Ind Cas 407 : AIR (V 7) 1920 Pat 845 (DB).

7. Special leave — Stay of Execution.

——O. 45, R. 13 — Appeal to Privy Council admitted by special leave — Power of High Court to stay execution.

The High Court has power to stay execution of a decree notwithstanding that an appeal from such decree has been admitted by special leave of his majesty in Council. 38 Cal 335 : 13 C L J 529 : 8 A L J 449 : 13 Bom L R 419 : 10 M L T 25 : (1911) 2 M W N 124 : 4 Bur L T 123 : 38 I A 74 : 11 Ind Cas 384 (PC).

——O. 45, R. 13 — R. 13 of O. 45 has no application to a case in which special leave has been granted by the Judicial Committee. O. 45 applies only to cases where leave to appeal is granted by the Court against whose decree the appeal is sought to be preferred. (1909) 10 C L J 326 : 4 Ind Cas 452 (DB).

(See, however, 38 C 335 : 11 Ind Cas 384 (PC).).

8. Withdrawal of deposit.

——O. 45, R. 13, S. 151 — Deposit of money — Withdrawal — Interim order — Inherent powers.

Plaintiff executing decree for possession of one-third share in property under management of Court of Wards — Appeal by defendant to High Court and application for stay of execution — High Court allowing execution to proceed on conditions — Manager of Court of Wards to hold plaintiff's share as manager of plaintiff and deposit into Court income until decision of appeal — Plaintiff not to withdraw it without furnishing security — Appeal dismissed — Application by plaintiff for withdrawing amount lying in Court without furnishing security — Affidavit by defendant stating her intention to appeal to Privy Council — The question before the High Court was whether it had power to make an order retaining the money until an application for leave to appeal was presented or until the period of limitation prescribed for that purpose expired.

Held, that even after the dismissal of the defendant's appeal, the High Court had lawful custody of the monies lying in the Court and although O. 45, R. 13, did not in terms apply as no application for leave to appeal to the Privy Council had actually been preferred, the High Court had apart from the provisions of O. 45, R. 13, inherent power under S. 151 to make interim order in aid of the order which may eventually be passed by the Court dealing with the application for leave to appeal to the Privy Council maintaining the status quo and to put parties to terms until an application for leave to appeal to the Privy Council was preferred or until the period of limitation prescribed therefor had expired and to direct that the plaintiff should not withdraw the amount lying in Court for the aforesaid period without furnishing security. But that direction could not affect the monies paid in by the plaintiff's manager after the dismissal of the appeal by the High Court as they were not covered by any order of the High Court and the plaintiff was, therefore, at liberty to withdraw the same.

Held, further that the monies lying in the Court, that is the income of the decretal property accruing after the passing of the decree would form part of the subject-matter of an appeal to His Majesty in Council within O. 45, R. 13 (2) (d) and hence the Court granting leave to appeal would have ample jurisdiction to make such orders as it considered necessary with reference to those monies. A I R (V 29) 1942 Cal 488 : ILR (1942) 1 Cal 67 : 45 C W N 1023 : 202 Ind Cas 442 (DB).

9. Compromise after leave.

——O. 45, R. 13 — Leave to appeal to the Privy Council granted — Compromise, if can be recorded by High Court — Second decree in suppression of first decree, if can be passed.

Where the parties to a suit arrive at a compromise after leave to appeal to the Privy Council has been granted by the High Court, it is not open to the High Court to record the compromise and to pass a second decree superseding the decree which has already been passed and from which leave to appeal has been granted. AIR (Vol 20) 1933 Bom 244 : 35 Bom LR 413 : 57 Bom 369 : 145 Ind Cas 286 (DB).

——O. 45, R. 15.

1. **Scope and nature of.**
2. **Jurisdiction to execute.**
3. **Form of application.**
4. **Execution — Meaning of.**
5. **Restitution proceedings.**
6. **Limitation.**
7. **Order whether appealable.**

1. Scope and nature of.

——O. 45, R. 15 — "Execution" in O. 45, R. 15, whether covers the case of restitution — Subordinate Judge when can take action on Privy Council judgment — Mandatory nature of O. 45, R. 15 — Violation of provisions —Effect.

The provisions of O. 45, R. 15 are mandatory, and order made in violation of its provisions are quite irregular if not altogether without jurisdiction. The word "Execution" as used in O. 45, R. 15 was intended to cover a case for restitution also and a person who desired to obtain execution of any kind, whether by way of restitution or otherwise must apply in the first instance to the court indicated by

R. 15. AIR (V 23) 1936 Oudh 185 (188) : 1936 OWN (CC) 262 : 12 Luck 52 : 160 Ind Cas 814 (DB).

——O. 45, R. 15 — Privy Council appeal — Review — Power of High Court or executing Court to stay execution pending application for review.

The mandamus of O. 45, R. 15, is clear and mandatory and neither the executing Court nor the High Court has power to stay the execution of a decree of the Privy Council on the ground that an application for review has been made to the privy Council. A I R (Vol 18) 1931 Pat 203 : 12 P L T 145 : 132 Ind Cas 359 (DB).

——O. 45, R. 15 — Power of Court.

A Court acting under O. 45, R. 15 cannot consider or discuss the effect of the order in Council. A Judge in Chambers therefore has no jurisdiction to pass an order giving directions disallowing costs, reducing certain items and declaring interest not to be claimable. Such an order is ultra vires. A I R (Vol 17) 1930 Lah 674 : 123 Ind Cas 277 : 31 P L R 182 : 12 Lah L J 93 (DB).

——O. 45, R. 15 — Lodging the order of the Privy Council.

Where a party having order in Council is delaying or refusing to lodge the order, opponent can apply to the High Court with a certified copy of the order and ask for a summary order on the party to lodge the order which had been entrusted to him so that execution might follow in terms of the judgment of the Board. A I R (Vol 13) 1926 P C 31 : 51 M L J 586 : 94 Ind Cas 813 : 5 Pat 461 : 53 I A 89 : 1926 MWN 492 : 24 MLW 84 : 30 CWN 938 : 28 Bom L R 1260.

——O. 45, R. 15 — The provisions of R. 15 are mandatory and failure to comply with them renders an application for execution liable to dismissal. A I R (Vol 11) 1924 Pat 576 : 78 Ind Cas 766 : 3 Pat 596 : 5 PLT 451 : 1924 PHCC 221 : 2 Pat L R Civ. 249 (DB).

——O. 45, R. 15 — Execution — Decree in ignorance of death of one of the parties.

Under O. 21, R. 15, C. P. C. some of the decree-holders who have obtained permission under O. 45, R. 15, can execute the Privy Council decree on behalf of all the decree-holders though some were dead at the time of the Privy Council decree. A I R (Vol 7) 1920 Pat 672 : 1 Pat L T 426 : 58 Ind Cas 212 (DB).

——O. 45, R. 15, (S. 610 Old Code) — The section has nothing to do with the manner of execution. So where the surety bond amounts to a mortgage, a separate suit will have to be filed on the bond under Ss. 67 and 99. T. P. Act. (1905) 9 C W N 372 (373) : 32 C 494 (DB).

2. Jurisdiction to execute.

——O. 45, R. 15 (1) — Order in council on appeal from Calcutta High Court — Jurisdiction of Patna High Court to execute — Letters Patent, (Patna) Cl. 39.

The High Court at Patna has no jurisdiction to execute an order in council passed in an appeal from the Calcutta High Court on appeal from a subordinate court in Behar. An application for the execution of such an order shou'd be to the High Court at Calcutta . A I R (Vol 5) 1918 Pat 383 : 2 PLJ 684 : (1918) Pat 49 : 4 PLW 133 : 43 Ind Cas 457.

3. Form of application.

——O. 45, R. 15 — Order of His Majesty in Council, execution of — Prayer for preparation of memorandum of costs — Prayer for transmission of order to Court concerned, if included — Proper procedure.

Where in an application for execution of an order of His Majesty in Council, it is prayed that memorandum of costs should be prepared, the prayer includes also the prayer for transmission of the order to the Court concerned. The usual procedure adopted by the Oudh Chief Court is that when such an application is made, it is sent to the office for necessary action. The office then prepares the memorandum of costs, and transmits it to the Court concerned without any further direction or orders of the Court.

When transmitting an order of His Majesty in Council for execution under O. 45, R. 15 (2), Civil P. C., it is not necessary to give any further directions and particularly when they are not asked for. A I R (Vol 25) 1938 Oudh 250 : 14 Luck 243 : 1938 O W N (CC) 1045 : 178 Ind Cas 242 (DB).

——O. 45, R. 15 — Certified copy of decree — Meaning of — Plain copy with affidavit — Whether sufficient.

Rule 15, should not be construed as restricting the only possible evidence of an order in Council to the certified copy. It is intended to ensure that proper information on the subject of an order-in-council should be supplied to the Courts in India. A I R (Vol 5) 1918 Mad 626 : (1917) M W N 587 : 33 MLJ 300 : 41 Ind Cas 629 (DB).

4. Execution — Meaning of.

——O. 45, R. 15 (2) — Privy Council directing costs of appellant before High Court to be paid by respondent —Costs of execution, whether also, included.

Costs incurred by an appellant before the High Court include the printing charges and other expenses incurred by him in the High Court, for presentation of the appeal to the Privy Council and also the costs of the execution. A I R (Vol 24) 1937 Pesh 3 : 1937 Pesh L J 3 : 167 Ind Cas 879 (DB).

——O. 45, R. 15 — "Execution" in O. 45, R. 15, whether covers case of restitution — Subordinate Judge, when can take action on Privy Council judgment — Mandatory nature of O. 45, R. 15 — Violation of provisions — Effect.

The word "execution" as used in O. 45, R. 15, was intended to cover a case for restitution also and a person who desired to obtain execution of any kind whether by way of restitution or otherwise, must apply in the first instance to the Court indicated by R. 15. The Subordinate Judge is not entitled to take any action on the printed copy of the judgment of their Lordships of the Privy Council without proof that an Order in Council had followed thereon. Even certified copies of Orders in Council should never be acted upon without the production of the original Order in Council signed by the clerk of the Council. The provisions of O. 45, R. 15 are mandatory, and orders made in violation of its provisions are quite irregular if not altogether without jurisdiction. A I R (Vol 23) 1936 Oudh 185 : 1936 O W N (CC) 262 : 12 Luck 52 : 160 Ind Cas 814 (DB).

——O. 45, R. 15 — Transmission of order of Privy Council at one party's instance — If other parties can avail of transmission.

It is not necessary that each person interested in the execution of a particular order should obtain a separate transmission of the order of His Majesty in Council when the order has already been transmitted to the lower Court at the instance of one of the successful parties. A I R (Vol 19) 1932 Mad 440 : 35 M L W 638 : (1932) M W N 589 : 62 M L J 698 : 55 Mad 856 : 137 Ind Cas 645.

——O. 45, R. 15 — It would be inconvenient, if not impossible, to hold that each person interested in the execution of a particular order shall obtain a separate transmission when that order has already

been transmitted. A I R (Vol 11) 1924 Mad 95 : 75 Ind Cas 219 : 32 M L T 249 (DB).

——O. 45, R. 15 — A person seeking execution either by way of restitution or otherwise must apply first, to the Court indicated by R. 15, as the word "execution" means any kind of execution. For action on the judgment of their Lordships of Privy Council, proof of an order-in-Council is necessary. AIR (Vol 2) 1915 All 434 : 37 A 567 : 13 A L J 769 : 30 Ind Cas 77 (DB).

——O. 44, R. 15, (S. 610 Old Code) — Execution of decree — Privy Council — Restoration of property alienated pending appeal to the Privy Council — Procedure.

Pending an appeal to His Majesty in Council certain property forming part of the subject-matter of the suit in which such appeal had been preferred was sold by auction in execution of a money decree against the plaintiff who held the decree of the High Court under appeal. The defendant's appeal to the Privy Council was decreed.

Held, that the successful appellant was entitled to recover the property sold as above mentioned by means of an application under S. 244 read with S. 610, C. P. C., and this right was not affected by the fact that the auction-purchasers were not parties to the decree of the Privy Council. (1906) 1906 A W N 43 : 3 A L J 110 : 28 A 337 (339) (DB).

5. Restitution proceedings.

——O. 45, R. 15 — When entertaining an application under O. 45, R. 15, the High Court cannot decide to which Court application under S. 144 has to be made, when such a question is decided, it does not prevent the opposite party from raising the plea that the Court is not competent to decide the application. Where, therefore, the person has succeeded before the Privy Council, it is not necessary for him to apply for restitution under O. 45, R. 15. It is his right to approach the Court which passed the decree i.e., the Court of the first instance, and the Court of first instance can order restitution under S. 144. A I R (Vol 24) 1937 All 515 : (1937) A L J 588 : I L R (1937) All 670 : 1937 A W R (HC) 510 : 170 Ind Cas 706 (DB).

——O. 45, R. 15 — Where the Privy Council though of opinion that the mortgagees (respondents) were entitled to relief under S. 144, C. P. Code, deliberately excluded such relief from the order of His Majesty in Council and so did not make restitution part of that order and therefore capable of execution but left the mortgagees to seek their own remedy under S. 144, C. P. Code.

Held, that the High Court was in order in transmitting the order of His Majesty in Council under O. 45, R. 15 to the Senior Subordinate Judge in response to the petition of the mortgagees for restitution of land as one of the prayers in that petition, viz., the demand for costs, was for execution.

Held, further, that the Senior Subordinate Judge who could not dispose of the application himself as the land of which possession was to be restored had in the meanwhile been transferred to the jurisdiction of another Senior Subordinate Judge, could transfer the same to the other Senior Subordinate Judge under S. 144 or in the alternative under S. 151 though not under S. 39, C. P. Code, and that his order of transfer was correct. A I R (Vol 17) 1930 Lah 961.

——O. 45, R. 15 — Copy of the decree.

Proceedings for restitution are not proceedings in execution and therefore O. 45, R. 15 does not apply to an application for restitution.

Where the applicants for restitution were unable to put before the trial Court a copy of the decree of the Privy Council, yet before the order was passed, the trial Court had been furnished with a copy of that order.

Held, there was no irregularity. A I R (Vol 14) 1927 Pat 208 : 102 Ind Cas 614 : 6 Pat 252 (DB).

6. Limitation.

——O. 45, R. 15 — Application under, whether falls under Art. 183 or Art. 181, Limitation Act, 1908.

The transmission order being a sine qua non for execution proceedings an application under O. 45, R. 15, Civil P. C., is one for enforcing an order in Council of His Majesty and is covered by Art. 183, Lim. Act, and, therefore, the residuary article would not apply. A I R (Vol 29) 1942 Pesh 14 : 1942 Pesh L J 14 : 199 Ind Cas 46.

——O. 45, R. 15 — Mukerji, J. — Where an application is made to obtain restitution as the necessary result of the order of His Majesty in Council, that application is to be taken as one to "enforce" an order in Council and must be governed by Art. 183 and not by the general and omnibus Art. 181.

Sen, J. — Such an application is one under O. 45, R. 15 and Art. 183 applies. A I R (Vol 15) 1928 All 293 : 112 Ind Cas 876 : 50 All 767 : 26 A L J 587 (DB).

7. Order whether appealable.

——O. 45, R. 15 — O. 43, R. 1 Competency of appeal.

The order passed by a High Court transmitting an order in Council for execution is appealable. A I R (Vol 17) 1930 Lah 674 : 123 Ind Cas 277 : 31 P L R 182 : 12 L L J 93 (DB).

——O. 45, R. 17.

——O. 45, R. 17 — O. 45, R. 17 added by Government of India (Adaptation of India Laws) Order, 1937 — No certificate — Application under O. 45, if proper.

Rule 17, which has been added to O. 45 by the Govt. of India (Adaptation of India Laws) Order, 1937, assumes that a certificate under S. 205 of the Constitution Act has already been given.

Where a certificate had not been granted at the time the judgment was pronounced, the party interested might bring the matter to the notice of the Court by an application, but that will not be an application under O. 45. A I R (Vol 27) 1940 F C 25 : 6 B R 498 : 21 P L T 405 : (1940) 1 M L J 28 Sup : I L R (1940) Kar (FC) 52 Sup : 1940 M W N 685 : 52 M L W 122 : 44 C W N F C 29 : 72 CLJ 142 : (1940) FCR 75 : 187 Ind Cas 453.

——O. 45, R. 17, Proviso (a) — Construction of.

The addition of the words to R. 3 of O. 45, Civil P. C., effected by Proviso (a) to R. 17, makes it quite clear that it is unnecessary for the Court to consider in a petition filed in compliance with O. 45, R. 2 the question whether there is a substantial question of law involved as to the interpretation of the Govt. of India Act, 1935. A I R (Vol 27) 1940 Mad 890 : (1940) 2 M L J 170 : 52 M L W 240 : 1940 M W N 849 : I L R (1941) Mad 43 : 193 Ind Cas 865.

——O. 46, R. 1.

1. Applicability and scope.
2. **Court, meaning of.**
3. **Court to state its reasons.**
4. **Matter relating to court-fee.**
5. **Question of Law.**
6. **Reasonable doubts.**
7. **Reference to High Court.**
8. **Small cause courts.**

1. Applicability and scope.

——O. 46, R. 1 — Reference — Whether reference arises is to be decided by referring Judge.

Whether the reference does not arise on the facts of the case is a matter for consideration by the

Judge who has made the reference and not for the Judges hearing the reference to decide. A I R (Vol 33) 1946 Nag 30 : I L R (1945) Nag 975 : (1945) Nag L J 431 (DB).

——O. 46, R. 1 — Scope — Distinction between suit and application.

According to O. 46, R. 1, a Court can state a case and refer it to the High Court on question of law which must arise at the hearing of a suit or appeal. The Legislature has made a distinction between a suit and an application. A suit is instituted by presentation of a plaint and ends in decree. A reference made by the Collector to a Court under S. 18, Land Acquisition Act is neither a suit nor an appeal. The president of the tribunal, therefore, is not competent to refer a case to the High Court for decision under O. 46, R. 1. A I R (Vol 32) 1945 Nag 146 : I L R (1945) Nag 399 : 1945 N L J 274 (DB).

——O. 46, R. 1, Ss. 113, 9, 26 — C. P. and Berar Relief of Indebtedness Act (XIV of 1939), Ss. 19, 20 — Revision application to District Judge from order of Debt Relief Court — District Judge, if can make reference to High Court.

The right of reference is a substantive one and not a mere matter of procedure. When a statute gives a litigant a right to go to a particular Court for the hearing and decision of his appeal, he has a right to the decision of that particular tribunal and cannot be put off by having foisted upon him some other tribunal. Provisions of O. 46, R. 1, Civil P. C., cannot be applied to proceedings before the Debt Relief Board, inasmuch as such proceedings are not suits. Consequently the District Judge has no power of reference and the High Court, has no jurisdiction to entertain it.

Consequently the District Judge to whom a revision application is made under S. 20, C. P. Relief of Indebtedness Act, cannot refer the case to the High Court under S. 113 and O. 46, R. 1, Civil P. C. A I R (Vol 29) 1942 Nag 8 : 1941 N L J 485 : I L R (1941) Nag 588 : 198 Ind Cas 824 (DB).

——O. 46, R. 1 — Expressions "not subject to appeal" and "any such decree" explained.

The idea underlying the rule is to allow difficult points of law to be brought before the High Court in cases where that could not be otherwise done, e.g., where the original decree in a suit is final or where a matter has been decided in first appeal and no second appeal is provided.

Whatever meaning is to be attached to the words "not subject to appeal" in R. 1, O. 46, Civil P. C., it is clear that they cannot mean simply that no appeal has in fact been made, where there might have been an appeal from a decree of the High Court, although it was extremely unlikely that there should have been, nevertheless the decree is strictly speaking subject to appeal and no reference can, therefore, be made under O. 46, R. 1.

The words "any such decree" in R. 1, O. 46, mean either a decree in a suit where no appeal is provided against the decree, or a decree in an appeal where no further appeal is provided. A I R (Vol 28) 1941 Bom 365 : 43 Bom L R 733 : 197 Ind Cas 895 (DB).

——O. 46, R. 1 — No reference can be made under O. 46, R. 1 when the Court has come to a definite conclusion. (1940) 72 C L J 522 : 44 C W N 1067.

——O. 46, R. 1 — Only when the decree of which the execution is sought is not an appealable one, a reference under O. 46, R. 1 can be made. (1940) 72 C L J 522 : 44 C W N 1067.

——O. 46, R. 1 — Application to execute award made under Bombay Co-operative Societies Act (VII of 1925), is neither suit nor execution of decree — No reference lies.

The condition precedent to a reference under O. 46, R. 1, Civil P. C., is that the Court which refers is either hearing a suit or an appeal in which the decree is not subject to an appeal, or is hearing proceedings in execution of any such decree. An application to execute an award made under the provisions of the Bombay Co-operative Societies Act, 1925, is not a suit or the execution of a decree in a suit, so that O. 46, R. 1 can have no application and no reference lies. A I R (Vol 27) 1940 Sind 111 : I L R (1940) Kar 411 : 188 Ind Cas 609 (DB).

——O. 46, R. 1 — Refence on question whether suit abates on death after preliminary decree, is incompetent since the decision of the question any way is appealable. A I R (Vol 18) 1931 Pat 353 : 10 Pat 471 : 12 P L T 909 : 133 Ind Cas 767 (DB).

——O. 46. R. 1 — O. 46 does not apply to miscellaneous proceedings. A I R (Vol 12) 1925 Cal 391 : 84 Ind Cas 543 : 40 C L J 578 : 29 C W N 521 (DB).

——O. 46, R. 1 — Sanction application.

Order 46, R. 1 of the C. P. C. refers to such questions only as may arise in the trial of the suit and not to questions arising on application for sanction to prosecute which cannot in any sense of the word, be considered as a trial of a suit. A I R (Vol 11) 1924 Lah 566 : 76 Ind Cas 201.

——O. 46, R. 1 — Scope of.

Section 113 read with O. 46, R. 1 permits reference to the High Court of only such cases as do not admit of further appeal. AIR (V 4) 1917 Lah 135 : 130 PR 1916 : 37 Ind Cas 227 (DB).

——O. 46, R. 1 — Reference by an Appellate Court — No jurisdiction to hear appeal — Effect.

Where no appeal lies to an Appellate Court, the Court has no jurisdiction to make a reference to the High Court under O. 46, R. 1, C. P. C.

Where the referring Court has no reasonable doubt on the question of law referred, no reference can be made. 123 P L R 1913 : 117 P W R 1913 : 61 P R 1913 : 18 Ind Cas 314 (DB).

——O. 46, R. 1 — Reference — Decree not final.

Where the decree of a Court would not be final in a certain case, the Court cannot make a reference to the High Court. (1910) 5 Ind Cas 584 (All) (DB).

——O. 46, R. 1, (S. 617, Old Code) — Reference to High Court — In action by a third person not a party to the suit not bad.

A reference to the High Court under S. 617 of the Civil Procedure Code, 1882, is not bad merely because it arises out of the action taken by a third person not a party to the suit. (1908) 10 Bom LR 13 : 32 B 157 (161) (DB).

2. Court, meaning of.

(a) Rent controller.
(b) Collector.

(a) Rent controller.

——O. 46, R. 1 — The Court of the Rent Controller is in certain respects a Court of civil jurisdiction but the enquiry before the Rent Controller is not a suit within the meaning of O. 46, R. 1 and therefore the Rent Controller cannot make a reference under this order. A I R (Vol 12) 1925 Cal 391 : 84 Ind Cas 543 : 40 C L J 578 : 29 C W N 521 (DB).

(b) Collector.

——O. 46, R. 1 — Court — Collector — Executing decree transferred under S. 68, C. P. C.

The word "Court" in O. 46, R. 1 means a Court of Civil Judicature. The functions of a Collector in execution of a decree transferred to him under S. 68 of the Code though treated as judicial under S. 71 do not make him such a Court as to empower him to make a reference. A I R (Vol 6) 1919 Oudh

18 : 2 U P L R (JC) 21 : 22 O C 319 : 54 Ind Cas 564 (DB).

3. Court to state its reasons.

——O. 46, R. 1 (S. 646 B Old Code) — Reference.

Held, that when a reference is made to the High Court under S. 646 B., C. P. C., the Court which makes it should state its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous. (1906) A W N 29 : 3 A L J 23 : 28 A 293 (DB).

4. Matter relating to court-fee.

——O. 46, R. 1, (S. 617 Old Code) — Court Fees Act 12 (1) — Reference — Court-fee payable on memorandum of appeal.

Held, that S. 617 of the Code of Court Procedure does not contemplate a reference to the proper Court-fee payable on a memorandum of Appeal. (1906) A W N 180 (180) (DB).

5. Question of law.

——O. 46, R. 1 — Legal question in general form referred to High Court answered — Trial Court has to apply law to facts.

Where a legal question in general form referred to the High Court is answered by it, it is for the trial Court and not High Court to apply the law to the facts set out in the pleading. A I R (Vol 29) 1942 Lah 205 : 44 PLR 136 : ILR (1943) Lah 113 : 201 Ind Cas 671 (DB).

——O. 46, R. 1 — Reference on question of law — When permissible.

Under R. 1 of O. 46, Civil P. C., a reference to the High Court on a question of law is only permissible when the Court trying the suit or executing the decree entertains a reasonable doubt. A I R (Vol 20) 1933 Lah 402 : 34 P L R 544 : 141 Ind Cas 572.

——O. 46, R. 1 — Question of law — When can be referred — Practice.

Subordinate Courts in the Punjab are bound to follow the decisions of the Chief Court and cannot make a reference on a question of law, already decided by the Chief Court, unless such decision is questioned by a judgment of the Privy Council. 266 PLR 1913 : 8 PR 1914 : 20 Ind Cas 194 (DB).

——O. 46, R. 1 — High Court of N. W. Provinces — Second appeal — Question of fact.

No reference lies to the High Court of the N. W. Provinces where the question involved is one of fact and not of law. There is no provision in law for a reference to the High Court of Allahabad of an Ajmere case decided by a Second Court of appeal. (1911) 11 Ind Cas 671 (Ajmer).

6. Reasonable doubts.

(a) General.
(b) Doubt as to jurisdiction.
(c) No reasonable doubt.

(a) General.

——O. 46, R. 1, O. 7, R. 10, S. 24 — Suit valued at Rs. 205 filed in First Class Sub-Judge's Court allocated to joint First Class Sub-Judge — Case sent to Second Class Sub-Judge by District Judge's order — Latter allowing amendment — Suit becoming beyond his pecuniary jurisdiction and sent by him to First Class Court — Action reported to District Judge — District Judge informing grant of sanction — Reference by First Class Sub-Judge under O. 46, R. 1.

A suit for a declaration and injunction valued at Rs. 205 was instituted in the First Class Subordinate Judge's Court. According to the practice, the case was allocated to the joint First Class Subordinate Judge for disposal. Subsequently, by order of the District Judge the case was sent to the Court of the Extra Joint Second Class Subordinate Judge who was one of the Subordinate Judges attached to the First Class Court. While the case was pending in the Court of the Joint First Class Subordinate Judge, an application was made to amend the plaint by including additional properties in the list of suit properties and asking for partition. This application for amendment was granted by the Second Class Subordinate Judge after the case had been taken up by him. The result was that the suit became one beyond his pecuniary jurisdiction and so he sent the case to the First Class Court and reported the action taken by him to the District Judge. In a letter sent by the clerk of the Court of the District Judge by order of the District Judge, the First Class Subordinate Judge was informed that the sanction applied for, had been granted. When the case was taken up by the First Class Subordinate Judge, the defendants objected that he had no jurisdiction and that the only legal way of dealing with the case was that the Second Class Subordinate Judge should have returned the plaint for presentation to the First Class Subordinate Judge under O. 7, R. 10. The First Class Subordinate Judge doubted whether the District Judge had power to transfer the case under S. 24, Civil P. C., and also whether any order of transfer under that section had in fact been made. He submitted several questions for the opinion of the High Court under O. 46, R. 1 :

Held, that O. 46, R. 1 had no application, nor did O. 7, R. 10 apply as the suit was properly instituted in the first instance :

Held, further that the High Court could properly take action under S. 24 of its own motion and in order to save difficulty and delay, transfer the suit to the First Class Court for disposal, since the suit was properly filed in the First Class Court and the Second Class Subordinate Judge to whom it was transferred for disposal by administrative order had jurisdiction to entertain it and to deal with it up to the date of amendment. Hence there was no legal objection to the High Court passing an order under S. 24 transferring the case to the Court of the First Class Subordinate Judge.

(The High Court in this case passed an order under S. 24, Civil P. C., ex majore cautela, withdrawing the suit from the Court of the Extra Joint Second Class Subordinate Judge and transferring it for trial to the First Class Subordinate Judge.) AIR (Vol 28) 1941 Bom 69: 42 Bom LR 1093: ILR (1941) Bom 131: 193 Ind Cas 242.

——O. 46, R. 1, S. 113 (S. 617 Old Code) — Reference — High Court practice.

A reference under Ch. 46, C. P. C., can only be made when the Judge, of the Lower Court entertains a reasonable doubt; he cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his Presidency, unless the authority of the decision can be questioned by virtue of anything said or decided in Privy Council. (1905) 7 Bom LR 995 (997) : 30 B 226 (DB).

——O. 46, R. 1 Ss. 113, 141 (Ss. 617, 647 Old Code — Reference — High Court.

Section 617, C. P. C., read with S. 647 authorises a reference to the High Court when doubt arises in the hearing of a suit or appeal or execution or other proceeding. Suppositous cases, until they actually call for decision, cannot be referred to the High Court under S. 617. (1901) 3 Bom LR 368: 25 B 327 (329) (DB).

(b) Doubt as to jurisdiction.

——O. 46, R. 1 — When the plaintiff, an old man filed his suit in the Court of the Subordinate Judge he was told to go to the Court of the Munsif and

when he went to the Court of the Munsif he was told by the Munsif that he had no jurisdiction.

Held, that although the orders passed were very old and an application as made for a reference under O. 46, R. 1 could not lie; yet, the High Court could take action under S. 151 of the C. P. Code, and pass such orders as may be necessary for the ends of justice. High Court ordered the Sub-Judge to take up the case. AIR (Vol 12) 1925 Oudh 461: 85 Ind Cas 702: 12 OLJ 189: 2 OWN 81: 28 OC 323.

(c) No reasonable doubt.

——O. 46, R. 1 — Parties not objecting.

Where it was perhaps somewhat difficult to hold that the Judge making the reference entertained any reasonable doubt as to what his decision should be, or as to what decision was correct, but the respondent withdrew any objection on this gound, as he said the questions that arose would affect a very large number of cases and must affect a very large amount of money, reference was entertained. AIR (Vol 10) 1923 Rang 193: 76 Ind Cas 519: 1 Rang 220 (DB).

7. Reference to High Court.

(a) When to be made.
(b) Condition.
(c) Grounds.
(d) Power.
(e) Quashing.

(a) When to be made.

——O. 46, R. 1 — Reference, when can be made — Bengal Tenancy Act (VIII of 1885), S. 93 — Proceedings under — Whether in the nature of a suit — Reference — Competency of.

Proceedings under S. 93, Ben. Ten. Act do not amount to a suit but are in the nature of an application and hence where a question of law arises on which doubt is entertained, a reference cannot be made to the High Court under O. 46, R. 1, Civil P. C., which applies only to doubts arising on the hearing of a suit or an appeal. AIR (Vol 21) 1934 Cal 566: 38 CWN 499: 151 Ind Cas 721 (1) (DB).

——O. 46, R. 1 — It is not the object of O. 46, R. 1, that Subordinate Courts should be enabled to relieve themselves of the necessity of deciding difficult questions arising before them to make a reference to the High Court calling upon it to do what could have been done by the Subordinate Courts. AIR (Vol 20) 1933 All 597: (1933) ALJ 1468: 55 All 648: 148 Ind Cas 364 (DB).

——O. 46, R. 1 — Point decided by High Court — Duty of Subordinate Courts — When reference can be made.

A subordinate Court is bound to follow the decision of a Bench of the High Court to which it is subordinate unless that decision has been overruled by decision of a Full Bench of that Court, or by His Majesty in Council, or unless the law has been altered by a subsequent Act of the Legislature. Ordinarily, therefore, when there is a clear pronouncement by a High Court, which has not been doubted subsequently, the Subordinate Courts are bound to follow it no matter whether that decision has been dissented from by other High Courts. The subordinate Courts should not, under such circumstances, entertain any reasonable doubt as to its soundness. But where some doubts have been expressed by Judges of the High Court in subsequent cases and other High Courts have expressly dissented from that ruling, and the subordinate Courts entertain a doubt, it would be impossible to hold that a reference under O. 46 cannot be made. AIR (Vol 13) 1926 All 204: 93 Ind Cas 24: 48 All 188: 24 ALJ 69 (FB).

(b) Condition.

——O. 46, R. 1 — Condition for reference.

A reference can be made only in suits or appeals in which the decrees are not subject to an appeal. AIR (Vol 14) 1927 Mad 1179: 39 MLT 657: 54 MLJ 66 (DB).

(c) Grounds.

——O. 46, R. 1 — Reference — Grounds for.

Order 46, R. 1, C. P. C., does not authorize a reference when the Court below does not entertain a reasonable doubt as to the decision of the matter before it and the fact that there are conflicting rulings on a point of Law is not a sufficient ground for reference. 15 OC 380: 18 Ind Cas 977 (DB).

(d) Power.

——O. 46, R. 1 — Difference between appeal and reference.

A power of reference is not a modified form of appellate jurisdiction. A right of appeal is a right conferred on the suitor. A power of reference is a power vested in the Court. It lies in the sole discretion of the Court to exercise or not to exercise it. An appeal presupposes a decree or order already passed against which the appeal is directed. The power of reference is exercised while the case is still pending in order to enable the Court to arrive at a correct decision. A Court to whom a reference can be made is not necessarily authorised to hear appeals from the Court making a reference. AIR (Vol 12) 1925 All 380: 87 Ind Cas 51: 23 ALJ 385: 6 LRA Civ 191: 47 All 513 (FB).

(e) Quashing.

——O. 46, R. 1 — Rule 5 is wide enough to enable the High Court to quash the order of reference under R. 1 made by the lower Court. AIR (Vol 16) 1929 Bom 30: 118 Ind Cas 692: 30 Bom LR 1627 (DB).

8. Small cause Courts.

——O. 46, R. 1 — A Single Judge of Small Cause Court can make a reference to High Court. Section 11, Provincial Small Cause Courts Act extends rather than restricts the power of a Provincial Court of Small Causes to make reference under S. 113 of the Act and O. 46, R. 1 Civil P. C. AIR (Vol 24) 1937 Sind 318: 172 Ind Cas 805 (DB).

——O. 46, R. 1 (S. 646 (B) Old Code) — Small Cause suit tried as original suit — Appeal — Decree dismissing suit on merits — Order for costs — Validity of.

Section 646-B, C. P. C., is an enabling section and does not cut down the jurisdiction of the appellate tribunal. An order for costs by the District Court while dismissing the suit on the merits is an appeal from the decree of the District Munsif in an original suit which was wrongly tried as such even though cognizable by a Small Cause Court, is not an order which the appellate Court had jurisdiction to make. (1907) 30 M 41 (43): 1 MLT 414.

——O. 46, R. 1; O. 46, R. 5 (Ss. 617, 621 Old Code) — Presidency Small Cause Courts Act (XV of 1882), S. 69 — Conditions imposed on Judge of Small Cause Court in stating case for opinion — Power of High Court to remand for amendment.

See (1903) 30 C 458 (462).

——O. 46, R. 5.

——O. 46, R. 5 — Powers of High Court.

When a High Court hears a reference it really performs the functions of a Court of appeal quite as much as it undoubtedly does when it hears an application for revision. AIR (Vol 8) 1921 Cal 262: 25 CWN 80: 32 CLJ 433 (DB).

(Reference under Income-tax Act.—Ed.)

——O. 46, R. 6.

——O. 46, Rr. 6 and 7 — Reference to High Court — Small Cause.

A Munsif returned a plaint holding that the suit was triable in a Small Cause Court which however returned the plaint back holding that it was cognizable by it. Held, the procedure adopted by the Subordinate Judge was wrong. If he entertained a doubt as to the forum in which the suit should be instituted, he should have referred the matter to the High Court under O. 46. If he had no doubt he should have sent the record to the District Judge for action under R. 7 of the order. AIR (Vol 5) 1918 Cal 1037: 21 CWN 784: 27 CLJ 96: 41 Ind Cas 929 (DB).

——O. 46, R. 7.

——O. 46, R. 7 — Small Cause Court — Suit for accounts.

A suit is not one for accounts merely because accounts have to be to some extent gone into and is not cognizable by Small Cause Court on that ground. AIR (V 26) 1939 Nag 64 : 1938 NLJ 457 : 181 Ind Cas 123.

——O. 46, R. 7 — Jurisdiction to Small Cause Court raised — Plaint pending in Court of Sub-Judge returned to Small Cause Court — Small Cause Court returning plaint for proper presentation — Plaint represented before Sub-Judge — Sub-Judge maintaining original order — Appeal to Additional District Judge dismissed :

Held, that under O. 46, R. 7, the Additional District Judge was entitled to make a reference to the High Court on the question and that he ought to have made such a reference whether he was asked by the plaintiffs or not. As all the orders were put before the High Court, it could revise one, of the original Court, returning the plaint for presentation to the proper Court. AIR (V 21) 1934 Nag 257 : 17 NLJ 169 : 153 Ind Cas 461.

——O. 46, R. 7 — Small cause suit tried on original side — Objection not raised — Appeal — Reference by District Judge — High Court, powers of.

Where a small cause suit is tried on the original side and the parties do not raise any questions of jurisdiction and an appeal from the decree of the trial Court is preferred to the District Judge who makes a reference under O. 46, R. 7, to the High Court, it is open to the High Court either to set aside the decree of the lower Court and direct the plaintiff to present the plaint to the proper Court, or to look into the merits of the case and decide whether the decree of the lower Court is a just and proper one or not. AIR (V 20) 1933 Pat 31 : 11 Pat 690 : 14 PLT 269 : 141 Ind Cas 130 (DB).

——O. 46, R. 7, S. 115 — Order refusing to submit record to High Court.

Under O. 46, R. 7, the District Judge is bound, if required by a party, to submit the record to the High Court with a statement of his reasons, whether the last order is by the Small Cause Court or by the Sub-Judge, and the High Court is competent to revise an order made by the District Judge refusing to submit a case, inasmuch as the refusal constitutes a failure to exercise jurisdiction vested in him by law. AIR (V 19) 1932 Nag 70 : 28 NLR 54 : 137 Ind Cas 88.

——O. 46, R. 7 — Small Cause Court's proceedings.

The Small Cause Court being a Court subordinate to the Dist. Court, the Dist. Judge is competent to make references of cases tried by that Court to the High Court under O. 46, R. 7, C. P. C. (1911): 34 M 527 : 20 MLJ 946 : 9 MLT 100 : 8 Ind Cas 1093 (DB).

——O. 46, R. 7 — C. P. C., S 117, O 46, R. 7 (Ss. 632 646-B old Code) — Revision — Small cause suit tried on regular side.

The provisions of S. 646-B, followed in a revision case. (1904) 27 M 478 (479) (DB).

——O. 47.

See also, Civil P. C., S. 114.

——O. 47 — Jurisdiction to review — Error apparent on the face of the record — Origin of error — Relevancy for purposes of exercising jurisdiction.

Where an error is found to be one apparent on the face of the record, whether it occurred by reason of the counsel's mistake or had crept in by reason of an oversight on the part of the Court is not a circumstance which could affect the exercise of jurisdiction of the Court to review its decision. The question as to how the error occurred is not relevant in such a matter. Where the Court finds that a mistake has in fact crept into a judgment it would be appropriate for it to correct it on a petition for review raher than drive a party to an appeal to a higher Court. AIR (V 37) 1950 FC 131 : 1950 RLW 158 : (1950) SCJ 117.

——O. 47 — Applicability to proceedings under the U. P. E. E. Act. AIR (V 37) 1950 All 229 : 1950 ALJ 64.

——O. 47 — Interlocutory order — S. 151, C. P. Code.

A interlocutory order made in chambers can be reviewed by the Court under S. 151, and ought to be reviewed if the ends of justice require it, even though the application for such a purpose does not expressly fall within the language of O. 47. AIR (V 17) 1930 Bom 294 : 32 Bom LR 665.

——O. 47 — Review when allowed.

Order dismissing for default an objection of judgment-debtor is not appealable because S. 2 (2) when defining a decree and stating that it includes the determination of any question within S. 47 expressly states that it shall not include any order of dismissal for default.

Obiter — If order was not covered by O. 9 judgment-debtor should have applied under S. 151 or O. 47. AIR (V 16) 1929 All 123 : 112 Ind Cas 380: 26 ALJ 1395 (DB).

——O. 47 — Consent decree by fraud.

It is not competent under O. 47 to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud. AIR (V 16) 1929 Cal 470 : 33 CWN 883 (DB).

——O. 47 — Application for adjournment by plaintiff's pleader refused — Order passed on application, in presence of pleaders in dismissing suit and another order on plaint dismissing suit ex parte — Having dismissed the suit in the presence of the pleaders for the plaintiff, the Court had no jurisdiction to pass a second order of dismissal for default of appearance by the plaintiff after the plaintiff's pleader had left the Court — It was, therefore, a fit case for granting an application for review. AIR (V 16) 1929 Sind 38 : 115 Ind Cas 314 (DB).

——O. 47 — Limitation.

There is nothing in O. 47 to suggest that the application for review must necessarily be made within the same period which is allowed to a party for the alternative remedy by way of appeal or application for restoration of a suit which has been dismissed for default of appearance. AIR (V 16) 1929 Sind 38 : 115 Ind Cas 314 (DB).

——O. 47 — Revision — Refusal to review.

The discretionary powers of revision vested in the High Court by S. 115 are not in any way controlled by the provisions of O. 47; such powers are intended to apply even to orders disallowing a review application. 26 All 572, Diss. from. AIR (V 16) 1929 Sind 38 : 115 Ind Cas 314 (DB).

——O. 47 — Applicability — Letters Patent Appeal.

The provisions of S. 114 and the rules under O. 47 apply to an application for review of a decree in any appeal under the Letters Patent. AIR (V 14) 1927 Bom 232 : 101 Ind Cas 766 : 29 Bom LR 371.

——O. 47 — Omission to file copies of record of rights — Bombay Land Revenue Code, S. 135-H, sub-S. 2.

Where a certified copy of an extract from the record of rights relevant to the case was not produced at the trial as required under S. 135-H of Bombay Land Revenue Code and the point was abandoned in appeal.

Held, the defect should be cured by allowing the plaintiff to put in the certified copies of the extract from the record-of-rights and that the previous non-production is no sufficient ground for reviewing the decision. The High Court has the power as the Original Court has to allow a reasonable time for the production of the extracts if it has not been produced and what is or is not is reasonable time is a matter entirely within the discretion of the High Court. Though the consequence of the omission on the part of the plaintiff to put in the necessary certified copy is as let down in sub-S. 2 of S. 135-H, it cannot be said that the consequence must necessarily be given effect to at any stage of the litigation. AIR (V 9) 1922 Bom 114 : 64 Ind Cas 156 : 46 Bom 79 : 23 Bom LR 745 (DB).

——O. 47 — Specific performance — Defendant's decree — Defective title.

When the plaintiff in a suit for specific performance of a contract to sell, gets a decree and then discovers that the defendant cannot give him a good title his proper course is apply for a review or to file another suit to set aside the decree. AIR (V 10) 1923 Bom 26 : 67 Ind Cas 667 : 46 Bom 990 : 24 Bom LR 496 (DB).

——O. 47 — Events subsequent to decree.

The decree of the Privy Council reversing the decree of the High Court is no ground for review of the judgment passed prior to the decision of the Privy Council, on the strength of the judgment of the High Court. The ground of amendment must be something which existed at the date of the decree and the section does not authorise the review of a decree which was right when it was made, on the ground of the happening of some subsequent event. AIR (V 9) 1922 Mad 227 : 43 MLJ 33 : 70 Ind Cas 741 : 1922 MWN 304 : 15 M L W 593 : 31 MLT 473.

——O. 47, R. 1.

See also Civil P. C., O. 9, R. 9.

1. Appeal.
   See also, Note 21.
2. Appeal from decree.
3. Applicability and scope.
4. Cessation of appeal.
5. Compromise after decree.
6. Consent decree.
7. Court fee.
8. Duties of Court.
9. Effect of.
10. Error or mistake.
    See also Note 12.
11. Ex parte order.
12. Grounds for
    See also Notes 10, 17, and 18.
13. Inherent power.
    See also Note 12 and C. P. C., S. 151.
14. Interpretation.
    See also Note 18.
15. Limitation.
16. Minors and pardanashin ladies.
17. New evidence.
    See also Note 12
18. Other sufficient reason.
    See also Notes 12 and 14.
19. Power of Court.
    See also Note 3.
20. Procedure.
21. Revision.
22. Second appeal.
23. Small cause case.

1. Appeal.

See also Note 21.

——O. 47, R. 1 — Discovery of new evidence — Review granted on ground of sufficient reasons — No appeal lies.

Clause (b) of R. 4 of O. 47, Civil P. C., does not make the ground of the application decisive; it makes the ground of granting the application decisive. Where therefore, the Court grants the application not on the ground of the discovery of new evidence, but on the ground that there was a sufficient reason within the meaning of Cl. (c) of Sub-R. (1) of R. 1, O. 47, Civil P. C., for granting the application for review, no appeal lies against the order granting an application for review. AIR (Vol 31) 1944 Sind 68 : ILR (1943) Kar 393 : 211 Ind Cas 364 (DB).

——O. 47, Rr. 1 and 7 — An order rejecting an application for review even in proceedings under U. P. Encum. Estates Act (XXV of 1934) is not an order passed under S. 45 (1) of the Act but it is an order under O. 47, Civil P. C. Such an order, therefore, is not appealable. AIR (Vol 30) 1943 Oudh 214 : 1943 OWN (CC) 83 : 1943 AWR (CC) 19 (1) and 6 (2) : 205 Ind Cas 456 (DB).

——O. 47, R. 1 — Basis of review order not correct — Original order demonstrably wrong.

Where the original order which has been reviewed is demonstrably wrong, the Appellate Court will not interfere with that review order even though the basis or reasoning on which the original order has been reviewed is open to criticism. AIR (V 28) 1941 Mad 918 : (1941) 2 MLJ 390 : 54 MLW 263 : 1941 MWN 1047.

——O. 47, R. 1 — Execution of money decree — Before confirmation of sale of judgment debtor's property petition showing full satisfaction filed on behalf of decree-holder — Subsequent application by decree-holder under O. 47, R. 1 and S. 151 on the ground that the application of full satisfaction had been fraudulently filed — Application dismissed;

Held, that the application under O. 47, R. 1 and S. 151 was essentially one under S. 47, and hence the appeal was competent. AIR (Vol 21) 1934 Pat 202 : 148 Ind Cas 549.

——O. 47, R. 1 — Although if an application for review is rejected, the party applying would be debarred from asking for relief, he can, after a decree has been passed on review, claim in appeal against that decree that the amount awarded by the original decree should be increased. AIR (Vol 19) 1932 Nag 143 : 28 NLR 245 : 140 Ind Cas 21.

——O. 47, R. 1 — No right of appeal is given if the provisions of R. 1, O. 47 are contravened; what is meant by R. 7 (i) (b) is that an appeal lies if the two provisos of R. 4, O. 47 are contravened. 116 Ind Cas 221 : AIR (Vol 16) 1929 Lah 26.

——O. 47, R. 1 — An order granting a review for other "sufficient reasons" within the meaning of O. 47, R. 1 of C. P. Code is not appealable. 66 Ind Cas 558 : AIR (Vol 9) 1922 All 366 (DB).

——O. 47, Rr. 1, 4 (Ss. 623, 626 old Code) — Review of judgment — Appeal — Second appeal.

When an order granting a review of judgment has been set aside on appeal the order passed in appeal is final and not open to second appeal. (1907) 6 CLJ 225 (225) (DB).

2. Appeal from decree.

——O. 47, R. 1 — Subsequent filing of appeal — Review, if incompetent.

When an application for review has been made the subsequent filing of an appeal will not render the application for review incompetent. But, if the application for review is granted during the pendency of the appeal, the appeal cannot be heard and must be dismissed. The reason is obvious ; the order appealed from has been superseded by the order passed after review. AIR (V 25) 1938 Mad 307 : 47 MLW 51 : (1938) MWN 656 : 183 Ind Cas. 33.

——O. 47, R. 1 — Application for review presented before appeal is preferred.

If the application for review is presented before the appeal is preferred, the Court is not deprived of jurisdiction to entertain the application for review, on the ground that when the application comes on to be dealt with, an appeal is pending. (1937) 170 Ind Cas 653 : 41 CWN 129.

——O. 47, R. 1 — Appeal — Modification of lower Court's decree in review before decision of appeal.

Where during the pendency of an appeal, the decree appealed from is modified on an application for review made by the appellant, the appeal becomes incompetent by reason of the fact that the decree appealed from has been superseded by the order on the application for review modifying that decree. AIR (Vol 23) 1936 Mad 464 : 43 MLW 542 : (1936) MWN 277 : 162 Ind Cas 261.

——O. 47, R. 1 — Appeal filed.

There is nothing in O. 47, R. 1 or in other provisions of Civil Procedure Code which would justify the Courts in refusing to entertain an application for review merely on the ground that subsequent to the making of the application, an appeal has been filed. The policy of the Code appears to be that a person cannot, after filing a second appeal, be allowed to obtain a review of judgment in the lower Court which should have the effect of altering the judgment and decree from which he has appealed. 119 Ind Cas 561 : AIR (Vol 16) 1929 All 375.

——O. 47, R. 1 — Where during pendency of an appeal the order for review supersedes the original decree under appeal ceases to exist and the appeal cannot be heard. 116 Ind Cas 227 : 31 Bom. LR 137 : AIR (Vol 16) 1929 Bom. 183 (DB).

——O. 47, R. 1 — Where an application for review is filed after an appeal has been filed by the opposite party, the Court to which the application for review is made should decline to proceed with the application until the appeal has been heard and should direct the applicant to obtain the relief which he desires by means of review, by filing cross-objections to the same effect. (1927) 99 Ind Cas 271 : 3 OWN 968 (DB).

——O. 47, R. 1 — There is no necessity for review while an appeal from the original decree is pending, because the plaintiff respondent in the Appellate Court could have got the decree modified in the Appellate Court. But if a review is made and allowed, the decree to be appealed against is the review decree. 90 Ind Cas 119: AIR (Vol 13) 1926 Oudh 55.

——O. 47, R. 1 — Appeal filed.

Where an application for review is preferred before the filing of an appeal it is the duty of the Court to decide the application on the merits notwithstanding the fact that an appeal has subsequently been filed. (1922) 65 Ind Cas 125 (Pat) (DB).

——O. 47, R. 1 — O. 47, R. 1, does not apply where after filing an application for review the opposite party prefers an appeal. (1921) 63 Ind Cas 841 (All) (DB).

——O. 47, R. 1 (1) (a) — Appeal — Filing of, after review.

A Court can entertain an application for review and dispose of it on the merits even though subsequently an appeal is filed against the decree originally passed. The first Court dismisses the application for review on the ground that an appeal had been filed; but the High Court refused to interfere in revision against the order of the first Court as the Judge had dismissed the appeal. 2 UPLR (HC) 43: 18 ALJ 135: 54 Ind Cas 764: AIR (Vol 7) 1920 All 160 (DB).

——O. 47, R. 1 (1) (a) — Appeal — Filing of after review.

An appeal may be preferred even after an application for review; the Court in such a case can proceed with application for review; but the hearing of the appeal must be stayed. 57 Ind Cas 785: AIR (Vol 7) 1920 Cal 584 (DB).

——O. 47, R. 1 (1) (a) — Appeal — Filing of appeal during pendency of review.

If, during the pendency of an application for review, the applicant files an appeal against the order of which he is seeking a review, the pendency of the appeal is no bar to the disposal of the application for the review. 17 ALJ 1021 : 42 A 79 : 52 Ind Cas 642 : AIR (Vol 6) 1919 All 67 (DB).

——O. 47, R. 1 (1) (a) — Appeal — Filing of after review.

An application for review can be continued after the filing of appeal from the decree. If the review succeeds then the appeal becomes incompetent and cannot be heard. 15 NLR 65: 50 Ind Cas 329 (2) : AIR (Vol 6) 1919 Nag 78.

——O. 47, R. 1 (1) (a) — Appeal — Review — Order of Lower Court after appeal.

A lower Court cannot review its order after it has been confirmed on appeal. 40 PR 1918: 60 PWR 1918: 45 Ind Cas 84: AIR (Vol 5) 1918 Lah 45 (DB).

——O. 47, R. 1 (1) (a) — Appeal — Filing of after review.

The court must proceed with a review application though an appeal is preferred subsequently by the applicant. But once the appeal is heard and a final decree passed, in appeal, the review cannot be proceeded with. If on the contrary the application for review is successful the appeal abates. 44 C 1011: 41 Ind Cas 497: AIR (Vol 4) 1917 Cal 29 (DB).

——O. 47, R. 1 (1) (a) — Appeal — Review after appeal.

The application for review is not maintainable after preferring an appeal against the same decree. 35 Ind Cas 867 (2): AIR (Vol 3) 1916 All 90:

——O. 47, R. 1 (1) (a) — Appeal — Review filed before appeal.

Per Shah, J.: If an application for review is made and also an appeal is preferred, the Court, to which the review application is made, can still entertain the application for review. 38 Bom 416 : 16 Bom LR 189: 23 Ind Cas 513: AIR (Vol 1) 1914 Bom 1 (DB).

——O. 47. R. 1 (1) (c), O. 6 — Other sufficient reason — Prior case reversed in appeal.

When a decree in a small cause suit was based on a finding in an original suit; the Judgment in which was reversed in appeal, the proper procedure was to apply to the Court which passed the decree to review its decision. (1913) 13 MLT 225: 19 Ind Cas 214.

——O. 47, Rr. 1 (2) and 7 — Application for review — Appeal filed against decree — Admissibility.

A Court has no jurisdiction to entertain an application for review of its own judgment, where an appeal has been filed against the same and the applicant has an opportunity of presenting his case in that appeal. (1911) 14 OC 108: 11 Ind Cas 343.

——O. 47, R. 1 — Inconsistent remedies — Application for review of judgment — No bar to subsequent suit, to vacate judgment for fraud.

The doctrine of estoppel by election of remedies rests upon the principle that litigant cannot come before a Court of justice and have recourse to repugnant remedies. The remedy by a review and one by suit are not inconsistent and a prior application for review and its dismissal are no bar to a subsequent suit to set aside the decree. (1909) 13 CWN 1197 (1216, 1219); See 10 C 1 (8); 12 M 325 (329); 10 C 924 (927, 928).

——O. 47, Rr. 1 (2) and 8 — Appeal — Filing of, after review.

If an appeal is preferred after a review of application by the same or opposite party, the latter may be heard by the Court to which it is presented but the jurisdiction of hearing the review application should be exercised with the greatest care and only in a very strong case. (1909) 32 Mad 416 : 6 MLT 135 : 19 MLJ 388 : 2 Ind Cas 802 (FB).

——O. 47, R. 1 (S. 623, old Code) — Review of judgment — Effect of order on review — Appeal from original decree.

Where an application for review of judgment is granted the result is a new decree superseding the original decree, and not merely some amendment thereof. An appeal was filed pending an application for review of judgment in the Court below; the review was granted; an order passed which purported merely to amend the decree then under appeal.

Held, that the order for review superseded the original decree; the decree under appeal had ceased to exist and the appeal could not be heard. (1905) AWN 265: 28 A 240 (241) (DB).

3. Applicability and scope.

——O. 47, R. 1 — Applicability — Order passed under S. 43 of the Provincial Insolvency Act. (1947) 2 MLJ 425: AIR (Vol 35) 1948 Mad 233.

——O. 47, R. 1 — An application for relief under Ben. Money-lender's Act, by re-opening the decree is an original application and not one for review under O. 47, Civil P. C. AIR (Vol 30) 1943 Cal 170: ILR (1942) 2 Cal 116: 46 CWN 607: 208 Ind Cas 154 (DB).

——O. 47, R. 1 — Proceedings under other Acts.

Unless a statute provides a remedy by way of review, the Court cannot review its own judgment except in very exceptional circumstances, such as, for example, where it passed an order in advertently or on account of some false representation by the officers of the Court. AIR (Vol 28) 1941 Mad 272: 52 MLW 753: 1940 MWN 1140: (1940) 2 MLJ 780.

——O. 47, R. 1 — Grant to 'inamdar' attracting Inam Rules in Berar Code — Judge holding that grant enured for benefit of sub-grantees and exempting estate from attachment:

Held, that the view of the Judge that though the grant by the Crown to an 'inamdar' attracted Rr. 5, 11 and 15 of the Inam Rules in the Berar Code, the representatives of the donees from the predecessor-in-title of the 'inamdar' had estate that could not be attached as though they were 'inamdars', was erroneous but no review would be allowed against this decision. AIR (Vol 25) 1938 Nag 145 : ILR (1938) Nag 151 : 1938 NLJ 48 : 182 Ind Cas 232 (DB).

(Overrules AIR (Vol 15) 1928 Nag 305 (2) : 113 Ind Cas 896).

——O. 47, R. 1 — Interlocutory order admitting evidence — Court, if can legally vary order.

Where an interlocutory order that certain evidence is admissible is passed, it can be legally varied by the Court though it is not often done. AIR (Vol 24) 1937 Lah 176: 39 PLR 262: 172 Ind Cas 619.

——O. 47, R. 1 — The mere fact that an appeal lies from an order is no justification for rejecting an application for review of the order. AIR (Vol 20) 1933 Lah 226 : 34 PLR 273 : 14 Lah 55 : 144 Ind Cas 768.

——O. 47, R. 1 — Disposal of connected case.

There were two connected appeals between the same parties, one before a Bench of two Judges and the other before the single Judge of the High Court. The respondent in one was the appellant in the other and the matter at issue was practically connected. The appeal before the two Judges was dismissed under O. 41, R. 11 and no notice was issued to respondent. The other appeal was heard and decided, the appellant was till then unaware of the dismissal of the connected appeal. The judgment was delivered but subsequently the appellant applied for review as the point on which the appeal was decided adversely to appellant was decided in favour of the appellant by the Bench.

Held, that the case came within the purview of O. 47, R. 1. AIR (Vol 17) 1930 All 621 (DB).

——O. 47, R. 1 — Dismissal for default.

Per Jwala Prasad, J. — Application of the decree holder for ascertainment of mesne profits was dismissed on account of non-payment of Court-fee can be restored under S. 151, C. P. Code but not by way of review. 5 Pat 361: 7 PLT 313: 1926 PHCC 49: 93 Ind Cas 939: AIR (Vol 13) 1926 Pat 218 (FB).

——O. 47, R. 1 (S. 623, old Code) — Review in Letters Patent Appeals — Letters Patent, N. W. P., S. 10.

Section 623 C. P. C., does not apply to a judgment passed by two Judges of the High Court in an appeal under S. 10 of the Letters Patent. (1904) 1 ALJ 509 (511) (DB).

——O. 47, R. 1 — S. 623 C. P. C. (old) is only an enabling section. The procedure prescribed therein is not compulsory, though in the case of mistake, an application under that section is doubtless the simpler and expeditious course. A suit will lie to rectify a mistake in a decree which was found also in the judgment. (1904) 8 CWN 473 (475) (DB).

——O. 47, R. 1 (S. 623 old Code) — Insolvency order, setting aside of — Application by creditors not party to a prior order.

Section 623, C. P. C., appears to contemplate action by a party to a decree or order; and consequently, an application by a creditor not party to the order to set aside an insolvency order obtained on the motion of another creditor does not fall within S. 623. (1904) 8 CWN 468 (469) (DB).

4. Cessation of appeal.

——O. 47, R. 1 (i) (b) — Review — Competency — Appeal dismissed as incompetent — Review of judgment appealed against.

Where an appeal from a judgment is dismissed as being incompetent a review of the judgment, appealed against will fall within the purview of O. 47, R. 1 (i) (b), C. P. Code. AIR (Vol 35) 1948 A 213: ILR (1948) All 237: 1948 ALJ 114: 1948 ALW 165 (DB).

——O. 47, R. 1 — Review — Competency of review after dismissal of appeal as time-barred.

An application for review of judgment presented after the filing of appeal from that judgment is incompetent, even if the appeal is subsequently dismissed as time-barred. AIR (Vol 32) 1945 Bom 40: 46 Bom LR 671: 1LR (1944) Bom 675: 220 Ind Cas 327.

——O. 47, R. 1 — Discovery of material evidence — Appeal already filed Subsequent withdrawal of appeal — Whether can validate application for review.

Irrespective of the time when a person aggrieved by a decree discovers material evidence, viz., whether before or after an appeal is filed, he has no right to apply for a review if he has already preferred an appeal. He being incompetent to apply for a review, his application is invalid, and the Court will have no jurisdiction to enquire into the application. The subsequent withdrawal of the appeal cannot validate the application for a review which was initially void so as to confer on the Court a jurisdiction which it had none when the application was filed. AIR (Vol 22) 1935 Nag 174: 31 NLR 418: 157 Ind Cas 366.

——O. 47, R. 1 — Per Mitter, J.—The scheme of the order relating to review in the Civil P. C. is that in those cases in which an appeal lies the application for review should be filed before the appeal is lodged and an application for review of a judgment is not competent after the appeal therefrom has been dismissed on the merits. AIR (Vol 19) 1932 Cal 171: 36 CWN 40: 144 Ind Cas 561 (DB).

——O. 47, R. 1 — Appeal summarily dismissed — Subsequent application for review in lower Court.

Where a second appeal from a decree has been dismissed under O. 41, R. 11, it is no longer open to the lower Appellate Court to entertain an application for review of its judgment. AIR (Vol 18) 1931 All 704: (1931) ALJ 945: 133 Ind Cas 432 (DB).

——O. 47, R. 1 — Application for review pending appeal — Withdrawal of appeal — Test of jurisdiction — Proper procedure.

Under O. 47, R. 1, the Court has no jurisdiction to entertain an application for review if at the time of the prosecution of the application, an appeal from the decree sought to be reviewed is pending, and a subsequent withdrawal of the appeal before the application comes on for hearing, cannot cure the initial defect and give the Court jurisdiction to proceed with the application.

Dictum :—The provision of law could be easily complied with in such cases by the simple process of filing an application for review first and the appeal subsequently. AIR (Vol 18) 1931 Bom 232: 33 Bom LR 378: 132 Ind Cas 446 (DB).

——O. 47, R. 1 — Appeal disposed of.

When an appeal has not only been preferred but has also been disposed of, whether it has been dismissed or allowed, the appellant cannot be placed in the position as though "no appeal has been preferred" and no application for review of an order summarily dismissing an appeal lies. AIR (Vol 16) 1929 Bom 225: 118 Ind Cas 255: 31 Bom LR 436.

——O. 47, R. 1 — A suit was decreed by the trial Court but in appeal it was dismissed. An application for review of the appellate decree was successful and thus the suit was again decreed. In an appeal to Privy Council from that decision it was held that the decree of the High Court in appeal be restored and the suit dismissed with costs throughout. The plaintiffs then applied for leave to appeal to Privy Council which was granted by the High Court holding that the order of Privy Council merely held the review application to be incompetent.

Held, that the appeal to Privy Council must be dismissed as it was an appeal from a non-existent suit. AIR (Vol 12) 1925 PC 174: 89 Ind Cas 185: 26 PLR 526: 6 LR PC 128.

——O. 47, R. 1 — Appeal dismissed — Effect of.

When an appeal to the High Court stands dismissed under O. 41, R. 11 of C. P. Code (1908), no application for a review can be entertained or proceeded with in the lower Court. There is no sufficient reason within the meaning of O. 47, R. 1 (1), why a review of the order under O. 41, R. 11 should be granted. If a party elects to proceed with an appeal and gets decision against him, it is no ground for a review that if he had known the decision would go against him he would have taken a different course. AIR (Vol 9) 1922 Bom 130: 63 Ind Cas 910: 46 Bom 1: 23 Bom LR 597 (DB).

——O. 47, R. 1 — Effect of withdrawal of appeal.

Where an application for review is presented after an appeal has been filed by the applicant but before the disposal of the review application the appeal is withdrawn, the appeal must be treated as if it had never been "presented" within O. 47, R. 1 (a). AIR (Vol 8) 1921 All 197: 61 Ind Cas 334: 43 All 283: 19 ALJ 24 (DB).

——O. 47, R. 1 (1) (b) and O. 9, R. 9 — Order of dismissal for default — Review.

Plaintiff can apply for review when his suit has been dismissed for default under O. 9, R. 8 and he has not applied under O. 9, R. 9 to set the order aside. 1 Pat LJ 547 Not Foll. AIR (Vol 6) 1919 M 844: 9 LW 311: (1919) MWN 246: 37 MLJ 59: 50 Ind Cas 327.

——O. 47, R. 1 (2) — Right to apply or review — Appeal by some of the defendants summarily dismissed.

The expression "where the ground of such appeal is common to the applicant and the appellant" refers to a case where the grounds of appeal and review are the same and does not refer to a comparison between the actual appeal by a party and a possible appeal by the applicant for review. If an appeal by some of the defts. has been summarily dismissed under O. 47, R. 11, an application for review of the judgment appealed against "on the ground of discovery of new and important matters or evidence" should be dismissed if review is sought by the defts. who preferred the appeal but if the other defts. apply, the application is not entertainable as the grounds of appeal are different from the grounds of review and as these defts. could not possibly present their case to the appellate Court as respondents, the appeal being summarily dismissed. AIR (Vol 4) 1917 Cal 417: 24 CLJ 517: 21 CWN 430: 36 Ind Cas 460 (DB).

——O. 47, R. 1 (1) (b) and O. 41, R. 10 (2) — Dismissal of appeal under O. 41, R. 10 (2) C. P. C.— Application for restoration of an appeal.

Semble.—An application for restoration of an appeal rejected under O. 41, R. 10 (2) may be treated as an application for review of the order rejecting the appeal. AIR (Vol 3) 1916 C 227: 32 Ind Cas 86 (DB).

——O. 47, R. 1 (1) (b) — Dismissal for default.

Rule 1 (1) of O. 41, C. P. C., enables a court to entertain an application for review of an order of dismissal for default even in cases where no application for restoration of the suit is made within time. 108 PWR 1913: 181 PLR 1913: 109 PR 1913: 19 Ind Cas 481 (DB).

——O. 47, R. 1 (2) — Withdrawal of appeal — Review lies to original Court.

On the withdrawal of the appeal the original Court has jurisdiction to entertain an application

for review of its judgment. (1912) 14 Ind Cas 327 (All) (DB).

5. Compromise after decree.

——O. 47, R. 1, Ss. 114, 152 (Ss. 623, 206 Old Code) — Compromise after decree — No amendment of decree except under S. 206 or S. 623 of the Civil Procedure Code — Proceeding in execution barred by time — Limitation Act (XV of 1877), Sch. II, Art. 179.

A sued to recover land from B, C, D and E, B and E acknowledged his right, and C and D defended the suit. A decree was passed jointly and severally against B, C, D, and conditionally against E. Afterwards A and D entered into a compromise. An application by C and D for leave to appeal to the Privy Council was withdrawn, the two parties to the compromise having got an order for amendment of the decree in its terms. An application for execution was put in by A.

Held, (1) that the High Court could not alter its own decree except under S. 206 or S. 623 of the Code of Civil Procedure. The ground of review must have been existing at the time of the decree and could not be subsequent. Such amendment had no operation either in favour of or against those defendants who had not been parties to the petition for that amendment. (2) The period of limitation ran from the date of the primary, and not of the amended, decree of the High Court. Execution was hence barred by limitation. (3) Instead of attempting the alteration in the decree, the High Court could properly have made the compromise a rule of Court, and have stayed all proceedings against the defendant who was a party to it, except for enforcing it against him. (1901) 24 M 1 (10): 2 Bom LR 771: 27 IA 197: 10 MLJ 221: 4 CWN 725 (PC).

6. Consent decree.

——O. 47, R. 1 — Consent decree sought to be vacated or amended on ground of fraud.

The proper course and indeed the only course, for a party desiring to have a consent decree amended or vacated upon the ground that it was fraudulently procured, is to proceed by a separate suit for the purpose. It is not competent under O. 47 to obtain a review of consent decree on the ground that the consent decree was obtained by fraud. AIR (Vol 28) 1941 Pat 574: 7 BR 795: 194 Ind Cas 551 (DB).

——O. 47, R. 1 — Consent decree — Setting aside decree for fraud by way of review.

In order to set aside a consent decree on the ground of fraud, a separate suit will have to be instituted. Such a decree cannot be set aside for fraud under O. 47. (1933) 144 Ind Cas 82 (1) (Cal).

——O. 47, R. 1 — Grounds for Review — Agreement — To abide by result of another suit.

Where in a suit parties agree to abide by the decision in another suit and after the decision of that suit a decree is passed in accordance with that decision, but the decision in the other suit is reversed in appeal, such reversal is good ground for review of the decree. AIR (Vol 14) 1927 Rang 189: 5 Rang 261: 103 Ind Cas 258.

——O. 47, R. 1 (1) (c) — Other sufficient reason — Consent decree.

A Court can review its order, which was passed on the alleged consent of both parties, on an application by one of the parties that he never consented to it. (1911) 15 CLJ 408: 17 CWN 631: 10 Ind Cas 894 (DB).

——O. 47, R. 1 (1) (c) — Consent decree — Application for review.

An application for review may be made when the consent decree is sought to be impeached on the ground of clerical error or when it does not represent what the Court intended to decide. (1909) 13 CWN 1197: 10 CLJ 420: 2 Ind Cas 129 (DB).

——O. 47, R. 1 (S. 623 Old Code) — Compromise decree — Compromise by vakil — Semble.

Per Banerjee, J.: That a decree on a compromise might be set aside on an application for review on the ground that the compromise was entered into by the vakil without the client's authority. (1902) 6 CWN 82 (85) (DB).

7. Court-fee.

——O. 47, R. 1 and O. 33, Rr. 5 and 15 — Review of dismissal of pauper petition after its rejection because court-fee was not paid even after several extensions of time — Maintainability — Court-fee paid on review being allowed — Refund when review found not maintainable.

An application to sue as a pauper though rejected on 23rd June, 1945, was ultimately dismissed on 21st July, 1945, because court-fee was not paid though the petitioner was given more than one extension of time within which to pay the requisite court-fee. This was subsequently reviewed on an application under O. 47, R. 1, C. P. Code on the petitioner paying half the court-fee on the review petition and full court-fee on the plaint. In revision,

Held: None of the conditions mentioned in O. 47, R. 1 were present in the case. The order of dismissal as passed in the case was really not one contemplated by the Code and as the review application could not be brought within the scope of O. 47, R. 1 it was not maintainable.

Court-fee paid on the plaint in pursuance of the illegal order allowing the review petition can be refunded but not the half court-fee paid on the review petition as the fact that it is found to be not maintainable will not justify a refund of the court-fee paid on it.

Obiter: Strictly, the rejection of an application to sue in forma pauperis is under the Code intended to be penalised under O. 33, R. 15, C. P. Code and there is no statutory support for the practice which has grown up of giving pauper applicants after the rejection of their petitions to sue in forma pauperis time to pay court-fee and allowing them in fact to sue, first paying the costs of those opposing their pauper application. AIR (Vol 37) 1950 Mad 50: 1949 MWN 576: (1949) 2 MLJ 145.

——O. 47, R. 1 — Where a plaint is rejected for non-compliance with the order for payment of court-fee, a review of that order is permissible and the Court has discretion to restore the suit. AIR (Vol 23) 1936 Pat 310: 2 BR 531: 17 PLT 766: 162 Ind Cas 992.

——O. 47, R. 1 — Court taking Fasli year for calculating profits and not applying General Clauses Act (X of 1897) — Deductions — Arguments about deductions not made at time of original order — Whether can be made on an application for review — Court Fees Act (VII of 1870), S. 7 (v) (a) (b).

Where in a suit for possession of a part of a village which was revenue-free, the Court in calculating the profits under S. 7 (v) (c) of the Court Fees Act, took the Fasli year and it was urged in an application for review that according to the General Clauses Act, the year to be taken was the calendar year:

Held, that inasmuch as S. 3 of the General Clauses Act states that the definitions would apply unless there was anything repugnant to the context, and in view of Sub-Ss. (a) and (b) of Sub-S. (v) of S. 7, Court Fees Act, the Court was right in taking the Fasli year for Sub-S. (c) where the land was revenue-free and that it could not be said

that, in not applying the General Clauses Act there was any error apparent on the face of the record :

Held, also that whatever argument about deductions was to be made should have been made at the time of the original order and not later on in an application for review. AIR (Vol 22) 1935 All 642 (1): (1935) ALJ 548: 1935 AWR 640 (1): 155 Ind Cas 668.

——O. 47, R. 1 — An application for review of a judgment is to be charged with court-fee calculated on the basis of the relief which the applicant seeks in review. Where a review is applied for only against the part of the judgment of the Appellate Court which relates to the order of costs, the application is to be stamped ad valorem on the amount or sum awarded as costs against the applicant in the Appellate Court. AIR (Vol 20) 1933 Rang 203: 11 Rang 120: 146 Ind Cas 560.

——O. 47, R. 1 — Certificate for refund of court-fee — Condition — Failure to appear at original hearing.

The requirements of S. 15, Court Fees Act are (1) the admission of the application for review of the judgment irrespective of the correctness of the grounds for the admission. (2) A reversal or modification of the former decision on the ground of mistake in law or in fact, such reversal or modification not being due wholly or in part to fresh evidence which might have been produced at the original hearing. If these conditions are satisfied, the applicant for review is entitled to a certificate for refund of court-fee, and the fact that the adverse order first passed was due to the laches of the applicant in not appearing and presenting his case at the original hearing is immaterial. AIR (Vol 19) 1932 Pat 86: 13 PLT 284: 10 Pat 649: 135 Ind Cas 83 (DB).

——O. 47, R. 1 — Where a Judge passed an order for payment of Court-fees his successor cannot vary the order or refuse to hear opponent. AIR (Vol 13) 1926 Rang 89: 5 Bur LJ 9: 95 Ind Cas 541 (DB).

——O. 47, R. 1 — Grounds for Review — Court-fee — Paid in time to pleader.

The deficit court-fee demanded by the Court was paid by the plaintiff to the pleader who handed it to his clerk to put it in Court. The clerk misappropriated the money and filed bogus applications for time to pay the deficit Court-fee with the result that the Court, being tired of such applications, ultimately rejected the plaint. The plaintiff coming to know of the result of the suit and the deceitful conduct of the clerk filed an application in Court for revocation of the order rejecting the plaint and for restoration of the suit to its original file.

Held, that the suit must be restored to file. After having paid the money to a duly constituted agent and an officer of the Court under the Legal Practitioners' Act and the rules of the High Court, whose duty it was to deposit it in Court, the responsibility of the plaintiff ceased until he was informed of the default made by the pleader or his clerk. AIR (Vol 12) 1925 Pat 435: 91 Ind Cas 213: 4 Pat 180: 1925 PHCC 147 (DB).

——O. 47, R. 1 (1) (b) — Dismissal of appeal for deficient Court fee — Not a dismissal for default.

An order dismissing a memorandum of appeal as being insufficiently stamped is open to review under O. 47 and no application for restoration of the appeal can in such a case be made under O. 41, R. 19. An application for review bearing Court fees prescribed for such applications is the proper remedy. AIR (Vol 7) 1920 P 608: 55 Ind Cas 502 (DB).

——O. 47, R. 1 (S. 623 Old Code) — 'Any other sufficient reason' — Title.

Per Richards J. : The fact that the Court-fee on the plaint, at first held to be inadequate, is afterwards found to be sufficient is a good ground for granting a review of judgment. (1905) AWN 154: 2 ALJ 465: 27 A 695 (696).

8. Duties of Court.

——O. 47, R. 1 — If a Court is of opinion that there is not sufficient ground for review, it should reject the application under R. 4 (1), O. 47; if it is of opinion that there is sufficient ground, then it will grant it under certain provisos. But merely because the Judge issued notices to the other side he is not precluded thereafter from rejecting the application under R. 4 (1), O. 47. AIR (V 27) 1940 Rang 144 : 189 Ind Cas 570.

——O. 47, R. 1 — Obiter. — Where a decree directs the doing of a certain thing, then that thing must be done unless and until the decree is altered or provides on the face of it for the limits of its own existence. It is not like a contract which can be varied by common consent and in which the law recognising the unwillingness of the average person to put into writing clauses which are too obvious to his mind to require mention, takes into consideration the surrounding circumstances. No such laxness can ordinarily be imputed to Judges. Their decree can only be varied or altered by the Court itself and only in a particular way. AIR (V 26) 1939 Nag 249 : 1939 NLJ 409 : ILR (1941) Nag 437 : 185 Ind Cas 580 (DB).

——O. 47, R. 1 — Court's function is not to review all evidence.

Urging various points arising in the evidence for reconsideration of a contract in review amounts to asking the Court to review the whole evidence in the case; this is not the function of the Court setting in review of its own judgment. AIR (V 22) 1935 Nag 245 : 31 NLR 372 : 159 Ind Cas 998.

——O. 47, R. 1 — Court should confine itself to particular matter sought to be reversed.

Where a review application is filed for the purpose of having a clerical error put right, the Judge, in deciding the application, should confine himself to this matter, and if he decides other matters, there is an illegality or material irregularity in the proceedings. AIR (V 20) 1933 Rang 151 : 145 Ind Cas 158 (DB).

——O. 47, R. 1 — Grounds in petition.

In granting a review, the court should not travel beyond the grounds mentioned in the application for review. (1901) 5 CWN 485 (486).

9. Effect of.

——O. 47, R. 1 — Where the Judge contrary to the provisions of O. 47, R. 1 reviews his own judgment suo motu and allows the plaintiff interest at 9 per cent. per annum from 1927, and there is no finding recorded in the original judgment that the plaintiff was entitled to this rate from 1927, the modification cannot be held to be of the nature of an amendment permissible under S. 152. AIR (V 28) 1941 Lah 212 : 43 PLR 88 : 195 Ind Cas 157.

——O. 47, R. 1 — Effect of notice.

Where a rule for a review of judgment is granted it has not the effect of reversing the judgment but it holds the judgment in suspense until the review application is heard. AIR (V 11) 1924 Bom 310 : 48 Bom 210 : 26 Bom LR 103 : 79 Ind Cas 753 (DB).

——O. 47, R. 1 — Validity of — Decree how challenged — Review and Suit — Remedies, alternative — Res Judicata.

The validity of a decree may be challenged either by an application for review or by a suit to set it aside. When, however, a party has elected to proceed by way of review and the matter has been decided against him, he cannot be allowed to have recourse to the remedy by way of suit, even though he seeks in the suit to challenge the validity of the decree on grounds which he did not take, but might have taken, in the review proceedings. The decision upon the questions raised and decided in the review proceedings is res judicata. (1905) 2 C L J 503 (509, 510) : 10 CWN 529.

10. Error or mistake.

See also Note 12.

(a) **Absence of apparent error.**
(b) **Apparent error.**
(c) **Clerical error.**
(d) **Error of Court.**
(e) **Error of law.**
(f) **Error of party or counsel.**

(a) Absence of apparent error.

——O. 47, R. 1 — Ground for review — Error of law — Order interfering under S. 115 on ground that Court below had committed error of law — If open to review.

It is now well-established that a mere error of law would not attract the operation of O. 47, R. 1, C. P. Code. The error must be one which is blatant and obvious, it must be an error which does not require any elaborate discussion for its establishment.

As there are decisions holding that a serious error of law would give the High Court jurisdiction to interfere under S. 115, C. P. Code, a judge of that Court making a Rule absolute under that section on the ground that the Court below had committed an error of law cannot be said to have himself committed a mistake or error apparent on the face of the record. It may be that his decision is wrong in law but that fact alone will not give the aggrieved party a right to have the judgment reviewed. (1949) 53 C W N 869.

——O. 47, R. 1 — A mistake or error which is not material does not furnish a ground for review. AIR (V 32) 1945 Oudh 82 : 1944 AWR (C C) 311 : 1944 OWN (C C) 519.

——O. 47, R. 1 — Error of law.

In order that a mistake or error may constitute a ground under O. 47, R. 1, Civil P. C., for review it must be one apparent on the face of the record and not one which may require extraneous matters to prove the underlying fallacy. Such an error may be one of law but in order that it may be a valid ground, the law must have been indisputable at the date of the decision which is characterised as erroneous. A view of law taken by a Judge on a debatable point and subsequently found by an authoritative pronouncement to be incorrect is not a mistake apparent on the face of the record so as to entitle the aggrieved party to apply under O. 47, R. 1. AIR (V 31) 1944 Oudh 198 : 1944 AWR (CC) 81 : 1944 OWN (CC) 76 : 217 Ind Cas 132 (DB).

——O. 47, R. 1 — An obvious and patent error of law — what may be called a blunder — may be a good ground for review but where there is no obvious and apparent blunder, no review lies.

Where the High Court reversed a decree of the lower Court not on assumed state of facts but upon a question of nomenclature applied to a sum of money paid by the defendants, and the defendant applied for review on the ground that a new contention was put forward :

Held, that there was no new contention nor any apparent blunder and that review should not be allowed. AIR (V 20) 1933 Rang 85 : 146 Ind Cas 946.

——O. 47, R. 1 — Onus of proof.

Where the question was as to the amount of mesne profits for a certain year to be awarded to the plaintiff and the Court dismissed the claim as there was no evidence adduced by either party on the point, and where in a petition for review of the decision, it was contended that as the opposite party was admittedly in possession, the burden of proving the value of the crops was on them and that the Court made an error of law in deciding as it did.

Held, that the question as to whether the decision was right or wrong might be a matter for argument, but there was not any mistake or error apparent on the face of the record within the meaning of O. 47, R. 1. AIR (V 12) 1925 Pat 368 : 86 Ind Cas 143 : 6 PLT 40 (DB).

——O. 47, R. 1 (1) (c) — Mistake or error — Leave to appeal to Privy Council.

An order under Order XLV rejecting an application to grant leave to appeal may be reviewed by the Court which made the order. Where on a redemption suit the sum would not reach Rs. 10,000 with the addition of interest up to the six months allowed for redemption but would reach that sum if interest was calculated subsequently it was held there was no error apparent on the face of the record sufficient to justify a review. (1912) 39 Cal 1037: 16 OWN 1089: 17 Ind Cas 221 (DB).

(b) Apparent error.

——O. 47, R. 1 — Review — Grounds — Mere error.

A mere error in an order is no valid ground for review. It must be an error "apparent on the face of the record." AIR (V 37) 1950 All 450 : 1950 ALJ 653 : 1950 AWR 617.

——O. 47, R. 1 and U. P. Tenancy Act (XVII of 1939), S. 273 — Review — Grounds — No mistake apparent on the face of the record.

When the mistake alleged is not apparent on the face of the record there is no ground for review. 1949 R D 164.

——O. 47, R. 1 — Obvious mistake of law.

Though the Court cannot admit an application for review merely upon the ground that it has made a mistake in law, yet if the mistake is an obvious one due to failure to notice particular section of an Act or part of such a section, it would be too much to say that the obvious error could not be corrected by the Court. AIR (V 32) 1945 All 284 : (1945) ALJ 223 : 1945 OWN (HC) 205 : 1945 AWR (HC) 90 (1) and 138 (1) : 1945 RD 359 : ILR (1945) All 680.

——O. 47, R. 1 — In order that a mistake or error may constitute a ground for review, it must be one apparent on the face of the record and not which may require extraneous matters to prove the underlying fallacy. (1944) 1944 OWN (CC) 340 : 1944 AWR (CC) 229.

——O. 47, R. 1 — While preparing schedule under S. 80 (b), Provincial Insolvency Act (V of 1920), Official Receiver coming to conclusion that alleged debt was genuine but unsecured — Appeal under S. 68, Provincial Insolvency Act (V of 1920) — Review — Revision under S. 75, Provincial Insolvency Act (V of 1920) — Revision, if can be treated as one under S. 115, Civil Procedure Code (Act V of 1908).

In order to prepare the schedule (under the powers delegated to him under S. 80 (b) of the Prov. Insol. Act) the Receiver has to decide whether the debt was actually due, and if so, whether the whole or a part of it was unsecured. Where he accordingly holds an enquiry into these matters and comes to the conclusion that the debt was genuine,

but that no part of it was secured, the proceedings before the Receiver cannot be said to have been misconceived on the order passed by him ultra vires. Appeal against the Receiver's order lies to the District Judge under S. 68 at the instance of the creditor who is an aggrieved person. It cannot, therefore, be said that the "appeal" is misconceived or that there was any error, patent on the record, which could justify a review under R. 1 of O. 47, Civil P. C.

Revision under S. 75, Prov. Insol. Act is not maintainable in a case where the order was passed in the first instance by the Receiver and not by a Court Subordinate to the District Judge. The revision may, however, be treated as one under S. 115, Civil P. C., read with S. 5, Prov. Insol. Act. AIR (V 26) 1939 Lah 460 : 41 PLR 884 : 186 Ind Cas 22.

——O. 47, R. 1 — Question whether liability to perform contract or to pay damages in breach is included within terms "debts and liabilities" of special enactment.

A mistake of law is not sufficient in itself to grant a review. The error must be patently gross and manifest if indeed a review can even then be properly granted, but it is idle to pretend that a question so debatable as the question whether the liability to perform a contract or pay damages in breach is included within the term "debts and liabilities" of a special enactment is an error apparent on the record within the meaning of O. 47, R. 1. It clearly is not; it is a difficult question of law. AIR (V 26) 1939 Sind 137 : ILR (1939) Kar 330 : 182 Ind Cas 154 (DB).

——O. 47, R. 1 — Error apparent on the face of the record — Execution sale — Deposit under O. 21, R. 89 — Amount to be deposited.

Where in execution of a decree, certain property belonging to the judgment-debtor was attached and sold and the judgment-debtor deposited the amount of the decree with 5 per cent. and another decree-holder had also applied for rateable distribution of the assets and the Judge thinking that the judgment-debtor was bound to deposit the amount due to both the decree-holders, confirmed the sale:

Held, that there was an error apparent on the face of the record and an application for review was competent. AIR (V 20) 1933 Lah 226 : 14 Lah 55 : 34 PLR 273 : 143 Ind Cas 768.

——O. 47, R. 1 — Where an application is dismissed in Chambers without hearing the parties, there is a mistake apparent on the face of the record or at any rate there is a sufficient reason within O. 47, R. 1, and the Court can grant a review of its order. An order granting review in such a case does not contravene O. 47, R. 4 and is not appealable. AIR (V 19) 1932 Oudh 63 : 8 OWN (CC) 1267 : 7 Luck 350 : 135 Ind Cas 695 (DB).

——O. 47, R. 1 — Where there was no clear decision by the lower appellate Court concerning the correctness or otherwise of the trial Court's finding that theft from running train had occurred absolving thereby the railway company from liability and yet the decree of the lower Court was reversed.

Held, that there was a mistake or error apparent on the face of the record or at any rate a sufficient reason for review analogous to such error. AIR (V 17) 1930 Lah 37 : 123 Ind Cas 845 : 11 Lah 158 : 31 PLR 419 (DB).

——O. 47, R. 1 — The failure to notice the provisions of S. 21, C. P. Code, bears an analogy to a mistake or error apparent on the face of the record and is a ground for review. AIR (V 16) 1929 Nag 73 : 116 Ind Cas 645 : 12 NLJ 13 : 25 NLR 104.

——O. 47, R. 1 — Construction of a power of attorney.

In a suit by R against A a decree was passed against A on the basis of an admission of the claim made by A's general agent. Thereupon A brought a suit to get the decree set aside alleging that mukhtyarnama executed by A did not confer any power on his agent to admit any claim or make any compromise.

Held, that A could not seek the remedy by way of review of judgment and the proper remedy for him was by instituting a regular suit for the purpose inasmuch as the decree did not contain merely a mistake or an error apparent on the face of the record but one involving a delicate question whether the general agent of A had authority under the mukhtyarnama executed in his favour to admit the claim. AIR (V 15) 1928 Oudh 418 : 113 Ind Cas 483 : 4 Luck 76 : 5 OWN 812 (DB).

——O. 47, R. 1 — Limitation.

Although an error of law is not necessarily a ground for review, yet where a Court decided a case considering the question of applicability of S. 5, Limitation Act, only, without considering whether the case was really barred by time at all.

Held, that such failure is analogous to a mistake or error apparent on the face of the record and a review is competent. AIR (V 14) 1927 Rang 20 : 4 Rang 265 : 98 Ind Cas 417 : 5 Bur LJ 187.

——O. 47, R. 1 — The decision of a case, merely on the ground that the defendants had not proved their title and without considering whether the plaintiff had proved his title was held an error apparent on the face of the record, rendering review permissible. AIR (V 12) 1925 Oudh 329 : 86 Ind Cas 29 : 12 OLJ 30.

——O. 47, R. 1 — Omission to raise a point of law — 'Sufficient reason'.

A mere omission to raise a point of law, which, had it been raised, might and probably would, have brought about a different result, is not necessarily "a mistake or error apparent on the face of the record" for which a review can be claimed. Although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words "any other sufficient reason" in O. 47, R. 1, yet from the earlier part of the clause it is clear that a point which might have been but which is not discovered at the trial by the exercise of due diligence, is not intended by the section to afford any sufficient reason for review. AIR (V 9) 1922 Pat 119 : 1922 PHCC 1 (DB).

——O. 47, R. 1 (1) (c) and Sch. II, Para. 12 — Mistake or error — Award — Decree on.

An application for review of a decree based on an award, on the ground of an evident mistake in the award, is maintainable and a Court has jurisdiction, under O. 47, R. 1 of the C. P. C. to go into the merits of the application. AIR (V 6) 1919 Cal 522 : 52 Ind Cas 696.

(c) Clerical error.

——O. 47, R. 1 — Delay in filing appeal not due to mistake on the part of appellant — Appellant knowing facts — Appeal dismissed as time-barred.

The error made in the Copying Department in the heading of the copy of the judgment and the consequent delay in filing an appeal may be treated as a sufficient reason within O. 47, R. 1 (1), for review of the order dismissing the appeal as time-barred. AIR (Vol 22) 1935 Nag 109: 155 Ind Cas 583.

——O. 47, R. 1 — Clerical mistake not affecting decision.

Where it is apparent that the mistake is only of a clerical nature and does not affect the actual decision of the case, it is no ground for review. AIR (Vol 21) 1934 Nag 111: 148 Ind Cas 718 (DB).

——O. 47, R. 1 — System of calculation wrong.

Section 152 refers merely to arithmetical or clerical errors which are patent on the face of the judgment or of the decree. But where the whole system of calculation adopted by the Court was challenged in plaintiff's application and there was no more allegation of an arithmetical or clerical mistake.

Held, that although the Court purported to act under Section 152, it must be considered legally to have acted under Order 47. AIR (Vol 8) 1921 Lah 250 : 66 Ind Cas 992: 3 LLJ 341.

(d) Error of Court.

(i) General.
(ii) Apposite law.
(iii) Attitude of party or counsel.
(iv) Discovery of own error.
(v) Jurisdiction.
(vi) Omission.
(vii) Practice.
(viii) Reliance on authority.

(i) General.

——O. 47, R. 1 — Grounds for review.

The ground for interfering in review is not the discovery of any new fact but the existence of an error which is apparent on the face of the record the error being that the Court has been misled into making an order which is contrary to the statute. AIR (Vol 25) 1938 Bom 422: 40 Bom LR 952: 177 Ind Cas 911 (DB).

——O. 47, R. 1 — Judgment based on misapprehension of nature of attachment.

Where the decision of the Judge, which is sought to be reviewed, is based on obvious misapprehension of the nature of attachment, there are sufficient reasons for review. AIR (Vol 23) 1936 Lah 486 : 163 Ind Cas 374.

——O. 47, R. 1, O. 44. R. 1 — That meaning of O. 44, R. 1, is not as understood by lower Court, if ground.

That the meaning of Proviso to O. 44, R. 1, is not as understood by lower Court, is no ground for interference in review from an order rejecting the application to appeal in forma pauperis. AIR (Vol 22) 1935 Pesh 22: 154 Ind Cas 943.

——O. 47, R. 1 — Provincial Insolvency Act (V of 1920), Ss. 35, 43 — Appeal from order rejecting proof — District Judge annulling adjudication altogether — Power to review — Error apparent on face of record — Insolvency Court's powers of review

An insolvent got himself collusively adjudicated in order to defeat a genuine creditor who had brought a suit. When the bogus creditor who had filed the petition put in his proof, it was rejected by the Official Receiver. He preferred an appeal to the District Judge who not only dismissed the appeal but annulled the adjudication. Another genuine creditor filed a petition under O. 47, R. 1, to review the order annulling the adjudication, and the District Judge rejected the application, on the ground that he had no jurisdiction to review:

Held, Per Beasley, C. J., Ramesam and Cornish JJ., that since the only question before the District Judge was whether or not the Official Receiver's order dismissing the petitioner's proof was correct and the District Judge had proceeded to do that which neither party had prayed the Court to do, namely to annul the adjudication, there was an error apparent on the face of the record and the District Judge had power to review apart from the question whether he had committed any error of law.

Per Waller, J. — Although S. 35 of the Provincial Insolvency Act gives no power to the Insolvency Court to annul an adjudication suo motu and the District Judge was wrong in annulling the adjudication, his error did not fall within the category of mistakes apparent on the face of the record or anything analogous to them.

Per Krishnan Pandalai, J. — There is a difference between wrongly understanding or applying the law and not being aware of conditions legally necessary for exercising a power given by law and in the latter case an application for review is competent. AIR (Vol 20) 1933 Mad 631 : (1932) MWN 153 : 65 MLJ 173 : '38 MLW 257 : 145 Ind Cas 346 (FB).

——O. 47, R. 1 — An erroneous view of evidence or of law is no ground for review. Also, grounds, which might be good grounds for appeal, would not support an application for review. AIR (Vol 17) 1930 Cal 701 : 34 CWN 696.

——O. 47, R. 1 — A suit in forma pauperis was dismissed for default. The plaintiff applied under O. 9, R. 9, for restoration of the case. He, however, did not appear when the application was taken up for hearing and the application was hence dismissed. The plaintiff then applied under S. 151 for restoration of the application. The judgment holding S. 151 inapplicable dismissed the application.

Held, that the Judge was wrong in his view.

Held further, that in view of the fact that the Judge declined to deal with the merits of the case upon an erroneous view of S. 151, it cannot be gainsaid that the error was an error apparent on the face of the record. AIR (Vol 16) 1929 Cal 17 : 115 Ind Cas 357: 32 CWN 811 (DB). (

——O. 47. R. 1 (1) (c) — Mistake or error.

Erroneous view as to cognizability of a suit by a Court is a sufficient cause for review. 140 PWR 1911: 195 PLR 1911: 11 Ind Cas 15.

——O. 47, R. 1 — Discretion wrongly exercised — Remedy.

Where the discretion vested in a court is wrongly exercised through oversight, the proper course is to apply for review and not to appeal. (1902) 4 Bom LR 816 (816, 817) (DB).

(ii) Apposite law.

——O. 47, R. 1 — Mistaken view of law.

The mere fact that the Judge in deciding a case has taken a mistaken view of law is not sufficient to enable a party to come up with an application for review under O. 47, R. 1. It may be possible to argue that a review lies if a positive rule of law is ignored but to say that a review lies because the apposite law is not applied is to state the proposition very widely. AIR (Vol 25) 1938 Nag 221: 175 Ind Cas 649 (DB).

——O. 47, R. 1 — Judge overlooking apposite law — Error should be apparent on record.

The view that review lies where the Judge does not apply "the apposite law" is wrong. A Judge is supposed to know the law. There is only one correct view of the law though there may be many opinions as to what that view is. A Judge is assisted in arriving at the correct opinion by the argument of Counsel. Whether Counsel is helpful or not, whether the Judge has in mind or not a particular point, the Judge is supposed to have it in mind. If he makes

a mistake, his judgment proceeds on "an incorrect exposition of the law." It makes no difference whether that mistake is due to inadvertence, forgetfulness ignorance, or other error unless that mistake or error is apparent on the face of the record, that is it amounts to an error which can be disclosed without referring to anything beyond the record.

Judges are always bound by their oath to apply the law. If they fail to do so because they have overlooked a provision of law, their judgment proceeds on an incorrect exposition of the law and is not capable of review under O. 47, R. 1. All law is equally clear if the Judge is sufficiently able and equally difficult and doubtful if he is sufficiently inexperienced. Hence no distinction can be drawn between a real blunder and a debatable point. AIR (Vol 25) 1938 Nag 145: ILR (1938) Nag 151: 1938 NLJ 48: 182 Ind Cas 232 (DB).

(Overrules AIR (Vol 15) 1928 Nag 305 : 11 Ind Cas 896.)

——O. 47, R. 1 — No failure to apply apposite law.

The dismissal of a suit for foreclosure against the purchaser has the same effect as that of discharge. The decree of dismissal will not preclude the subsequent mortgagee from suing on any other cause of action. There can be no apportionment of rights so long as the purchaser's position is that of a mortgagee. In such circumstances there will be no failure of apposite law and an application for review cannot be allowed. AIR (Vol 21) 1934 Nag 111: 148 Ind Cas 718 (DB).

——O. 47, R. 1 — Apposite law not applied.

Where the question involved is not that the Court had taken a wrong view of or had misinterpreted the law, but the apposite law had not been applied at all, an application for review does prima facie lie. AIR (Vol 15) 1928 Nag 305: 113 Ind Cas 896: 11 NLJ 184.

(iii) Attitude of party or counsel.

——O. 47, R. 1 — Misapprehension as to the attitude of a party.

On the day on which orders for the grant of Letters were passed, advocate for one of the parties conveyed to the Court the impression that his client did not contest the right of the other party to Letters. It appeared, however, that, in fact, the client had given no consent, and, in his written objections, he quite clearly contended that the other party had no legal right to the Letters. It further appeared that the advocate did not intend to agree to a consent order and in passing orders for the grant of Letters, the Court was acting under a misapprehension as to the attitude of the parties.

Held, that that provided a sufficient reason for review analogous to the discovery of new and important matter or evidence, or a mistake apparent on the face of the record. AIR (Vol 12) 1925 Rang 314: 91 Ind Cas 509 : 3 Rang 261 (DB).

(iv) Discovery of own error.

——O. 47, R. 1 — And so where a Court amends its own error upon the ground that the judgment was wrong or unfair to one of the parties the remedy of person aggrieved by the review of judgment lies by an appeal from the decree passed on review and not by an appeal from the order granting the review under the circumstances. The sufficiency or otherwise of the reason for granting of a review outside the limit of O. 47, R. 7 does not invest the person aggrieved with a right under C. P. Code, to appeal. AIR (Vol 17) 1930 All 126 : 122 Ind Cas 184 (DB).

——O. 47, R. 1 — Discovery by a Judge that he was in error on a point of law could not be a discovery of new and important matter or evidence because the law itself is always the same and the discovery by the Judge subsequent to the delivery of the judgment that his judgment is not in accordance with the true interpretation of the law or any statute which is in existence cannot be held to be a discovery of new and important matter of evidence. Nor is it possible to suppose that a mistake or error apparent on the face of the record. That a judgment is found to be erroneous on a point of law as expounded by a superior Court subsequent to the judgment is not sufficient reason to grant a review of the judgment. AIR (Vol 12) 1925 Sind 53: 78 Ind Cas 993: 19 SLR 30.

- —O. 47, R. 1 (1) (c) — Mistake or error — Jurisdiction of Court.

The Court has jurisdiction to review its judgment on the ground that the previous finding was wrong. (1911) 9 MLT 361: 9 Ind Cas 273.

(v) Jurisdiction.

——O. 47, R. 1 — Appellate decision of Assistant Settlement Officer confirmed on appeal by Settlement Officer.

The rents of the occupancy tenants were reduced by the Deputy Collector under S. 112, Bihar Ten. Act. In an appeal by the landlords, the Assistant Settlement Officer reversed the decision of the Deputy Collector and held that the rents could not be reduced. This appellate decision was affirmed by the Settlement Officer in appeal. Subsequently, the Assistant Settlement Officer on receipt of a circular from the Settlement Officer reviewed his previous decision and reduced the rents:

Held, that the Assistant Settlement Officer had no jurisdiction to review his previous decision which was affirmed by the superior tribunal notwithstanding any direction or circular from the superior Court namely the Settlement Officer. The order of the Assistant Settlement Officer passed on review was therefore ultra vires and of no effect. AIR (Vol 30) 1943 Pat 353: 24 PLT 125: 10 BR 326: 215 Ind Cas 40 (DB).

——O. 47, R. 1 — Trial Court dismissing suit as against person on ground of want of jurisdiction as against such person — On appeal by other defendant, Appellate Court passing decree as against person against whom it was dismissed:

Held, that no decree could be passed against such person and as this was a defect apparent on the face of the record, review should be allowed. AIR (Vol 22) 1935 Cal 153 (1).

——O. 47, R. 1 — Misapprehension as to nature of jurisdiction.

Where a Single Judge of the High Court dismissed an application for revision but granted a review of his judgment on the ground that both the Pleaders and the Judge himself were under a misapprehension as to the nature of the jurisdiction he was entertaining and that there was, therefore, an error on the face of the record;

Held, that the order of review was not illegal. AIR (Vol 20) 1933 Lah 746 : 34 PLR 400 : 14 Lah 453 : 142 Ind Cas 640 (DB).

——O. 47, R. 1 — Larger powers are conferred on the Insol. Courts under S. 8 (1), Presi. Town Insol. Act in reviewing, rescinding or varying its orders

than in proceedings which fall exclusively under O. 47, R. 1. There would be sufficient cause for reviewing an order in insolvency, if it could be shown that the order was made without jurisdiction. AIR (Vol 19) 1932 Bom 569: 34 Bom LR 1175: 139 Ind Cas 587.

——O. 47, R. 1 — Grounds for review — Powers of Court.

Where the High Court by its decree ordered possession and mesne profits to the plaintiff but the executing Court finding that there was a compromise between the same parties as regards certain suit items. modified the decree and it was not brought to the notice of the High Court.

Held, that the lower Court had no jurisdiction to make the order it did and the proper remedy of the aggrieved party was to apply by way of review or other legal proceeding. AIR (Vol 15) 1928 Cal 804: 115 Ind Cas 591 (DB).

——O. 47, R. 1 (1) (c) — Mistake or error — Decree by Court without jurisdiction.

Review of a decree by a Court without jurisdiction ought to be granted. AIR (Vol 5) 1918 Cal 946: 21 CWN 1109 : 27 CLJ 594 : 41 Ind Cas 276 (DB).

——O. 47, R. 1 (1) (c) — Mistake or error — Jurisdiction objection to, after decision invited on merits.

Whether Civil Courts have jurisdiction to declare the class of tenancy or not, if the defendants invited the adjudication of the Court by putting forward documents of title, they could not turn round and dispute a finding unfavourable to themselves, in review, by alleging that the Court had no jurisdiction to make it. AIR (Vol 3) 1916 Oudh 104: 3 OLJ 268: 36 Ind Cas 83 (DB).

(vi) Omission.

——O. 47, R. 1 — Error apparent on the face of the record.

Where there is an error in an order of a Judge which appears to have been passed with pointed attention towards the question of saleability of a house as such without any particular reference to the saleability of the site in a matter arising under the U. P. Debt Red. Act, the error can be said to be analogous to the error apparent on the face of the record and could be corrected on an application for review. 1950 ALJ 204 : 1950 AWR 364 (DB).

——O. 47, R. 1 — Sufficient grounds analogous to those mentioned in — Omission on the part of the Court to consider the provisions of O. 41, R. 33, C. P. Code. See AIR (Vol 36) 1949 FC 106 : 1949 FLJ 125.

——O. 47, R. 1 (c) — Review — Sufficient ground — Overlooking of prior decisions

If the ruling that has been overlooked represents the consistent view of the Court on a point material to the case it would amount to a sufficient reason for review within the meaning of O. 47, R. 1, C. P. Code, even though it may not be strictly interpreted as a mistake apparent on the face of the record. 1949 RD 50.

——O. 47, R. 1 — Objection as to executability of decree not decided by executing Court.

Omission of the executing Court to decide a point raised on behalf of the judgment-debtor that the decree is not executable for want of engrossment on a non-judicial stamp would clearly amount to "other sufficient reason" under R. 1, O. 47, even if it did not constitute a "mistake or error apparent on the face of the record." The order, therefore, is open to review and an order granting a review is not wrong in law. AIR (Vol 25) 1938 Mad 307: 47 MLW 51: (1938) MWN 565: 183 Ind Cas 33 (DB).

——O. 47, R. 1, — It cannot be held that omission to mention and discuss a certain decision in the judgment is an error apparent on the face of record and therefore no review lies upon it. (1937) 1937 OWN (CC) 342.

——O. 47, R. 1 — Order under S. 174, Bengal Tenancy Act, passed without notice — Omission to give such notice is a good ground for review under O. 47, R. 1. AIR (Vol 19) 1932 Cal 265: 54 CLJ 490: 137 Ind Cas 430.

——O. 47, R. 1 — Review — Omission to consider important facts on the record.

Omission to consider important facts which are on the record is similar to a mistake apparent on the face of the record and affords sufficient reason for entertaining an application for review under O. 47, R. 1. AIR (Vol 19) 1932 Nag 177: 28 NLR 221: 140 Ind Cas 409.

——O. 47, R. 1 — Omission to consider High Court ruling.

An order cannot be reviewed merely because a ruling of the High Court had not been brought to the notice of the Court on the previous occasion.

Where the parties and the Court have treated an application in the Court below as one under O. 47, R. 1, and a second application for review is dismissed on this ground, it is not open to the party to contend in appeal that the application was not one under that rule. AIR (Vol 18) 1931 All 91: 15 RD 16: (1931) ALJ 889 : 132 Ind Cas 815.

——O. 47, R. 1 — Error of law.

The mere omission on the part of a Judge to consider a decision, however, regrettable, however, wrong, cannot possibly be regarded as constituting an error apparent on the face of the record. AIR (Vol 14) 1927 Mad 998: 106 Ind Cas 514.

——O. 47, R. 1 (1) (c) — Other sufficient reason — Omission to notice provision of law.

The omission of the Court and the pleaders to notice certain provisions of the Code applicable to a case would be a sufficient reason within O. 47, R. 1 for granting a review. AIR (Vol 6) 1919 Cal 94: 30 CLJ 250 : 52 Ind Cas 29 (DB).

(vii) Practice.

——O. 47, R. 1 — Where in ignorance of the fact of abatement the Court accepts the appeal, the mistake can be set right in review. AIR (Vol 21) 1934 Lah 442 : 35 PLR 457 : 15 Lah 879 : 152 Ind Cas 227 (DB).

——O. 47, R. 1 — Second appeal — Judge going into evidence.

Where a Judge in second appeal goes into the evidence, it cannot be said to be an error apparent on the face of the record under O. 47, R. 1, for purposes of review. AIR (Vol 20) 1933 Pat 433 : 14 PLT 234 : 145 Ind Cas 810 (2).

——O. 47, R. 1 — An error which lay in the Court departing from the pleadings in a petition under S. 48, and allowing the petitioner to prove a fraud that he had not pleaded is not an error on the face of the record. AIR (Vol 18) 1931 Mad 608: 133 Ind Cas 206.

——O. 47, R. 1 — Substantial rights — Ignoring of.

Where a Court by taking too stringent a view of the title of the suit and its prayer overlooks the

substantial rights of the party in its judgment which were sufficienly made clear in the pleadings and evidence, there is a good ground for review. AIR (Vol 17) 1930 Rang 162.

——O. 47, R. 1 — The law as to the liability of legal representatives of a deceased debtor governed by the Hindu Law does not admit of any dispute and there was no suggestion by the defendants that the ancestral property of the deceased was not liable for the payment of this debt. Consequently there was no issue on the subject, nor did the judgment contain any discussion of the question as to the liability or otherwise of the ancestral property. The trial Judge added a restrictive clause exempting the ancestral property of the deceased without assigning any reason.

Held, that this mistake was not the result of any exposition of law. The error committed by the Judge was apparent on the face of the record and the granting of the review was justified. AIR (Vol 16) 1929 Lah 424 : 118 Ind Cas 396 : 30 PLR 593 (DB).

——O. 47. R. 1 — Grounds for review — Judgment — Delivery of.

Delivery of judgment without previous notice to the parties or their pleaders is illegal, and this illegal action, if it deprives a party of a very important right of obtaining leave to appeal is a sufficient ground for granting a review. AIR (Vol 16) 1929 Rang 70 : 6 Rang 794 : 114 Ind Cas 687.

——O. 47, R. 1 — Money decreed to wrong person.

Where decree was in consonance with the judgment but there was the erroneous direction in the judgment that the pre-emption price should be paid to defendant No. 1 instead of defendant No. 3.

Held, that it may be a mistake or error apparent on the face of the record such as is referred to in R. 1, O. 47, but it certainly is not a clerical mistake apparent on the face of the decree, in the case of which an application for review to the successor of the Judge who passed the order is not prohibited. AIR (Vol 11) 1924 Nag 190: 75 Ind Cas 829.

——O. 47, R. 1 (1) (c) — Other sufficient reason — Mistake of law.

Where the Lower Court thought that it committed a mistake in excluding an unstamped acknowledgment from its consideration, but had in fact committed no mistake, a review may be nonetheless granted. (1909) 5 MLT 284: 4 Ind Cas 1141.

(viii) Reliance on authority.

——O. 47, R. 1 — By oversight Judge going wrong by not knowing legal position established by well-known authority.

When there is a legal position clearly established by a well-known authority and by some unfortunate oversight, the Judge has gone palpably wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case be a ground coming within the category of an error apparent on the face of the record. AIR (Vol 28) 1941 Mad 918: (1941) 2 MLJ 390: 54 MLW 263: 1941 MWN 1047.

——O. 47, R. 1 — Failure of Judge to refer to an authority binding on him.

The meaning of "an error apparent on the face of the record" is an error which can be seen by a mere perusal of the record without reference to any other matter, and it certainly cannot be held that on a perusal of the record of a case, the fact that the Judge had failed to refer to an authority binding upon him would be apparent. A failure to consider a prededent bearing upon the case is not a mistake or an error apparent on the face of the record, but is really discovery of new and important matter by the party who ought to have brought this precedent to the notice of the Court, and, therefore, he cannot apply for review of the judgment and decree on this ground unless he can show that his failure to bring it to notice was excusable. AIR (Vol 22) 1935 Rang 32 : 13 Rang 220 : 154 Ind Cas 590.

——O. 47, R. 1 — Relying on overruled cases.

The fact that the Court has relied on a wrong authority that has been overruled is no ground for review. AIR (Vol 20) 1933 Lah 223: 34 PLR 254: 141 Ind Cas 427.

——O. 47, R. 1 — Review cannot be granted on the ground that the ruling which was relied upon is "not good law," because it is tantamount to asking for review on the ground of a wrong exposition of law. (1928) 112 Ind Cas 277 (Lah).

——O. 47, R. 1 — A judgment cannot be reviewed under O. 47, R. (1), on account of some mistake or some error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, as, for instance, when the judgment is based on a precedent which has been modified by subsequent decision Even assuming that the discovery of an authoritative precedent, by which a precedent relied on in a judgment has been modified amounts to the discovery of new and important evidence within the meaning of O. 47, R. 1 (1), such a discovery is not a ground for review without strict proof that the subsequent authority was not within the knowledge of the applicant, or would not be produced by him when the decree or order was passed or made. AIR (Vol 12) 1925 Nag 384: 87 Ind Cas 1029.

——O. 47, R. 1 — Error of law.

A Court hearing an application for review of a decree made on appeal has no power to order a review upon the ground that the decision was wrong on the merits, or on the ground of a mistake of law. A judgment cannot be reviewed under O. 47, R. 1 (1), on account of some mistake or an error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law as, for instance, when the judgment is based on a precedent which has been notified by a subsequent decision. AIR (Vol 12) 1925 Nag 266: 87 Ind Cas 125: 8 NLJ 31: 23 NLR 52 (DB).

——O. 47, R. 1 (1) (c) — Other sufficient cause — Decision overlooked.

Where a decision is erroneous owing to the fact that a decision of the High Court binding upon the Court was not referred to it, the Court can grant a review and an order passed on review cannot be interfered with by the High Court under S. 115 of the C. P. C. Where a Judge who heard the case issues notice on an application for review, his successor is not prohibited from disposing of it. AIR (Vol 2) 1915 Mad 1068: (1915) MWN 22: 26 Ind Cas 366.

(e) Error of law.

(i) General.
(ii) Different views.
(iii) Incorrect interpretation.

(a) General.

——O. 47, R. 1 — An application for review is not maintainable on the ground of an alleged error of law, as an error of law does not come within the meaning of the expression 'error apparent on the face of the record' in O. 47, R. 1. AIR (Vol 20) 1933 All 274: 55 All 196: (1933) ALJ 75: 146 Ind Cas 756 (DB).

——O. 47, R. 1 — Even a mistake on a point of law is not a good ground for review. AIR (Vol 20) 1933 Lah 169: 34 PLR 88: 141 Ind Cas 188.

——O. 47. R. 1 — "An error apparent on the face of the record" means that one can find in the judgment, or a document actually incorporated thereto. some legal proposition which is the basis of the judgment and which one can say is erroneous. Further an error of law to be apparent on the face of it must relate to some proposition of law which is well settled and beyond controversy so far as the Court which delivered the judgment is concerned and on which the judgment rests and not merely to a question of law which is debatable and may be shown to be erroneous.

Where the alleged error related to the construction of certain rules of the articles of association of a company which themselves were not clearly worded, no review is maintainable because there is no proposition of law which is obviously erroneous, but to see whether it is really an error one has to consider the terms of the contract between the company and the shareholders as laid down in the rules of the company. AIR (Vol 16) 1929 Mad 209: 117 Ind Cas 712: 1928 MWN 911 (DB).

——O. 47, R. 1 — A mistake of law is not in itself a sufficient mistake or error apparent on the face of the record to warrant a review of judgment. AIR (Vol 16) 1929 Nag 58: 112 Ind Cas 653.

——O. 47, R. 1 — An error of law is a proper ground for review when that error is apparent on the face of the record. AIR (Vol 16) 1929 Rang 70: 6 Rang 794: 114 Ind Cas 687.

——O. 47, R. 1 — "Any other sufficient reason" means a reason sufficient on ground at least analogous to those specified in previous clauses. The word "error" is not restricted to an error of fact but also includes an error or a point of law. AIR (Vol 15) 1928 Rang 12: 105 Ind Cas 710: 5 Rang 610.

——O. 47, R. 1 — Erroneous view of law is no ground for review. The words "any other sufficient reason" in R. 1 mean a reason sufficient on grounds at least analogous to those specified immediately previously. AIR (Vol 14) 1927 Nag 368: 100 Ind Cas 30.

——O. 47, R. 1 — Error of law — When review can be granted.

Review cannot be granted on account of a mistake or error apparent on the face of the record when the alleged mistake or error is a wrong exposition of the law, e.g., when the judgment is based on a precedent which has been modified by a subsequent decision. Where the point of law is a debatable one at the most, the alleged error would impy that the Court applied the law wrongly, but that in itself affords no ground for review. The species of mistake of law which could be designated as one on the face of the record, would include, for example, a case where a Court, in giving its decision, held with reference to a certain set of events or circumstances that a particular statute applied on the date in question, whereas on the said date it was obvious from the record that a wholly different statute, or the same statute, radically amended with reference to the point at issue, applied. AIR (Vol 14) 1927 Nag 252: 102 Ind Cas 6.

——O. 47, R. 1 — The word 'error' need not necessarily be limited to errors of fact, but there are cases in which an error of law can also come within the meaning of the rule e.g., where the error of law is such that it is clearly apparent on a perusal of the record. AIR (Vol 11) 1924 Mad 98: 76 Ind Cas 342: 46 Mad 955: 18 MLW 363: 1923 MWN 761: 45 MLJ 309 (DB).

——O. 47, R. 1 (S. 623, Old Code) — Error of law.

An application for review of judgment may be entertained on the ground of a bare error of law. (1902) 12 MLJ 194 (195) (DB).

(ii) Different views.

——O. 47, R. 1 — Ground for review — Flaw on a point of law.

An erroneous view of the law on a debatable point cannot be regarded as an error apparent on the face of the record and a review cannot be granted on the ground that some flaw on a point of law has found its way in the judgment. (1949) 1949 AMLJ 34.

——O. 47, R. 1 — Review — Grounds — Mistake or error apparent on the face of the record — What is included in.

The expression "mistake or error apparent upon the face of the record" in R. 1 of O. 47, C. P. Code, is not limited to mere errors of fact. It may also include errors of law. The law must be definite and the error in regard to it must be apparent (i.e.,), patent upon the face of the record. So even an erroneous view of the law on a debatable point or a wrong exposition of the law, when the law is not definite or clearly ascertained would be no mistake or error apparent on the face of the record in an application for review. AIR (Vol 35) 1948 All 213: ILR (1948) All 237: 1948 ALJ 114: 1948 ALW 165 (DB).

——O. 47, R. 1 — Possibility of different view on certain law point.

The fact that a different view on certain questions of law is possible, is hardly any ground for review. An application for review of judgment under O. 47, R. 1, Civil P. C., does not lie on the ground of an error of law and in any event the error must be so patent that it could be said to be apparent on the face of the record. AIR (Vol 26) 1939 All 619: (1939) ALJ 555: 1939 RD 440: 1939 AWR (CC) 581: 186 Ind Cas 885 (DB).

——O. 47, R. 1 — Erroneous view of law on debatable point.

An erroneous view of the law on a debatable point or a wrong exposition of the law or a wrong application of the law cannot be considered a mistake or error on the face of the record. AIR (Vol 25) 1938 All 308: (1938) ALJ 347: 1938 RD 496: 1938 AWR (HC) 196: 175 Ind Cas 586.

(iii) Incorrect interpretation.

——O. 47, R. 1 — Error apparent on the face of the record — Wrong application of provision of law.

A wrong application of S. 21, C. P. Code cannot be said to be an error apparent on the face of the

record to justify a review of an order passed. AIR (Vol 37) 1950 Ajmer 49.

——O. 47, R. 1 — Incorrect interpretation of complicated law.

In order to review a judgment it is possible for an error of law to be apparent on the face of the judgment; but the error has got to be patent, and an ordinary error of law, a mere failure to interpret the law correctly when the point of law is complicated, is not necessarily an error of law apparent on the face of the judgment. AIR (Vol 24) 1937 Rang 56: 167 Ind Cas 449 (DB).

——O. 47, R. 1 — Error of law, whether ground for review.

The Court has jurisdiction to decide a point of law wrongly as well as rightly and a review cannot be granted merely because the judgment or order proceeds on an incorrect exposition of the law.

Where the facts are such that even if the Judge had taken a correct view of the law, one cannot say that his order would not still have been the same there is no error of law at all and the order cannot be reviewed on this ground.

It is necessary in the interests of litigants that there should be a term put to questioning orders of the Court and improperly getting reviews of orders which are legally correct; otherwise, there can be no finality in such orders. AIR (Vol 20) 1933 Mad 662: 38 MLW 604: 65 MLJ 387: 145 Ind Cas 993.

——O. 47, R. 1 — A judgment cannot be reviewed under O. 47, R. 1 (1) on account of some mistake or error apparent on the face of the record when the alleged mistake or error is a wrong exposition of law. AIR (Vol 12) 1925 Nag 362: 88 Ind Cas 112.

(f) Error of party or counsel.

——O. 47, R. 1 — Mistake affecting judgment of party — Court's jurisdiction to grant review.

The Court has no jurisdiction to grant a review and thereby to set aside a decree passed on the basis of a compromise where the mistake is one affecting the judgment of the party and there is none affecting the decision of the Court and the mistake is to some extent of the party's own making. A I R (Vol 31) 1944 Mad 570 : (1944) 2 M L J 107 : 1944 M W N 523 (2) : 219 Ind Cas 160.

——O. 47, R. 1 — No ground — Specific question involved in issue raised by plaintiff abandoned as result of erroneous view of his Pleader.

Where a specific question involved in an issue that was raised at the instance of the plaintiff has been abandoned as a result of an erroneous view taken by the plaintiff's Pleader, Court cannot interfere under O. 47, R. 1. Otherwise, there will be no finality to the decision of a Court if after judgment is pronounced, the parties or Advocates are allowed to come forward and say that a certain argument was addressed or given up in the course of the trial as the result of their not remembering certain material facts. A I R (Vol 27) 1940 Mad 203 : 50 M L W 903.

——O. 47, R. 1 — Where in a case it is alleged that the defendant's Advocate thought that the Court had formed a certain opinion of the plaintiff's evidence and because of this belief he abandoned a certain contention which was one of the contentions to be put before the Court it is not a sufficient reason for granting a review. A I R (Vol 27) 1940 Rang 144 : 189 Ind Cas 570.

——O. 47, R. 1 — Omission to raise point of law.

Omission to raise a point of law is insufficient ground for allowing a review. A I R (Vol 25) 1938 Nag 145: ILR (1938) Nag 151: 1938 NLJ 48: 182 Ind Cas 232 (DB).

(Overrules AIR (Vol 15) 1928 Nag 305 : 113 Ind Cas 896.)

——O. 47, R. 1 — Omission to raise point of law.

An omission to raise a point of law is no ground for review. Where a party had an opportunity of raising a question but did not do so, it cannot ordinarily be allowed to agitate the question in review. A I R (Vol 25) 1938 Nag 41 : I L R (1937) Nag 392 : 181 Ind Cas 741.

——O. 47, R. 1 — Erroneous admission of fact by Counsel.

It is doubtful if an erroneous admission of fact made by Counsel can be considered to be a good ground for review. A I R (Vol 23) 1936 Lah 48 : 161 Ind Cas 444.

——O. 47, R. 1 — Sale of attached property ordered — Pleader of decree-holder certifying full satisfaction — Execution struck off as fully satisfied — Meanwhile agent of decree-holder stating that the Pleader acted on wrong information.

In execution of a decree a notice of sale was ordered to issue to the judgment-debtor. However, after the order was passed, Pleader for the decree-holder, stated to the Court on the same day that the claim had been fully satisfied, and the order for issue of notice was, therefore, discharged and the case was struck off as fully satisfied, the property being released from attachment. It was clear, that the payment was certified to the Court under O. 21, R. 2. On the same day, however, a written application with an affidavit was presented by the agent of the decree-holders, stating that the Pleader had made a wrong statement in Court on information given to him by him through mistake; that the decree-holders came to know this on seeing their khata, and it was only meant to get the execution struck off as partly satisfied. The Court passed an order reviewing his previous order of sale and instead passed an order striking off the execution case as partly satisfied.

Held, that the Court had no power to review the order striking off the execution as fully satisfied when a decree-holder has certified to the Court that a claim has been fully satisfied; the Court has no course open but to certify the payment and to strike off the execution as fully satisfied. A mistake by the decree-holder or his agent cannot be considered to be "any other sufficient reason" within the meaning of O. 47, R. 1. A I R (Vol 21) 1934 Nag 143 : 31 N L R 21 : 150 Ind Cas 44.

——O. 47, R. 1 — Mistake due to note-books not being put in evidence and referred to.

At the original hearing of the suit, before the Township Court the plaintiff in evidence made a mistake as to the year in which he had made certain advances to the defendant. This mistake, was due to the fact that he did not refer to his note-books, in which the details of these transactions had been recorded, at the time that he gave his evidence. Owing to the mistake in his deposition as to the dates of these advances, his suit was dismissed. Owing to the very bad way in which the suit was conducted before the Township Court, those note-books were not put in evidence as exhibits at the original hearing.

Held, that had the note-books been brought on the record, there would, without doubt, have been an error apparent on the face of the record on which the application subsequently made to the Township Court for review must have been allowed. Because the note-books were not brought on the record, such a mistake apparent on the record did not of course, exist. But this mistake in the deposition of the plaintiff (which became apparent on

examination of his note-books, which were put in evidence when the application for review was heard), was sufficient reason for allowing the application for review. AIR (Vol 21) 1934 Rang 233: 153 Ind Cas 996.

——O. 47, R. 1 — Ejusdem generis Court relying upon cases not cited in argument — Faulty logic and error of law.

The words 'any other sufficient reason' in O. 47, R. 1, are ejusdem generis with the preceding words of the rule.

If there comes to the knowledge of the Court cases not cited by the Counsel which in its opinion establishes that one party or the other is entitled to a decision, ordinarily, unless the cases are statements of elementary principles, the side against whom the decision is to be given on the basis of those cases, should be given an opportunity of dealing with the cases; but the fact that this course is not taken does not bring the case within the class of circumstances which give an applicant a right to a review of the decision.

That the Judges who heard a case proceeded upon faulty logic in coming to their conclusion and were, in any event, wrong in law is not an argument that can be used to support an application for review. A I R (Vol 19) 1932 Pat 275 : 11 Pat 519 : 13 P L T 384 : 139 Ind Cas 533 (DB).

——O. 47, R. 1 — Ignorance of law — 'Sufficient reason' — Meaning of.

The first two grounds upon which a review is permissible under O. 47, R. 1, namely, the discovery of new and important matter or evidence which could not after due diligence have been produced at the trial or some mistake or error apparent on the face of the record do not apply to a case where the ground of review is that the judgment has proceeded upon an incorrect exposition of the law. The third ground namely, 'any other sufficient reason' must be a reason sufficient on grounds analogous to those previously specified. Where the review was granted upon the ground that the law relied upon by the Court had been modified by a subsequent decision which amounts to the same thing as a wrong exposition of the law.

Held, that it is not open to the applicants to argue that the ground of review was an error on the face of the record.

Where a Full Bench decision of the High Court to which the trial Court was subordinate, was published in the authorised law reports some four months before the trial, but was not adduced at the trial.

Held, that ignorance of this nature ought not, in view of R. 1 of O. 47 to be allowed to be pleaded in support of an application for review. A I R (Vol 11) 1924 Pat 250 : 75 Ind Cas 177 : 3 Pat 134 : 5 P L T 52 : 1923 P H C C 361 (DB).

——O. 47, R. 1 (1) (c) — Mistake or error — Omission to raise question of law at the hearing.

The mere fact that a point of law which might have been raised was not raised during the trial is not necessarily in itself sufficient to support an application for review. Quaere — Whether an omission to raise a point of law which, had it been raised, might and probably would have brought about a different result, is necessarily a mistake or error apparent on the face of the record for which a review can be claimed. A I R (Vol 9) 1922 Pat 119 : 1 Pat L T 625 : 5 Pat L J 344 : 57 Ind Cas 11 (DB).

——O. 47, R. 1 (1) (c) — Mistake or error — Other sufficient reason.

A mere mistake of law is not in itself a sufficient mistake or error apparent on the face of the record so as to form a ground for review of judgment. Where the mistake arises from the negligent conduct of the applicant for review, the mistake cannot even be pleaded as "any other sufficient reason" within O. 47, R. 1. A I R (Vol 6) 1919 Cal 525 : 44 Ind Cas 161 (Cal) (DB).

——O. 47, R. 1 (1) (c) — Other sufficient reason — Mistaken advice.

The mere fact of failing to produce evidence on account of wrong advice of counsel is no ground for re-hearing the case. A I R (Vol 5) 1918 Oudh 305 : 5 O L J 695 : 48 Ind Cas 918 (DB).

——O. 47, R. 1 (1) (c) — Other sufficient reason.

A mortgage suit was dismissed on the gound of limitation. The lower appellate Court agreed with the first Court. In second appeal the High Court disagreed on the question of limitation and decreed plff's suit. The failure to bring to its notice that other points also are to be determined does not furnish sufficient cause for review of the judgment. (1913) 19 Ind Cas 689 (DB) (All).

——O. 47, R. 1 (1) (c) — Other sufficient reason — Mistaken admission.

If a decree holder has wrongly admitted that his claim is satisfied, he may apply for review. (1909) 5 Ind Cas 148 (DB) (Cal).

11. Ex parte order.

——O. 47, R. 1 — Bar to review — Dismissal on merits of application to restore in the case of an ex parte decree.

The dismissal on merits of a restoration application in the case of an ex parte decree is no bar to an application to a review application. 1949 R D 172 (DB).

——O. 47, R. 1 — After passing the order setting aside an ex parte decree, the Court becomes functus officio and has no jurisdiction to re-open the proceeding at the instance of a transferee from the plaintiff in the absence of an application for review. AIR (Vol 20) 1933 Oudh 385 : 10 OWN (CC) 794 : 145 Ind Cas 302 (DB).

——O. 47, R. 1 — In the exercise of insolvency jurisdiction, the mofussil Courts have by virtue of S. 5 of the Prov. Insol. Act, the right of review and the right to entertain applications under O. 9, R. 13 and O. 47 R. 1, Civil P. C., to set aside orders passed ex parte. A I R (Vol 19) 1932 Mad 63 : 61 M L J 719 : (1931) M W N 924 : 34 M L W 735 : 135 Ind Cas 750.

——O. 47, R. 1 — Where the order is an ex parte order issued without hearing the opposite party, it cannot operate as res judicata and can be reviewed by the successor of the Judge who made such ex parte order. A I R (Vol 16) 1929 Sind 110 : 116 Ind Cas 101 (DB).

——O. 47, R. 1 — Ex parte order — Notice.

Until the plaint is registered, a suit has not been duly instituted and until this is done there is no "opposite party" to whom notices can go. Therefore an order passed at a stage of the case before the plaint is registered can be reviewed without notice to the other party. A I R (Vol 9) 1922 Cal 234 : 26 C W N 391 : 70 Ind Cas 43.

——O. 47, R. 1 — Application under O. 9, R. 13 dismissed for default — Remedy.

No application under Order 9 will be against an order under Order 9. Order 47 does not apply in a case where the order passed under Order 9 was made by an officer other than the officer who made the original Order under Order 9, Section 153 also cannot apply to the matter as the dismissal order was not an error or defect in the proceedings, and it may have been an erroneous order as made on the merits. The only remedy open to the aggrieved minors is to appeal against

the original Order made under Order 9. A I R (Vol 9) 1922 Pat 121 : 1922 P H C C 5 (DB).

12. Grounds for.

See also Notes 10, 17 and 18.

(a) General.
(a-1) Absence of party or Counsel.
(b) Ex parte amendment.
(c) Dismissal.
(d) Evidence.

See also Note 17.

(e) Fraud.
(f) New grounds.
(g) Point of general importance.
(h) Question of fact.
(i) Remand.
(j) Subsequent events.
(k) Wrong judgment.

See also Note 10.

(a) General.

——O. 47, R. 1 — Review can only be granted on the grounds set out in O. 47. A I R (Vol 21) 1934 Pat 229 : 15 P L T 103 : 13 Pat 165 : 148 Ind Cas 947 (DB).

——O. 47, R. 1 — Partnership — Decree against firm — Application by partner for execution — Death of one partner before decree.

Rule 1 of O. 47, must we read as in itself definitive of the limits within which review is permitted by the Code, the only cases in which review is allowed being those set forth in the rule namely those of new material over-looked by excusable misfortune, mistake or error apparent on the face of the record or any other sufficient reason, the words "any other sufficient reason" being interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously.

A decree in favour of a firm is in favour jointly of its partners and some of the partners can execute it for the benefit of all. Nor need the application state expressly that it is being made for the benefit of all the partners.

A decree passed against a firm can be executed against the firm even though one of the partners of the firm had died before the passing of the decree. AIR (V 19) 1932 Lah 596 : 33 PLR 290 : 13 Lah 546 : 138 Ind Cas 379 (DB).

——O. 47, R. 1 — Even if the view of the law applicable be incorrect, that is no ground under O. 47, R. 1, C. P. Code, for allowing review. (1928) 107 Ind Cas 908 (1) (Nag).

——O. 47, R. 1 — Indefinite.

Where a judgment does not conclude the question, whether the decree may be executed against the partners individually and when the decree as it stands can be executed only against the property of the firm the judgment may be reviewed and that circumstance does not preclude the execution of the decree even prior to review against the individual partners as soon as any or all of the conditions set forth in O. 21, R. 50 are established. A I R (Vol 13) 1926 Lah 236 : 92 Ind Cas 898 (DB).

——O. 47, R. 1 — No ground for review.

A party filed a petition of compromise supported by an affidavit. On the day fixed for the appearance of the party himself his Counsel asked the Court to excuse the non-attendance of the party and stated that he had been instructed by the party personally to press the application for compromise. The Court accordingly passed a decree in terms of the compromise. Some time after the party applied for review of judgment on the ground that the petition of compromise and the affidavit were executed by the party because he was in fear of his life at the hands of the defendant.

Held, that S. 151 could not be applied and O. 47, R. 1 also could not be applied. A I R (Vol 11) 1924 All 398 : 82 Ind Cas 1022 : 46 All 245 : 22 A L J 118 : 5 L R A Civ. 46.

——O. 47 R. 1 — Commissioner.

The Commissioner has no power to "review" under S. 151 or O. 47, R. 1. But he is not bound to record his finding on each item objected to before proceeding to the next one. Nor is his finding on any of the objections final. He may on proper grounds re-open the inquiry into any of them. Until his report is made he decides nothing final or conclusive. But he must have proper grounds for re-opening enquiry into any item, grounds similar to the provisions of O. 47, R. 1 that rule being the best guide in a matter of this kind. If he re-opens inquiry on grounds which are not proper the party aggrieved can object only by means of exceptions to his report. A I R (Vol 11) 1924 Bom 231 : 82 Ind Cas 593 : 25 Bom L R 280 : 47 Bom 593.

——O. 47, R. 1 (1) (c) — Mistake or error — What is.

A decree can be reviewed on such grounds only as, if tenable, would justify an alteration or cancellation of the decree. A I R (Vol 1) 1914 A 44 : 36 All 277 : 12 A L J 382 : 23 Ind Cas 514 (DB).

——O. 47, R. 1 (1) (c) — Other sufficient reason — Other remedy open.

A review cannot be granted on ground other than those enumerated in O. 47, R. 1. Where a party has another remedy open to him to obtain the relief sought for, review cannot be granted. Where an appellant has not contested a liability imposed on him by first Court in his appeal grounds or in the course of arguments he cannot ask for review of judgment to escape that liability. That an appeal was badly argued is on ground for review. A I R (Vol 1) 1914 Lah 418 : 208 P W R 1913 : 103 and 197 P L R 1914 : 22 Ind Cas 785 (DB).

——O. 47, R. 1 (1) (c) — Grounds of review — Application for review limited to grounds raised.

An applicant in a review application must confine himself to the grounds on which the application is admitted. 73 P R 1911 : 113 P W R 1911 : 208 P L R 1911 : 11 Ind Cas 427 (DB).

(a-1) Absence of party or Counsel.

——O. 47, R. 1 and S. 151 — Absence of party is no ground for review — Inherent powers should not be invoked.

In view of the limited scope of O. 47, R. 1, the absence of Counsel or of a party is not a ground for review.

The inherent power of the Court cannot be invoked in such a case. A I R (Vol 31) 1944 Mad 293 : (1944) 1 M L J 259 : 57 M L W 192 : 1944 M W N 205 : I L R (1944) Mad 857 : 218 Ind Cas 292 (DB).

——O. 47, R. 1 — Plaintiff's absence on adjourned hearing — Plaintiff's Pleader applying for adjournment — Adjournment refused and suit dismissed — Remedy of plaintiff is by review or appeal — Application for restoration is misconceived. A I R (Vol 20) 1933 All 41 : (1933) A L J 4 : 144 Ind Cas 141 (DB).

——O. 47, R. 1 — The words "any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified previously. The absence of a pleader is not a ground for review. A I R (Vol 14) 1927 Mad 355 : 52 M L J 123 : 25 M L W 192 : 99 Ind Cas 954 (DB).

——O. 47, R. 1 — Grounds for review — Pleader absence of.

The grounds for review are set out in O. 47, R. 1 and no Court is justified in reviewing an order made

by it for any ground other than those mentioned in O. 47, or grounds which are similar to the grounds specifically mentioned therein. The absence of a pleader is not a ground for review. A I R (Vol 13) 1926 Mad 980 : 51 M L J 219 : 97 Ind Cas 1008 : 50 Mad 67 · 1926 M W N 890 : 26 M L W 878 (DB).

——O. 47, R. 1 — Ex parte order for delivery of property.

A Court can review its own order passed ex parte for the issue of a writ of delivery of possession of property. If possession is delivered in accordance with the earlier order, the later order will invalidate the delivery. A I R (Vol 12) 1925 Cal 1023 : 88 Ind Cas 921 : 41 C L J 349 (DB).

——O. 47, R. 1 — Inability to attend on date fixed.

The effect of Chhajuram's case (A. I. R. 1922 P. C. 112) is that under the words "other sufficient reason" there a son must be one having sufficiency of a kind analogous to the two specified cases that is to say, analogous to excusable failure to bring to the notice of the Court new and important matter or analogous to error on the face of the record Where for no adequate reason the party had not been ready on the date solemnly fixed for the purpose and had no real excuse for not being ready review should not be granted to produce evidence and if granted would be upset in revision. A I R (Vol 11) 1924 Cal 774 : 79 Ind Cas 745 : 51 Cal 70 : 40 C L J 163 (DB).

(b) Ex parte amendment.

——O. 47, R. 1 — Grounds for Review — Amendment.

It is unfair to amend the decree without giving the party, against whom it is to operate, an opportunity to show cause against it; and if the amendment is wrong it is open to the judgment-debtor to apply to the original Court for a review of its order. A I R (Vol 13) 1926 All 384 : 48 All 281 : 24 A L J 266 : 94 Ind Cas 877.

(c) Dismissal.

——O. 47, R. 1 — Order under O. 9, R. 8.

Obiter Per Nasim Ali, J. — It is doubtful whether the order of dismissal can be set aside by an application for review under O. 47, R. 1, Civil P. C. A I R (Vol 39) 1942 Cal 99 : I L R (1941) 2 Cal 477 : 74 Cal L J 13 : 45 C W N 932 : 199 Ind Cas 486 (DB).

——O. 47 R. 1 — Meaning of — Order dismissing suit for default.

The words "any other sufficient reason" in O. 47, R. 1 mean any other sufficient cause similar or analogous to those categorically set forth in O. 47, R. 1, namely (1) the discovery of new and important matter which was not within the knowledge of the plaintiff or could not be produced by him at the time when the decree was passed or order made or (2) on account of some mistake or error apparent on the face of the record. Thus a review is only permissible on these two grounds or on grounds similar and analogous to them. Consequently no review lies against an order dismissing a suit for default. A I R (Vol 22) 1935 Oudh 405 : 1935 O W N (CC) 446 : 154 Ind Cas 1102.

——O. 47, R. 1 — Grounds for review — Dismissal.

Dismissal of a suit for default though parties not directed to be present on the date — Plaintiff filing an application for review of the order dismissing the suit after more than two months — Review application was held to lie having regard to the facts of the case in spite of the delay. A I R (Vol 15) 1928 Rang 177 : 6 Rang 254 : 111 Ind Cas 80.

——O. 47, R. 1 — Other sufficient reason — Dismissal — O. 9, R. 8.

A plaintiff whose suit has been dismissed for want of appearance under O. 9 R. 8 has no remedy by way of review. The words "any other sufficient reason" in sub-section (1) mean a reason sufficient on grounds at least analogous to those specified in the rule. The fact that the applicant was absent when the suit was called on is not a ground analogous to any of those specified in the rule. A I R (Vol 12) 1925 Bom 521 : 90 Ind Cas 610 : 49 Bom 839 : 27 Bom LR 1150 (DB).

——O. 47, R. 1 — Date of hearing not fixed.

Summary rejection of an appeal as time-barred without fixing a date for the hearing the appellant is in contravention of the law and forms a good ground for review within O. 47, R. 1. A I R (Vol 12) 1925 Oudh 643 : 90 Ind Cas 115: 2 OWN 678.

——O. 47, R. 1 — An appellant whose appeal is dismissed for default and who has not availed of R. 19 of O. 41, within time cannot be allowed to apply for review. A I R (Vol 10) 1923 All 576 : 74 Ind Cas 528 : 21 A L J 416 : 4 L R A Civ 276 (DB).

(d) Evidence.

See also Note 17.

——O. 47, R. 1 — Under O. 47 R. 1, the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and secondly, the error referred to in this provision should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps. A I R (Vol 26) 1939 Pat 678 : 20 P L T 883 : 6 B R 184 : 19 Pat 159 : 185 Ind Cas 480 (FB).

——O. 47, R. 1 — Recital in document found to be false — Judgment based on such finding

Where the recital in a document is found to be false and collusive and the Court has passed judgment based on this finding, even if the document is a genuine document it is not open to the appellant to ask the Court to review the judgment of the lower Appellate Court on that ground. A I R (Vol 23) 1936 Sind 7 : 161 Ind Cas 501 (DB).

——O. 47, R. 1 — Grounds for review — Evidence.

Counsel was alleged to have erroneously abandoned evidence, but Court considered admissibility of evidence.

Held: No review lies. AIR (V 12) 1925 Oudh 644: 85 Ind Cas 752.

——O. 47, R. 1 — Other sufficient reason — Evidence.

Where a Court granted a review on the ground that the plaintiffs were deprived of their right to rebut certain evidence which the other side had produced, held that that would be a "sufficient reason" within the meaning of O. 47 R. 1, sub-rule 1. A I R (Vol 12) 1925 Oudh 266 : 84 Ind Cas 515 : 11 O L J 682 : 28 O C 4.

(e) Fraud.

——O. 47 R. 1 — Ground for review — Fraud discovered after decree.

Fraud which was not within the knowledge of the applicant or could not be discovered by him at the time of the decree even after the exercise of due diligence, may be a new and important matter sufficient to enable the applicant to maintain an application under O. 47 R. 1 C. P. Code, though it may be that in some cases the better procedure would be to file a regular suit. A I R (Vol 36) 1949 Dacca 18 : 2 D R 140.

——O. 47, R. 1 — Sufficient reason — Legitimate misapprehension created by other side in mind of applicant is sufficient reason.

After a decree in a partition suit was passed between A and his alienee B, B made an application to the Court under S. 43 T. P. Act. The Court made an order holding that S. 43 applied to the case. Thereafter, A made an application under O. 47, R. 1 Civil P. C., stating that when the Court heard B's application it asked B's pleader to file a suit but the pleader was given time to consider whether the suit would or would not be barred by time. The application was opposed by B who stated that the matter was adjourned for want of time and to satisfy the Court whether such an application could lie according to law.

Held, that there had been some legitimate misapprehension created by the other side (B) in the mind of A regarding the purpose of the adjournment and as there had been a genuine mistake induced by such circumstances, the Court was entitled to review its previous order. A I R (Vol 33) 1946 Sind 99 : ILR (1945) Kar 455.

——O. 47, R. 1 — Setting aside consent decree.

Setting aside of consent decree on ground of fraud — Order 47, R. 1 or S. 151 does not furnish proper remedy — Proper remedy is by way of suit. A I R (Vol 26) 1939 Cal 658 : 69 C L J 533 : 43 C W N 969 : 186 Ind Cas 276 (DB).

——O. 47, R. 1 — Plaint filed on last day of limitation on only one rupee stamp — Permission for extension of time for payment of balance on ground that plaintiff had no money asked — Permission granted under S. 149, Civil P. C. — Permission obtained by fraud — Order is open to review. A I R (Vol 24) 1937 Nag 87 : I L R (1938) Nag 359 : 171 Ind Cas 460.

——O. 47, R. 1 — Grounds for review — Fraud.

Fraud practised upon the Court or upon the party may be discovered after the order complained of is made and may be new and important matter which could not be within the knowledge of the applicant at the time when the decree was passed or the order made and an application for review on the ground of such fraud must be considered on merits. A decree vitiated by fraud may be set aside by (i) suit and (ii) by review of judgment, the latter being the more regular procedure. A I R (Vol 16) 1929 Cal 513 : 49 C L J 425 : 33 C W N 572 : 119 Ind Cas 371.

——O. 47, R. 1 — When a ground for Review.

Fraud or undue influence unaccompanied by any discovery of new matter does sot constitute a ground for review and the order granting review is an illegal exercise of jurisdiction. There is no analogy between discovery of new and important matter or error apparent on the fact of the record, and an assertion that a person had been under undue influence or coercion. Therefore, a Court has no jurisdiction under O. 47, R. 1, to review a compromise-decree on the ground that the compromise had been procured under undue influence or coercion and subsequent to the decree that compromise has been repudiated. A Court's power to review its order depends on a ground which existed on the date when the order was made and cannot be exercised on a ground which has come into existence subsequently. (Case Law reviewed). A I R (Vol 13) 1926 All 50 : 89 Ind Cas 946 : 48 All 160 : 6 L R A Civ. 569 : 23 A L J 1029 (DB).

——O. 47 R. 1 — The ground of fraud when practised upon a party in connection with a petition of compromise upon which a decree was made is a good ground for review. A remedy by suit is an alternative and a more appropriate remedy. A I R (Vol 7) 1920 Cal 808 : 64 Ind Cas 259 (DB).

——O. 47, R. 1 (S. 623 Old Code) — Fraud — Mistake.

The ground that fraud was practised upon a party in connection with a petition of compromise upon which a decree was made is a good ground of review under S. 623, C. P. C. A mistake in the matter of copying out the petition of compromise may not by itself fall within the scope of S. 623, C. P. C. but taking it with the other ground stated above, it might be a good ground of review. (1906) 10 C W N 286 (286) (DB).

(f) New grounds.

——O. 47, R. 1 — Review — Discovery of new arguments based on facts or law.

Order 47, R. 1 cannot possibly cover a case where the actual issue has been fully tried by the Court and afterwards one of the parties discovers an argument which he might have raised, based either on fact or law and asks the Court to review its order. AIR (Vol 20) 1933 Mad 290: 141 Ind Cas 381.

——O. 47, R. 1 — The subsequent discovery of a reasonable ground for adjournment by the Court is a sufficient grould for reviewing an order refusing to grant an adjournment. AIR (Vol 20) 1933 Mad 5: 36 MLW 586: (1932) MWN 1262: 140 Ind Cas 226.

——O. 47, R. 1 — It is most unfair to the Judges of the Court to file applications for review against their judgments on grounds not raised (although they could have been raised) before them at the time of the hearing. Applications for review raising such grounds ought to be rejected. (1927) 100 Ind Cas 429: 13 OLJ 507.

——O. 47, R. 1 — A party ought not to be allowed in review to raise a case which was never raised at the trial, and on which no evidence was adduced. AIR (Vol 12) 1925 All 552: 88 Ind Cas 653: 47 All 881: 23 ALJ 534: 6 LRA Civ 454 (DB).

——O. 47, R. 1 (1) (c) — Other sufficient reason — Point of law which could have been raised.

A point of law which could have been raised but was not raised does not justify grant of review. AIR (Vol 9) 1922 P 119: 5 PLJ 344: 57 Ind Cas 11 (DB).

——O. 47, R. 1 — The production of the authority which was not brought to the notice of the Judge at the first hearing and which lays down a view of the law contrary to that taken by the Judge is not a sufficient ground for granting a review. AIR (Vol 8) 1921 Pat 139: 1921 PHCC 152 (DB).

——O. 47, R. 1 (1) (c) — Setting up new case.

After the decision of the case in defendant's favour by the appeal Court, it was urged on behalf of the plaintiff upon review that the defendant should be held liable for the acts of his servants. Held, that the Court had properly refused to permit a new case to be set up at that stage. 14 CWN 86: (1909) AC 549: 5 Ind Cas 50 (PC).

(g) Point of general importance.

——O. 47, R. 1 — A mistake of law is no ground for review. Nor is the fact that the point involved is one of general importance a ground for review. AIR (Vol 31) 1944 Nag 371: 1944 NLJ 438 (DB).

——O. 47, R. 1 — When review allowed on a point of law.

Rule 1 of O. 47 must be read as in itself definitive of the limits within which review is permitted and words "any other sufficient reason" in that rule mean a reason on grounds at least analogous to those specified immediately previously. There is good authority for holding that a Judge should not review his judgment merely because a party has found fresh rulings on the matter. There must, generally speaking, be finality, but where it is not a question of right between the two parties being a

mere matter of Court-fees, and the matter is of general importance, review is justified. AIR (Vol 13) 1926 Mad 764: 1926 WMN 442: 50 MLJ 493.

——O. 47, R. 1 (1) (c) and S. 115 — Other sufficient reason.

A review of an order summarily rejecting an application for revision of a judgment on the original side was granted on the ground that the judgment as it stood was open to misconstruction and that the points raised involved questions of importance and of frequent occurrence and that it was desirable to have the views of the Appellate Court. (1913) 6 SLR 127: 19 Ind Cas 363 (DB).

(h) Question of fact.

——O. 47, R. 1 — Investigation into questions of fact.

A point involving an investigation into various questions of fact, namely, the incidents of the parent tenancy, the purpose for which it was created, and custom, etc., cannot be taken in an application for review when it has not been taken at any previous stage of the suit. AIR (Vol 21) 1934 Cal 131: 37 CWN 818: 149 Ind Cas 854.

——O. 47, R. 1 — Second appeal.

The High Court cannot in a second appeal entertain an application for a review of judgment based on the ground that since the disposal of the appeal documentary evidence has been discovered which, if sufficiently proved, would have led the Court below to come to a different finding, although had such evidence been discovered before the disposal of the appeal the Court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate Court for a review of judgment on the ground of the discovery of fresh evidence. The question whether any particular record has been rightly or wrongly framed is certainly a question of fact and not a question of law. AIR (Vol 10) 1923 All 541 : 73 Ind Cas 1016: 21 ALJ 377: 45 All 458: 4 LRA (Civ) 416 (DB).

(i) Remand.

——O. 47, R. 1 — Points already taken, or could have been taken in revision.

Where the points were all taken, or should have been taken at the time of revision, there is no ground justifying exercise of powers of review. AIR (Vol 24) 1937 Pesh 43: 1937 Pesh LJ 43: 168 Ind Cas 938.

——O. 47, R. 1 — Remand order.

A remand order made on second appeal is, unless, a, review of it be obtained within the prescribed time, conclusive determination of the points of law involved in it; and the correctness of the law laid down upon a remand cannot be questioned on a subsequent second appeal; the policy of the legislature as indicated in the C. P. Code of 1908 is in favour of finality of orders of remand. Nor is the fact of the Court's adopting a different view of the law after an order has been made in general a good ground for allowing a review of such an order after the time for a review has elapsed. AIR (Vol 10) 1923 Cal 385: 72 Ind Cas 588 (DB).

(j) Subsequent events.

——O. 47, R. 1 — Judge not omitting to consider provision of law — Order passed — Subsequent decision of High Court on the point brought to his notice.

Where the Judge did not omit to consider some provision of law but his attention was merely drawn after his order had been passed to a decision of the High Court in which a view of the law had been taken which he thought was different from that taken by him in his order, he is not justified on this account in holding that in his first order there was an error apparent on the face of the record and it is not a sufficient ground for granting a review under O. 47, R. 1 (1). AIR (Vol 30) 1943 Oudh 136: 1942 OWN (C C) 648: 1942 AWR (C C) 332: 205 Ind Cas 269 (DB).

——O. 47, R. 1 — Mere fact that subsequent Special Bench has differed from ruling sought to be impugned.

The mere fact that a subsequent Special Bench has differed from the ruling sought to be impugned is not a ground for allowing review. AIR (Vol 19) 1932 Rang 129: 139 Ind Cas 788.

——O. 47, R. 1 — Grounds for review — Subsequent law.

Because there is a subsequent decision of superior Court of binding authority on a question of law, the prior judgment passed on a different view of law is not liable as a matter of course to be reviewed. AIR (Vol 17) 1930 Mad 579 (DB).

——O. 47, R. 1 — Review is not permitted where new material comes into existence subsequently. A review cannot therefore be granted on the ground that the previous decision of the case had proceeded upon an incorrect exposition of the law. The question of hardship to the applicant does not arise in such a case. AIR (Vol 16) 1929 Nag 251: 121 Ind Cas 57: 12 NLJ 148 (FB).

——O. 47, R. 1 — A case was decided by the High Court following the view of the law on the point of the Privy Council, but the Judge had anticipated legislation on the point which was subsequently passed and which was contrary to the view of the Privy Council.

Held, that the case could not be re-opened simply on this ground, because subsequent legislation does not affect decided cases, nor can the subsequent legislation be said to be a discovery of new and important matter justifying review. AIR (Vol 15) 1928 Bom 308: 52 Bom 434: 30 Bom LR 668: 111 Ind Cas 633 (DB).

——O. 47, R. 1 — Reversal of judgment which was in evidence.

A ground for review must, at any rate, be something which existed at the time of the decree and the section does not authorise review of a decree, which was right, on the happening of some subsequent event. Therefore the mere reversal of the judgment which was put in as a piece of evidence in the suit that reversal having taken place subsequent to the decision of that suit is not a ground for review. AIR (Vol 14) 1927 Cal 920: 31 CWN 822: 104 Ind Cas 136.

——O. 47, R. 1 — A ground for review must be in existence on the date of the decree; so no review can be granted on any ground which is not in existence at the date of the decree. AIR (Vol 13) 1926 Nag 10: 89 Ind Cas 216.

——O. 47, R. 1 — Where a judgment was delivered following 39 All 437 (Sahu Ram v. Bhup Singh) but by the time an application for review of that judgment came on for hearing, the case in AIR 1924 PC 50 (Brij Narain v. Mangal Pd.) had been decided and the judgment delivered by the Court was found to be wrong in view of the later decision, held, that the words "error apparent on the face of the record" cover a case like this and that the application should be granted. AIR (Vol 12) 1925 Cal 304: 85 Ind Cas 65: 29 CWN 148 (DB).

——O. 47, R. 1 — It is settled law that the grounds for a review must be something which exist at the time of the decree and there is no authority that review can be granted because of the happening of some subsequent event such as alteration of law. AIR (Vol 11) 1924 Nag 70: 73 Ind Cas 4.

——O. 47, R. 1 (1) (c)—A review of the decree, which was right when it was made, on the ground of the happening of some subsequent event is not justified. The proper course in such cases is to request the appellate Court to accept additional evidence regarding the subsequent event and the Court will be justified in taking such evidence into consideration. AIR (Vol 5) 1918 Lah 10: 48 Ind Cas 137: 111 PWR 1918 (DB).

——O. 47, R. 1 (1) (c) — Subsequent events.

Where a judgment is based on the decision of the Revenue Court, the reversing of the Revenue Court's decision in appeal is a good ground for granting a review of the judgment. (1911) 33 All 566: 8 ALJ 584: 10 Ind Cas 244 (DB).

——O. 47, R. 1 (1) (c) — The words "for any other sufficient reason" in S. 623 C. P. C., 1882 do not include something which came into existence after the decree. (1910) 14 CWN 244: 11 CLJ 26: 5 Ind Cas 182 (DB).

(k) Wrong judgment.

See also Note 10.

——O. 47, R. 1 — That decision is erroneous is no ground for review.

Under O. 47, R. 1 no review of an order can be allowed when there is no error apparent on the face of the record nor discovery of any new and important piece of evidence subsequent to the passing of the order. No review can be allowed on the ground that the decision was erroneous. AIR (Vol 33) 1946 Cal 51: 49 CWN 522 (DB).

——O. 47, R. 1 — Court overlooking amendment and deciding case under old permission.

Under the Punjab Courts Act, as it stood before the amendment of 1941 a certificate was required in the case of an appeal involving a question of custom but this certificate was rendered unnecessary by the amending Act. The Appellate Court overlooked the provisions of the amending Act which were applicable to the appeal before it and dismissed the appeal on the basis of the old provision holding that the appeal was incompetent as it involved a question of custom and no certificate had been filed. In the application for review it was urged that there was in the case a mistake or error apparent on the face of the record in that the Appellate Court clearly overlooked the provisions of the amending Act of 1941, which rendered a certificate in the case unnecessary :

Held, that there was a mistake or error on the face of the record as alleged by the applicant which entitled him to a review. In any event it could be truly said that there was sufficient reason in the case for granting the application for review. AIR (Vol 31) 1944 Lah 442: 46 PLR 287: 219 Ind Cas 130 (DB).

——O. 47, R. 1 — Wrong decision on point of law.

An erroneous decision on a point of law is neither a "sufficient reason" nor a "mistake or error on the face of the record" within the meaning of O. 47, R. 1 and is, therefore, no ground for review. (1943) 208 Ind Cas 85: 1943 OWN (C C) 189: 19 Luck 242.

——O. 47, R. 1 — Jurisdiction of Court to grant review on ground that different conclusion of law should have been arrived at.

A Court hearing an application for review has no jurisdiction to order a review because it is of opinion that a different conclusion of law should have been arrived at. If the question is a question of jurisdiction, the omission to take objection in the lower Court would not be material. AIR (Vol 29) 1942 Oudh 210: 1941 OWN (C C) 1361: 1942 AWR (H C) 11: 18 Luck 48: 200 Ind Cas 142.

——O. 47, R. 1 — Wrong decision on point of law.

The right of review must be exercised in strict conformity with O. 47, R. 1. The review cannot be granted on the ground that some wrong decision on a point of law has found its way into the judgment and that if the Court had referred to certain provisions of law has found its way into the judgment and that if the Court had referred to certain provisions of law it would have come to a different conclusion. AIR (Vol 28) 1941 Rang 233: 1941 Rang LR 382: 197 Ind Cas 216 (DB).

——O. 47, R. 1 — Ground that decision was wrong on merits.

The words "any other sufficient cause" in R. 1, O. 47, mean a reason sufficient on grounds at least analogous to those specified immediately previously; and a Court hearing an application for a review has, therefore, no power to order a review upon the ground that the decision was wrong on the merits. AIR (Vol 26) 1939 Lah 460: 41 PLR 884: 186 Ind Cas 22.

——O. 47, R. 1 — Grounds for review — Wrong conclusion of law.

A Court hearing an application for review has no jurisdiction to order a review because it is of opinion that a different conclusion of law should have been arrived at. AIR (Vol 17) 1930 Bom 317: 32 Bom LR 610 (DB).

——O. 47, R. 1 — A Court hearing application for review of decree on appeal has no jurisdiction to order a review because it is of opinion that different conclusion of law should have been arrived at. AIR (Vol 17) 1930 Oudh 392: 7 OWN 741.

——O. 47, R. 1 — Reason for review must be analogous to the two grounds of review mentioned immediately before, in the rule. Therefore the mere fact, that a Judge has not in terms referred to certain of the evidence in favour of one party or the other, is not a sufficient reason for granting a review. AIR (Vol 11) 1924 Pat 258: 82 Ind Cas 502: 2 Pat 765 (DB).

——O. 47, R. 1 — Wrong decision on point of law is no ground for review. AIR (Vol 8) 1921 Oudh 260: 63 Ind Cas 344: 24 OC 154.

——O. 47, R. 1 (1) (c) — New evidence — Discovery.

Discovery of new and important matter is no ground for an application for review but a judgment which is erroneous on the merits is, since the applicant is not entitled to re-argue the whole case. AIR (Vol 3) 1916 Lah 261 : 135 PLR 1916 : 147 PWR 1916: 35 Ind Cas 342.

——O. 47, R. 1 (1) (c) — Mistake or error — Inconsistent judgments in the same case — Review.

Where the High Court gave two inconsistent judgments in the same case one before and another after remand, and the error was apparent on the face of it, a review lies. (1912) 13 Ind Cas 646 (All) (DB).

13. Inherent power.

See also Note 12 and Civil P. C. S. 151.

——O. 47 R. 1 — In view of the limited scope of O. 47, R. 1, the absence of Counsel or of a party is not a ground for review. The inherent power of the Court cannot be invoked in such a case. AIR (Vol 31) 1944 Mad 293: 57 MLW 192: (1944) 1 MLJ 259: 1944 MWN 205: ILR (1944) Mad 857: 218 Ind Cas 292 (DB).

——O. 47, R. 1 — Decree in favour of minor — Adjustment by next friend during execution — No separate suit lies in view of S. 47 to set it aside on grounds of fraud — Proper remedy is by way of an application for review or by invoking the inherent jurisdiction of the Court. Such an application comes under S. 47 and the Court has power

to take action independently of O. 47, R. 1 under S. 151. AIR (Vol 23) 1936 Pat 506: 17 PLT 743: 3 BR 94: 165 Ind Cas 857 (DB).

——O. 47, R. 1 — Suit for arrears of maintenance — Compromise — Lower Court holding that court-fee of Rs. 715 should be paid — Appeal in execution — High Court holding the decree to be merely a declaratory one — Application for return of court-fee should be treated as an application for review and the Court should grant refund — Court holding that it has no power under S. 151 fails to exercise jurisdiction possessed by it and revision lies. AIR (Vol 22) 1935 All 455: (1935) ALJ 376: 1935 AWR (H C) 368: 154 Ind Cas 520.

——O. 47, R. 1 — Order under Legal Practitioner's Act — Inherent power of High Court to review.

Although there is no express provision for a review of an order made under the Legal Practitioners Act, there is inherent power in the High Court to restore a Pleader whose name has been struck off the rolls. AIR (Vol 22) 1935 All 321: 4 AWR (H C) 1404: 156 Ind Cas 243 (FB).

——O. 47, R. 1 — Application to set aside ex parte order in execution proceedings.

Though O. 9, could not be made applicable to proceedings in execution with the aid of S. 141, Civil P. C., the Court has inherent jurisdiction to set aside its own previous ex parte order, if it were satisfied that it was necessary in the ends of justice to do so. AIR (Vol 20) 1933 All 783: (1933) ALJ 1032: 55 All 891: 145 Ind Cas 995 (FB).

——O. 47, R. 1 — Court's power under O. 10, R. 4, Civil P. C., is not an unlimited one.

Where a personal appearance of a party is directed without assigning any reason, the order is irregular and can be rectified under S. 151 and O. 47, R. 1, Civil P. C. AIR (Vol 20) 1933 All 517: (1933) ALJ 1318: 145 Ind Cas 607 (DB).

——O. 47, R 1 — A suit in forma pauperis was dismissed for default. The plaintiff applied under S. 151 to restore the case. The application was dismissed, the Judge holding that S. 151 was inapplicable. The plaintiff then applied to the High Court for revision of this order. The High Court refused to interfere with order of the lower Court. The plaintiff ultimately applied to the lower Court for review of the order under O. 47, R. 1.

Held, that the refusal to revise the order of the lower Court did not imply approval of the view of that Court as to the inapplicability of S. 151 to the case, and that the mere fact that the plaintiff was unsuccessful in revision does not prevent him from applying for review and an acceptance of such application by the Court is not without jurisdiction. AIR (Vol 16) 1929 Cal 17: 32 CWN 811: 115 Ind Cas 357 (DB).

——O. 47, R. 1 — S. 151, C. P. Code.

Where the power under O. 47, R. 1 is granted by the Code itself it is not necessary to invoke the inherent powers of the Court under S. 151, C. P. Code. The powers exercisable under these respective provisions are not mutually exclusive. AIR (Vol 11) 1924 Cal 1054: 84 Ind Cas 278: 28 CWN 928.

——O. 47, R. 1 — Apart from O. 47, R. 1, the Court has inherent power under the new S. 151 of the C P. Code of 1908 to make such orders as may be necessary for the ends of justice and thus to review its wrong orders or decisions passed previously. AIR (Vol 11) 1924 Pat 673: 80 Ind Cas 667: 5 PLT 425: 1924 PHCC 254: 3 Pat 930 (DB).

——O. 47, R. 1 — The powers of a Court to correct an error obvious on the face of the record before the order has been completed are very clear. AIR (Vol 10) 1923 Mad 392: 74 Ind Cas 416: 17 MLW 254 (DB).

——O. 47, R. 1 — There is complete power in the Court under O. 47, R. 1 to review the order passed by it in rejecting the plaint under O. 7, R. 11 (c). AIR (Vol 10) 1923 Pat 354: 72 Ind Cas 629: 4 PLT 261: 2 Pat 504 (DB).

——O. 47, R. 1 (1) (c) — Grounds for review — Inherent power.

An inferior Court has no power of review, unless such power is granted by statute. AIR (Vol 4) 1917 M 726: 34 Ind Cas 503 (DB).

——O. 47, Rr. 1 (1) (c) and 4 — Other sufficient reason — Precedents overlooked — Service on all parties.

Notice of an application under O. 47, C. P. C., must be served not only on the contesting but on all the defendants under R. 4 of that order. The discovery of the ruling of the High Court contrary to another ruling of equal authority of the same High Court on which the Court has passed an order is not a sufficient cause for granting a review, and in such a case the Court has no inherent power to grant it. (1913) 17 CLJ 416: 18 Ind Cas 275 (DB).

14. Interpretation.

See also Note 18.

——O. 47, R. 1 — Order 47, gives a special privilege to an aggrieved litigant and must be strictly construed. AIR (Vol 32) 1945 Bom 40: 46 Bom LR 671: ILR (1944) Bom 675: 220 Ind Cas 327.

——O. 47, R. 1 — Refusing of appeal, what is.

For purposes of O. 47, R. 1, no distinction can be drawn between the presenting of a memorandum of an appeal and the preferring of an appeal. AIR (Vol 32) 1945 Bom 40: 46 Bom LR 671: ILR (1944) Bom 675: 220 Ind Cas 327.

——O. 47, R. 1 — The expression "for any other sufficient reason" occurring in O. 47, R. 1, Civil P. C., is not unlimited and only points to reasons which are sufficient on grounds analogous to those mentioned in the rule itself. AIR (Vol 26) 1939 Cal 658: 69 CLJ 533: 43 CWN 969: 186 Ind Cas 276 (DB).

——O. 47, R. 1 — 'Sufficient reason', meaning of — 'Apparent on face of record', meaning of.

The words 'for any other sufficient reason' in O. 47, R. 1, mean reason sufficient on grounds at least analogous to those specified immediately previously. In all applications for review based on mistake or error or any other sufficient reason, the applicant has to show a mistake or error apparent on the face of the record or a mistake or error analogous thereto. It may be a mistake apparent on the face of the record where a Court applies a particular statute to a given set of events whereas on the said date it is obvious from the record that a wholly different statute applied. AIR (Vol 25) 1938 Nag 221: 175 Ind Cas 649 (DB).

——O. 47, R. 1 — Appeal withdrawn must be treated as not preferred.

An appeal which has been withdrawn must be treated as if it had never been preferred within the meaning of O. 47, R. 1. AIR (Vol 24) 1937 Pat 528: 4 BR 54: 171 Ind Cas 700.

——O. 47, R. 1 — Where two Judges constituting Bench dictate two separate judgments, judgment of any one of them cannot form basis of decree and without there being an expression of concurrence in any of them, out of the other, it cannot be judgment of the Court; it is in this sense that the term "judgment" is employed in O. 47, R. 1, Civil P. C. AIR (Vol 24) 1937 Rang 56: 167 Ind Cas 449 (DB).

——**O. 47, R. 1 — 'Facts on the record', meaning of.**

The expression 'facts on the record' means facts having a direct relation to the order the Court was about to make, facts which were actually within the Court's own knowledge and which momentarily escaped its memory. These are facts on the face of the record, and not such facts which are embedded in the record, only to be brought to light by a discussion and appreciation of the evidence. AIR (Vol 22) 1935 Nag 245: 31 NLR 372: 159 Ind Cas 998.

——**O. 47, R. 1 (2) — "Party" in O. 47, R. 1 (2) means party to decree.**

The word "party" in the second sub-section of O. 47, R. 1, is properly used in its context. It presupposes that the person to whom it refers is a party to the decree. AIR (Vol 22) 1935 Rang 364: 159 Ind Cas 186.

——O. 47, R. 1 — An application under S. 151 for revival of dismissed suit was held to be one for review and the expression of opinion in the former suit if it could be revived was merely obiter dictum. AIR (Vol 20) 1933 Mad 485: 144 Ind Cas 103.

——**O. 47, R. 1 — Grounds for review — Ejusdem generis.**

The words "for any other sufficient reason" in O. 47, R. 1, mean a reason sufficient on grounds at least analogous to those specified immediately previous to discovery of new and important matter or mistake or error apparent on the face of the record. A deliberate order passed by a bench of the High Court with a view to obtain a just decision of the dispute between the parties does not constitute a reason for review analogous to discovery of fresh evidence or a manifest mistake on the record. A review cannot therefore be granted against an order deliberately passed by a bench for the benefit of the parties in order to meet the circumstances of a particular case. AIR (Vol 17) 1930 Oudh 392: 7 OWN 741.

——**O. 47, R. 1 — 'Other sufficient reason' — O. 41, R. 19.**

The words "for any other sufficient reason" in R. 1 of O. 47, will cover the case where there is a good ground for not filing the deficit printing costs, and therefore an application to set aside a dismissal of appeal for failure to file printing costs is one for review and not an application under O. 41, R. 19. AIR (Vol 13) 1926 Pat 27: 91 Ind Cas 483: 4 Pat 704: 7 PLT 291 (DB).

——**O. 47, R. 1 — Petition to set aside ex parte decree.**

Where an application to set aside an ex parte decree or to restore a previous application (which had been dismissed for default) for setting aside the ex parte decree was asked to be treated as an application for review.

Held, it could not be so treated because (1) it was not an application for review but one for setting aside ex parte decree, (2) it was not stamped as an application for review and (3) the negligence of the former agent of the defendant which was the ground put forward was no justification for applying for this particular remedy. AIR (Vol 12) 1925 Rang 187: 85 Ind Cas 324: 2 Rang 655.

15. Limitation.

——O. 47, R. 1 — Ground for re-opening suit arising after limitation for review — Application for re-opening should be treated not as one under O. 47, R. 1, but one under S. 151. AIR (Vol 31) 1944 Nag 148: 1944 NLJ 143: ILR (1944) Nag 379: 215 Ind Cas 210.

——**O. 47, R. 1 — Right to appeal barred by limitation Act.**

The provisions of O. 47 are very limited indeed and cannot be applied to give a right of appeal, where such a right is even by implication necessarily barred by the provisions of the Lim. Act. The words "or for any other sufficient reason" in O. 47, R. 1 may be wide, but they are not wide enough to give a right of appeal where in fact no such right of appeal is given by other provisions of the Code but which right has been exhausted by reason of the provisions of the Lim. Act. AIR (Vol 30) 1943 Sind 132: ILR (1943) Kar 409: 209 Ind Cas 326 (DB).

——**O. 47, R. 1, O. 41, R. 19, S. 151 — Order dismissing appeal for failure of appellant to file list within time — Application to set aside.**

An application to set aside an order dismissing an appeal for non-filing of the appellant's list within the time allowed cannot be entertained as an application for review under O. 47, R. 1, Civil P. C. Order 41, R. 19 which is the only provision in the Code for the restoration of the appeal does not apply to such a case but such an application may be entertained under S. 151. AIR (Vol 26) 1939 Pat 678: 19 Pat 159: 6 BR 184: 20 PLT 883: 185 Ind Cas 480 (FB).

——O. 47, R. 1 — Section 5, Lim. Act is applicable to review proceedings. AIR (Vol 25) 1938 Cal 321: 42 CWN 317: ILR (1938) 2 Cal 22: 177 Ind Cas 729.

——O. 47, R. 1 — Quaere: — Whether it is competent to the Court to accept an application for review even though the limitation for presentation of an application under O. 9, R. 13, has expired. AIR (Vol 21) 1934 Lah 825: 35 PLR 670: 152 Ind Cas 620.

——O. 47, R. 1 — When there has been a review, the period of limitation for making an application for execution runs from the date of the revised decree even as against persons who were not parties to the review proceedings. AIR (Vol 20) 1933 Mad 276: 36 MLW 919: 64 MLJ 75: (1933) MWN 155: 141 Ind Cas 175 (2) (DB).

——**O. 47, R. 1 — Other remedy — Limitation, bar of.**

An application under O. 47, R. 1 designed merely to escape the consequences of the law of limitation is not maintainable when proper remedy was an application under O. 9, Rr. 4 or 9 and the period of such application is barred. AIR (Vol 20) 1933 Pat 557: 147 Ind Cas 179.

——**O. 47, R. 1 — Limitation.**

Under the mandatory provisions of S. 3, Limitation Act, the Court is bound to notice the statutory bar of limitation and where it has failed to do so and passed an order, that is a mistake or error apparent on the face of the record within the meaning of O. 47, R. 1, sufficient to justify the Court in granting an application for review and setting aside its previous wrong order. 116 Ind Cas 427: AIR (Vol 16) 1929 Nag 185 (DB).

——**O. 47, R. 1 — When review application can be treated as one under S. 151.**

An application for review of an order under O. 47, R. 1, C. P. Code, if found to be barred by limitation, may under appropriate circumstances be treated as an application under S. 151 if the Court is satisfied that there has been a flagrant abuse of its own process and it is also open to the appellate Court under similar circumstances to treat a barred application for review, made to the first Court, as one made under S. 151 in order to remove an apparent injustice done to the applicant and to prevent an abuse of the process of the Court. 116 Ind Cas 427: AIR (Vol 16) 1929 Nag 185 (DB).

——O. 47, R. 1 — The review of judgment referred to in Art. 162 of the Limitation Act is the re-

view of judgment mentioned in O. 47, R. 1, C. P. Code. 118 Ind Cas 615: 7 Raj 201: AIR (Vol 16) 1929 Raj 229.

——O. 47, R. 1 — Where a Court fails to apply the law to the facts found and when such an error is apparent on the face of the record, it can be made a ground for a review. Failure of the Court to apply the law of limitation to the facts found is an error apparent on the fact of the record. 112 Ind Cas 540: 10 Lah 184: 30 PLR 696: AIR (Vol 15) 1928 Lah 919 (DB).

——O. 47, R. 1 — Electing one of two alternative remedies.

Where a suit is dismissed for default, there are two courses open to the plaintiff; he can either make an application for restoration under O. 9, R. 9, or he can make an application for review under O. 47, R. 1. The application for restoration must be made within 30 days from the order of dismissal, but if such an application has been made and dismissed on the ground that it was barred by limitation, the rule of limitation cannot be evaded by making another application by way of review. 86 Ind Cas 616: AIR (Vol 12) 1925 Lah 517.

——O. 47, R. 1 (1) (b) — Dismissal for default — Review — Limitation.

When special provisions have been provided for recourse cannot be had to general provisions. When a remedy is open under O. 9, R. 9 the party in default will not be permitted to evade the rule of limitation by applying for review. 1 PLJ 547: 3 PLW 66: 38 Ind Cas 53: AIR (Vol 4) 1917 Pat 673 (DB).

——O. 47, R. 1 (1) (c) — Grounds for review — Review of judgment of Court of appeal.

An application for review of judgment of Court of appeal, confirming the decree of the Lower Court, can be entertained. (1909) 2 Ind Cas 204 (Mad) (DB).

16. Minors and pardanashin ladies.

——O. 47, R. 1 — Right to review — Decision detrimental to minor's interest — Next friend under misapprehension as to minor's rights.

There is a general consensus of authority in favour of the view that in cases where gross negligence, laches or misapprehension as to the rights of a minor on the part of the next friend lead to a decision detrimental to the interests of the minor the remedy by review is open to him. It is only in cases of fraud or collusion that a separate suit by a minor is insisted on. AIR (Vol 34) 1947 Pesh 57.

——O. 47, R. 1 — Obiter — Per Pal, J. — When the infant applies in the previous suit itself for a review of the adverse decision, negligence of the next friend should afford a good ground for the purpose. AIR (Vol 29) 1942 Cal 99: ILR (1941) 2 Cal 477: 74 CLJ 13: 45 CWN 932: 199 Ind Cas 486 (DB).

——O. 47, R. 1 — The minor cannot, however, apply for review of the judgment on the ground of culpable negligence on the part of the guardian 'ad litem', for, a review on the ground of negligence cannot strictly speaking be said to be 'ejusdem generis' with an error apparent on the face of the record or discovery of new and important evidence. AIR (Vol 28) 1941 Cal 401: ILR (1941) 1 Cal 477: 45 CWN 508: 196 Ind Cas 779.

——O. 47, R. 1 (1) (c) — Mistake or error — Minor — Omission to record sanction in a case of minors.

Minors can apply for review of an order recording a compromise, a sanction for which was not recorded. 5 Pat LJ 379: 1 Pat LT 663: 1920 Pat HCC 358: AIR (Vol 7) 1920 Pat 750 (DB).

——O. 47, R. 1 (1) (c) — New evidence — Negligence — Rights of Pardhanashin Lady.

Though the case of a pardhanashin lady is neglected by her agents, she cannot apply for re-hearing of the case in review. 42 Ind Cas 970 (1): AIR (Vol 4) 1917 Pat 659 (DB).

——O. 47, R. 1; O. 47, R. 2 — (Ss. 623, 624, old Code) — Decree when can be set aside on review and when by suit.

Where a decree is regular in itself, and on the face of it correct, it can only be set aside by suit. Where a plaintiff seeks to set aside a decree based on a compromise entered into by his guardian when he was a minor, merely on the ground that the compromise was fraudulent his only remedy lies in a fresh suit, and he cannot revive the previous suit by an application for review. Observation to the contrary in 6 C 687, 14 C 357 and 13 BLR App. II diss from.

But where it is clear upon the face of the judgment or the decree which is impugned that it is irregular and incorrect, or not in compliance with the provisions of the laws, the plaintiff can proceed by way of review. (1906) 3 CLJ 119 (126, 131) (DB).

17. New evidence.

See also, Note 12.

(a) General.
(b) Discovery.
(c) Non-discovery.

(a) General.

——O. 47, R. 1 — Applicant ought to furnish Court with evidence he seeks to have admitted.

In an application for review the applicant ought always to see that the Court is furnished with the evidence which he asks to have admitted because otherwise it is impossible to tell what its value really is. AIR (Vol 29) 1942 All 82 : (1942) ALJ 29: 1942 AWR (HC) 385: 198 Ind Cas 863.

——O. 47, R. 1 — Applicant should prove strictly, diligence he claims to have exercised and that evidence sought to be produced is nearly if not absolutely conclusive of matter.

Application under O. 47, R. 1, Civil P. C., must be treated with a considerable measure of caution. That is a matter of public policy as it is obviously necessary that, save in exceptional circumstances, finality in litigation should be achieved at some point. The person who wants a review should at least prove strictly the diligence he claims to have exercised and also that the matter or evidence, which he wishes to have access to is, if not absolutely conclusive, at any rate, nearly conclusive of the matter. It is not proper function of a review application merely to supplement evidence. It is not a proper use of O. 47, R. 1, to make it serve the purpose merely of introducing evidence which might possibly have had some effect on the result. Order 47, R. 1, requires a high standard of diligence.

The plaintiff in his suit made some efforts to compel the other party to produce a certain document in his possession on which the plaintiff relied. He, however, subsequently gave up the pursuit when he found that it would involve expense and trouble as the party had gone away to another place. The plaintiff subsequently discovered that the document had been filed by the party in whose possession it was, in some other case and therefore it would be easier to get the same on record. He, therefore applied under O. 47, R. 1, to have the document admitted in evidence:

Held, that the plaintiff did not attain that standard of diligence which O. 47, R. 1, required and the admission of the document was beyond the scope of O. 47, R. 1. AIR (Vol 29) 1942 All 82; (1942) ALJ 29: 1941 AWR (HC) 385: 198 Ind Cas 863.

——O. 47, R. 1 — Remedy of party discovering new and important matter.

The language of O. 47, R. 1 indicates that the Court which can review its judgment is the Court which has pronounced it and not the Appellate Court before which the appeal is pending. The only remedy open to a party who has discovered new and important matter, which could not with due diligence have been found before, is to move the Court for a review of judgment. AIR (Vol 21) 1934 All 175: 3 AWR (HC) 198: 147 Ind Cas 339.

——O. 47, R. 1 — When can be admitted.

Fresh documentary evidence cannot be admitted in review, unless and until it is shown that the evidence in question could not be produced at the trial for the reasons given in O. 47, R. 1. Where no new and important matter or evidence has been discovered, which after the exercise of due diligence, was not within the knowledge of the applicant for review, or could not be produced by him at the time when the decree was passed, fresh documentary evidence should not be admitted. AIR (Vol 20) 1933 Oudh 328 (2): 10 OWN (CC) 454: 146 Ind Cas 830 (DB).

——O. 47, R. 1 — Application for review of judgment on ground of discovery of new and important matter or evidence — Only dates material are those when suit was filed and when Court pronounced decree. 120 Ind Cas 465: AIR (Vol 17) 1930 Pat 63.

——O. 47, R. 1 — Due diligence — Enquiry as to.

The word "evidence" as used in O. 47, R. 1 is not confined only to "documentary" evidence but includes "oral" evidence. Whether or not the applicant could not with due diligence have discovered the evidence at the stage of the original trial must depend upon facts to be proved and the Court should hold an enquiry into the facts relevant to the recovery. Failure to make such an enquiry amounts to a material irregularity justifying interference in revision. 108 Ind Cas 439: AIR (Vol 15) 1928 Nag 279.

——O. 47, R. 1 — What should be proved.

An application for review on the ground of discovery of fresh evidence cannot be supported in the absence of proof that the applicant could not have got the evidence earlier by due diligence. AIR (V 14) 1927 Bom 232 : 29 Bom LR 371 : 101 Ind Cas 766.

——O. 47, R. 1 — The Court when considering whether review should be allowed or not is not called upon to see that the new evidence if believed would be conclusive. Brown v. Dean (1910) AC 373, Dist. and Not Foll. AIR (Vol 14) 1927 Mad 641 : 52 MLJ 682: 50 Mad 891: 39 MLT 11: 26 MLW 277: 1927 MWN 806: 103 Ind Cas 377 (DB).

——O. 47, R. 1 — Finding as to its importance.

A Judge is not likely to entertain a review of his own judgment unless he is prima facie satisfied that the new matter is important, and simply because the Court has not said in so many words that the matter is important, interference in revision is not competent. AIR (Vol 14) 1927 Mad 641 : 52 MLJ 682 : 39 MLT 11 : 26 MLW 277 : 50 Mad 891 : 1927 MWN 806: 103 Ind Cas 377 (DB).

——O. 47, R. 1 — Review — Conditions.

Where the new evidence alleged did not comply with the requirements of O. 47, R. 1 the review could not be admitted on the ground of other sufficient reason. AIR (Vol 11) 1924 All 759 : 5 LRA Civ 392 : 85 Ind Cas 180.

——O. 47, R. 1 (1) (c) — Mistake or error — Cases not cited on prior occasion.

Producing an authority not brought to the notice of the Judge at the first hearing, but which lays down a view of the law contrary to that taken by the Judge is not a sufficient ground for review. AIR (Vol 8) 1921 Pat 139 : 1 Pat LT 561 : 57 Ind Cas 147 (DB).

——O. 47, Rr. 1, 4 and 7 (1) (c) — New evidence — Allegations to be strictly proved.

Before a Court can grant an application for review on the ground of new and important matter of evidence, it must be satisfied with the allegation of the applicant that the evidence in question constituted new and important evidence within O. 47, R. 1 of the Code. If a Court without adjudication of the allegation that the evidence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, allows an application for review, the order is contrary to O. 47, R. 4 and an appeal lies against it. AIR (V 7) 1920 Cal 467 : 47 Cal 568 : 31 CLJ 134 : 56 Ind Cas 734 (FB).

——O. 47, R. 1 (c) — New evidence.

The ground on which a decree may be reviewed, must be in existence at the date of the decree. A judgment not in existence at the time of appeal, should not be admitted in review of the appellate decree as it is not "evidence" new. AIR (Vol 6) 1919 Cal 287 : 23 CWN 242 : 50 Ind Cas 119 (DB).

——O. 47, R. 1 (1) (c) — New evidence.

The greatest care ought to be exercised in granting a review when it is asked for on the ground of discovery of fresh evidence after judgment. AIR (Vol 5) 1918 Cal 618 : 45 Cal 60 : 21 CWN 1076 : 26 CLJ 187 : 42 Ind Cas 484 (DB).

——O. 47, R. 1 (1) (c) — Grounds for review — New case.

An applicant for review of a judgment of High Court will not be allowed to re-open the finding of the High Court by referring to a document not pressed by him upon the Court or mentioned in the memorandum of appeal or referred to in the course of argument. AIR (V 4) 1917 Pat 201 : 38 Ind Cas 196(2) (DB).

——O. 47, R. 1 (c) — New evidence — Strict compliance.

Where an application for review on the ground of discovery of new evidence was made to the High Court after judgment on appeal, and it appeared that the trial had lasted for three years and there was no reason shown why the proposed evidence was not previously submitted, the Privy Council affirmed the judgment of the High Court rejecting the review application. AIR (Vol 2) 1916 PC 78 : (1915) MWN 787 : 19 CWN 762 : 29 Ind Cas 717.

——O. 47, R. 1 (1) (c) — New evidence — Discovery of.

No review lies of an order dismissing an appeal under O. 41, R. 11, C. P. C., merely on the ground of discovery of some new and important matter. AIR (Vol 2) 1915 Cal 71 : 41 C 809 : 26 Ind Cas 281.

——O. 47, R. 1 (S. 623 old Code) — Discovery of new and important matter — Duty of parties and Court — Rejection — Application before appellate Court for admission of fresh evidence — Appellate Court's jurisdiction.

The Code of Civil Procedure permits applications for review on the ground of discovery, of fresh evidence but it exacts very strict conditions so as to prevent litigants lying on their oars when they ought to be looking for evidence. It enjoins the

Judge to require the facts as to the absence of negligence to be strictly proved & makes the Judge who tried the case final on such applications. Where the trial Judge rejected an application for review on the ground of discovery of fresh evidence, it is not competent to the appellate Judges to order admission of the "further evidence" as preliminary to the hearing of the appeal, for in effect, it would be a review and reversal of the trial Judge's refusal to grant a review. (1907) 11 CWN 721 : 17 MLJ 347 : 4 ALJ 461 : 6 CLJ 5 : 31 B 381 (388) : 9 Bom LR 671 : 34 IA 115 : 2 MLT 435 (PC).

(b) Discovery.

——O. 47, R. 1 — Discovery of fresh evidence — When a good ground for review.

In the absence of evidence to show that in spite of serious attempts made with reasonable care and diligence the evidence was not available, review would not be granted on the ground of discovery of fresh evidence. 1949 AMLJ 34.

——O. 47, R. 1 — A person in whose favour a decree has been passed under S. 14, U. P. Encum. Estates Act, cannot apply to have the decree reviewed under S. 14 on the ground of his subsequent dispossession by the Collector under S. 35, for such dispossession cannot be said to be a "discovery" within the meaning of O. 47, R. 1, Civil P. C. on a fact which was not within his knowledge when the decree in question was passed. AIR (V 27) 1940 All 519 : (1940) ALJ 632 : 1940 RD 493 : 1940 AWR (HC) 493 : 192 Ind Cas 212.

——O. 47, R. 1 — There was sufficient ground for allowing review of judgment dismissing appeal when the Counsel for appellant had discovered new and important evidence which was not within his knowledge and could not be produced by him after exercise of due diligence at the time when judgment dismissing appeal was delivered. AIR (Vol 23) 1936 Lah 650 : 166 Ind Cas 716 (DB).

——O. 47, R. 1 — O. 43, R. 1(w); O. 47, Rr. 1, 4 — Decision by Judge in appeal — Contrary decision on same point by Privy Council after it — Whether amounts to discover of new and important matter — Review, competency of.

When an appeal was being heard, a request was made to the Judge to adjourn the case until the decision of an appeal pending before the Privy Council against the decision of a Bench of the High Court in a similar case. The Judge did not consider it necessary to adjourn the case, but while dismissing the appeal, remarked that it would be open to the appellant to apply for review of his judgment if the Privy Council overruled the view taken by the High Court. The decision of the High Court being reversed by their Lordships of the Privy Council, the plaintiff applied for review which was granted:

Held, that in view of the reservation expressly made by the Single Judge it was open to the appellant to apply for review in the contingency which actually happened and that the ground on which he was asking to review his judgment should be deemed to be a ground which was in contemplation at the date of the decree and the decision of their Lordships of the Judicial Committee passed subsequent to the decision of the appeal by the Judge should, in the special circumstances of the case be treated as a sufficient reason ejusdem generis with the discovery of new and important matter. AIR (Vol 21) 1934 Oudh 445 : 11 OWN (CC) 1287 : 10 Luck 543 : 153 Ind Cas 815 (DB).

——O. 47, R. 1 — Nature of.

Where the ground for review is the alleged discovery of new evidence, the evidence discovered must at least be such as is presumably to be delivered, and if believed would be conclusive. AIR (Vol 16) 1929 All 545 : 119 Ind Cas 99 (DB).

——O. 47, R. 1 — A decision delivered after the passing of the decree sought to be reviewed is no material on which an application for review can be based for the new and important matter alleged to have been discovered must have existed at the date of the decree. (1922) 64 Ind Cas 324 (Cal).

——O. 47, R. 1 — Discovery of mistake.

Where plaintiff's signature to a compromise petition was given at the instance of her agent, and she signed under a mistake as to the purpose thereof.

Held, her having affixed her signature to the compromise at the instance of an agent in ignorance of its contents is a new and important matter. AIR (Vol 9) 1922 Mad 446 : 43 MLJ 290 : 31 MLT 132 : 1922 MWN 495 : 16 MLW 440 : 70 Ind Cas 425 (DB).

——O. 47, R. 1(1)(c) — New evidence — Burden of proving due diligence.

The applicant praying for review of judgment on the ground of discovery of new evidence must prove his inability to produce it during trial in spite of due diligence. AIR (Vol 3) 1916 All 286 : 38 A 280 : 14 ALJ 204 : 32 Ind Cas 622 (DB).

——O. 47, R. 1(1)(c) — New evidence — Discovery of — Procedure.

An application to receive fresh evidence discovered out of Court by the parties to an appeal comes under O. 47, R. 1 and not under O. 41, R. 27, C. P. C. AIR (Vol 2) 1915 Cal 407 : 19 CWN 401 : 42 C 675 : 28 Ind Cas 865 (DB).

——O. 7, R. 1(1)(c) — New evidence — Essentials.

Review on the sole allegation that new evidence had been discovered which was not within the applicant's knowledge cannot be granted without strict proof of such allegation. (1911) 9 Ind Cas 266 (All) (DB).

——O. 47, R. 1(1)(c) — New evidence — Discovery of document admitting liability.

Discovery of a document after judgment containing an admission of liability by defendant is a good ground for review. 140 PWR 1911 : 195 PLR 1911 : 11 Ind Cas 15.

——O. 47, R. 1 — Review on discovery of fresh evidence.

A review on the ground of discovery of fresh evidence which would have materially altered the chances of decision should be granted and a refusal is not calculated to advance the ends of justice. (1903) 5 Bom LR 615 : 28 B 4 (7) (DB).

(c) Non-discovery.

——O. 47, R. 1 — Suit for recovery of bhaoli rent on basis of takhmina papers — Payment in full alleged in defence — Court not insisting on plaintiff to produce village papers — Suit decreed in full — Appeal and second appeal by defendant dismissed — Village papers, subsequently produced by defendant in support of his contention alleging they could not be produced in spite of due diligence, due to plaintiff's conduct — Review.

A landlord instituted a suit against his raiyat for recovery of bhaoli rent for a period of years. The suit was based on takhmina papers showing an estimate of the share of the landlord in the grain produced. The defence was substantially payment in full and that the suit had been maliciously brought because the raiyat had refused to pay nakdi rent at Rs. 10 per bigha and was ready to apply for commutation of the rent under S. 40, Ben. Ten. Act. It was urged that the takhmina papers were forged. An excuse was given on behalf of the plaintiffs that certain papers were not available as they had been sent to the trustees in another place and the Court did not insist upon production though they were required by the de-

fendant. The Munsif held that in the absence of receipts payment had not been proved and that the demand for commutation at Rs. 10 per bigha had not been established. The defendant went in second appeal which was dismissed on technical grounds. After the disposal of the appeal, he had secured new and important evidence which owing to the conduct of the plaintiffs could not in spite of due diligence be available to him at the trial, namely, a copy of the actual batai khasra and danabandi papers:

Held, that the review could be granted. The suit having been instituted without reasonable and probable cause, the defendant was entitled under the provisions of S. 68(2), Ben. Ten. Act, to damages of twenty-five per cent. of the whole amount claimed:

Held, further, that an unwholesome practice has prevailed fairly generally of failing to grant receipts promptly, if at all, for produce rent and then suing for the rent paid if the raiyat seemed to be what the landlord chose to regard as "recalcitrant" or contemplated an application under S. 40, Ben. Ten. Act. The scope of the practice will become attenuated under the amendment reducing the limitation for suits claiming produce rent. AIR (Vol 23) 1936 Pat 595 : 15 Pat 295 : 17 PLT 575 : 3 BR 153 : 166 Ind Cas 317 (DB).

——O. 47, R. 1 — Applicant could have discovered matter if he had exercised due diligence — Proof that new matter would have proved his case conclusively — Necessity of.

Where it appears that if the petitioners had only exercised due diligence they would have discovered the matter, the petition for review will not be allowed. An applicant for review under O. 47, R. 1, must not only have not known the existence of the new matter but he must also show that such matter will prove his case conclusively. AIR (Vol 22) 1935 Rang 184 : 156 Ind Cas 733.

——O. 47, R. 1 — Evidence overlooked by excusable misfortune — Onus of proof — Due diligence.

Where an application for review is based on the ground that evidence was overlooked by excusable misfortune, it is for the applicant to prove that the misfortune is excusable and that the evidence sought to be adduced could not be produced at the proper time despite exercise of due diligence. The question as to whether a party has acted with due diligence is a question of fact in each case. AIR (Vol 20) 1933 Sind 110 : 143 Ind Cas 720.

——O. 47, R. 1 — Where a suit for restitution of conjugal rights was decreed and, subsequently the wife filed a petition to the Ecclesiastical Court for a decree for nullity and the Ecclesiastical Court found out the relation between the parties to be that of cousins and upon this finding gave a decree for nullity.

Held, that the matter which came to light by reason of investigation of the Ecclesiastical Court was a matter of evidence which after the exercise of due diligence was not within the wife's knowledge and, therefore, a valid ground for reviewing the decree for restitution of conjugal rights. AIR (Vol 17) 1930 Pat 63 : 120 Ind Cas 465.

——O. 47, R. 1 — Nature of.

The words "or could not be produced by him at the time" must refer to the words which precede, namely, "was not within his knowledge". The whole clause must mean that the new important matters for review were not within the knowledge of the party and therefore could not be produced by him at the time when the decree was passed or the order made. AIR (Vol 11) 1924 Pat 809 : 75 Ind Cas 91 (DB).

——O. 47, R. 1(c) — New evidence — Negligence of applicant.

The Court can in the interests of justice grant a review to the party affected by the non-production of a document before judgment notwithstanding his gross negligence. AIR (Vol 4) 1917 Pat 198 : 40 Ind Cas 79 (DB).

——O. 47, R. 1(1)(c) — New evidence — Diligence.

When a document was in the possession of a party at the time of hearing but not referred to, it will not be a ground for review. AIR (Vol 4) 1917 Pat 340 : 38 Ind Cas 142.

18. Other sufficient reason.

(a) General.
(b) Cost.
(c) Omission by party or counsel.
(d) Want of notice.

(a) General.

——O. 47, R. 1 — Meaning of.

The expression "any other sufficient reason" occurring in R. 1, O. 47, means any other sufficient reason analogous to those specified immediately previously, that is to say, to excusable failure to bring to the notice of the Court new and important matter. AIR (Vol 26) 1939 Cal 628 : 69 CLJ 573 : 43 CWN 913 : 184 Ind Cas 689 (DB).

——O. 47, R. 1 — Meaning of.

Rule 1 of O. 47, must be read as in itself definitive of the limits within which review of decree or order is now permitted and the words "any other sufficient reason" mean a reason sufficient on grounds analogous to those specified in R. 1. AIR (Vol 26) 1939 Pat 678 : 20 PLT 883 : 6 BR 184 : 19 Pat 159 : 185 Ind Cas 480 (FB).

——O. 47, Rr. 1, 4, 7 — 'Other sufficient reason', whether can be questioned in appeal.

The trial Court granted the review and decreed the plaintiff's claim. On appeal the learned District Judge agreed with the trial Court on the merits, but finding that there was not "other sufficient reason" for admitting the application for review dismissed the plaintiff's suit:

Held, that this order was clearly wrong for the "other sufficient reason" could not be questioned in appeal under Rr. 4 and 7, O. 47. AIR (Vol 22) 1935 Rang 501 : 160 Ind Cas 425 (1).

——O. 47, R. 1 — Court hearing application for review of decree has no jurisdiction to order review because it is of opinion that different conclusion of law will be arrived at and R. 1, O. 47 must be read as in itself definitive of limits within which review is permitted and the words "any other sufficient reason" must be taken to mean a reason sufficient on grounds at least analogous to those specified immediately previously. AIR (Vol 21) 1934 PC 213 : 11 OWN (PC) 1084 : 40 MLW 383 : 60 CLJ 267 : 67 MLJ 608 : (1934) MWN 1005 : 39 CWN 1 : 36 PLR 305 : 15 PLT 763 : 36 Bom LR 1179 : 4 AWR (PC) 358 : 56 All 634 : (1934) ALJ 918 : 61 IA 378 : 151 Ind Cas 41.

——O. 47, R. 1 — Ejusdem generis.

These words are not unlimited and must be taken to point to a reason which is sufficient on grounds at least analogous to those mentioned in the rule. AIR (Vol 16) 1929 Cal 470 : 33 CWN 883 (DB).

——O. 47, R. 1 — Where Court refused to grant adjournment because appellant's counsel was unprepared to argue, and did not permit the appellant to file a written argument, and further its judgment did not state that it considered certain aspects of the question of limitation a review was not granted. AIR (Vol 16) 1929 Nag 89 : 11 NLJ 238 : 115 Ind Cas 173.

——O. 47, R. 1 — The words "any other sufficient reason" mean a reason sufficient on grounds at

least analogous to those specified immediately previously. (1929) 113 Ind Cas 887 (Nag).

——O. 47, R. 1 — The words "other sufficient cause" in R. 1, O. 47 mean something ejusdem generis with what precedes them and would not include such a ground as an explanation of default of appearance. AIR (Vol 15) 1928 Mad 964 : 55 MLJ 330 : 28 MLW 358 : 1928 MWN 701 : 117 Ind Cas 791 (DB).

——O. 47, R. 1 — Where in a suit for specific performance the finding of fact as to the existence of a final agreement between the parties, and the granting of specific performance were upheld by a Second Appeal Bench, but the two members composing it held different views as to the finality of the agreement and the propriety of granting specific performances, the defendant applied for review.

Held, that the case was not such that the interference by way of review was justifiable. AIR (Vol 15) 1928 Nag 277 : 109 Ind Cas 253.

——O. 47, R. 1 — The words "any other sufficient reason" in R. 1, O. 47 mean a reason sufficient on grounds analogous to those specified immediately previously. The phrase "ejusdem generis" is more restricted than the word "analogous". AIR (Vol 15) 1928 Rang 31 : 5 Rang 675 : 107 Ind Cas 161.

——O. 47, R. 1 — "Sufficient reason" must be some reason analogous to the reasons which have been stated in O. 47, R. 1. AIR (Vol 14) 1927 Cal 920 : 31 CWN 822 : 104 Ind Cas 136.

——O. 47, R. 1 — Order 47, R. 1 must be read as "in itself definitive of the limits within which review of a decree or order is now permitted and the words "any other sufficient reason" mean grounds at least analogous to those specified in the rule. (1926) 92 Ind Cas 1013 (All) (DB).

——O. 47, R. 1 — The words "for any other sufficient reason" in O. 47, R. 1 must be reasons ejusdem generis with the other specified grounds for review. That an order appealed from has been set aside by the Court passing it on review is no ground to review the order passed in appeal. AIR (Vol 13) 1926 Lah 655 : 96 Ind Cas 832.

——O. 47, R. 1 — Words very wide.

The words "for any other sufficient reason" in O. 47, R. 1 need not be restricted to matters which are strictly ejusdem generis with those referred to in the earlier part of the rule. On the contrary, the words are not only very wide in themselves, but are intentionally so made by the legislature because of the possibility of exceptional cases arising in which obvious injustice would be worked by strict adherence to the terms of the decree as originally passed. AIR (Vol 12) 1925 All 364 : 47 All 361 : 23 ALJ 56 : 6 LRA Civ 159 : 86 Ind Cas 168 (DB).

——O. 47, R. 1 — Admission challenged.

Where the Court made a statement in its judgment that pleader for one of the parties made an important admission, but the admission was not in fact made, the proper remedy is to ask the Judge for a review of his judgment when the matter is fresh in the mind of both the Judge and the vakils. AIR (Vol 12) 1925 Mad 1031 : 49 MLJ 671: 22 MLW 234 : 90 Ind Cas 775.

——O. 47, R. 1 — The words "or for any substantial cause" in sub-r. 1(b) do not give the Court jurisdiction to entertain an application for recording further evidence on the grounds which would enable an application to be entertained under O. 47, R. 1. AIR (Vol 11) 1924 Bom 227 : 47 Bom 674 : 25 Bom LR 310 : 84 Ind Cas 74 (DB).

——O. 47, R. 1 — Words very wide.

The discretion in determining what is sufficient reason is not so rigidly circumscribed that an analogy must be discovered between the two grounds specified, namely, discovery of new and important matter in evidence and some mistake or error apparent on the face of the record. AIR (Vol 11) 1924 Cal 872 : 39 CLJ 247 : 81 Ind Cas 738 (DB).

——O. 47, R. 1 — Must be analogous to those specified before — Reviewing Court cannot consider grounds not decided by former Court as being immaterial. AIR (Vol 9) 1922 PC 112 : 43 MLJ 332 : 3 Lah 127 : 16 MLW 37 : 26 CWN 697 : 3 PLT 435 : 17 PWR 1922 : 30 MLT 295 : 49 IA 144 : 24 Bom LR 1238 : 36 CLJ 459 : 41 PLR 1922 : 72 Ind Cas 566.

——O. 47, R. 1 — Military service.

Where the applicant had left India to serve under, war conditions and immediately after his return applied to set aside a compromise decree passed against him:

Held, the decree could be set aside either under the latter part of S. 10 of the Indian Soldiers (Litigation) Act under the general powers of review contained in O. 47, R. 1, C. P. Code, and where the decree or order is of such a nature that it cannot be set aside as against such a soldier only it may be set aside as against all or any of the parties against whom it is made. AIR (Vol 8) 1921 Cal 393 : 27 CWN 193 : 75 Ind Cas 262 (DB).

——O. 47, R. 1 (1) (c) — Other sufficient reason — Case not well argued.

An application for review on the ground that if the Court allowed the applicants another opportunity of producing evidence they might persuade the Judge that the view taken by him on the previous occasion was erroneous is not permissible. AIR (Vol 2) 1915 All 250 : 37 All 444 : 13 ALJ 673 : 29 Ind Cas 994 (DB).

Also AIR (Vol 7) 1920 Nag 159: 57 Ind Cas 145: 5 Bur LT 57 : 14 Ind Cas 837.

——O. 47, R. 1 (c) — Other sufficient reason — Scope of.

A party can only ask for a review on the ground of 'other sufficient cause' if he can show the judgment to be incorrect. 131 PWR 1912 : 13 Ind Cas 318.

(b) Costs.

——O. 47, R. 1 — A Court can review as to costs any proper cases but the Court will be reluctant to review an order passed in presence of both parties unless a very strong case is made out. AIR (Vol 9) 1922 Pat 1 : 3 PLT 67 : 6 PLJ 284 : 63 Ind Cas 768 (DB).

(c) Omission by party or counsel.

——O. 47, Rr. 1 and 6 — Sufficient reason — Binding authority not brought to Court's notice — This is no ground for review (Per Agarwala J., Chatterji J., contra.)

Per Agarwala, J.—It is no longer open to the Courts in this country, in exercise of the powers conferred by O. 47, R. 1, to review a judgment on the ground that an authority binding upon the Court had not been brought to its notice at the hearing of the matter, the decision of which is sought to be reviewed.

Per Chatterji J., contra.— The excusable failure on the part of the applicant's Advocate to bring to the notice of the Court at the time of the delivery of the judgment, the Privy Council decision, by which a decision on which the judgment in question is based, is overruled and the Privy Council decision is not reported until after the judgment is delivered, is a sufficient reason within the meaning of O. 47, R. 1.

(Application was dismissed under O. 47, R. 6, owing to the difference of opinion between the Judges.) AIR (Vol 33) 1946 Pat 188.

——O. 47, R. 1 — Misapprehension of Counsel causing erroneous impression of Judge.

Where owing to some misapprehension, the Counsel or the respondent did not urge all his argu-

ments in support of the finding recorded in favour of his clients by the first Court, and the Judge was thereby led to form erroneous impression that he had no arguments to meet the appellant's points:

Held, that it was analogous enough to an error apparent on the face of the record to be a sufficient reason for review under O. 47, R. 1, Civil P. C. and, therefore, the decree of the Judge passed on rehearing the appeal could be sustained as one made on review. AIR (Vol 27) 1940 Mad 17 : 50 MLW 568 : (1939) MWN 1080 : (1939) 2 MLJ 809 : 188 Ind Cas 263.

——O. 47, R. 1 — Evidence shut out owing to misconception of Pleader.

Where evidence on a matter of considerable importance was shut out owing to a misconception on the part of the Pleader and the issue was accordingly found against his client:

Held, that though there was no discovery of new and important evidence yet there was 'sufficient reason' for granting a review within the meaning of O. 47, R. 1. AIR (Vol 18) 1931 Sind 3 : 25 SLR 242 : 130 Ind Cas 545 (DB).

——O. 47, R. 1 — The words "for any other sufficient reason" in R. 1, O. 47 are obviously meant to allude to reasons sufficient on grounds analogous to those previously mentioned in the rule. Where the applicant wished for the first time, obviously as a result of an after-thought to re-open the case in review on a doubtful and technical legal point which he had failed to consider or urge in the second appeal in question.

Held, that it was not a case in which leave for review could be granted. (1928) 108 Ind Cas 750 (Nag).

——O. 47, R. 1 — Non-production of record.

Where a certified copy of an extract from the record-of-rights relevant to the case was not produced at the trial as required under S. 135-H of Bombay Land Revenue Code and the point was abandoned in appeal.

Held, the defect should be cured by allowing the plaintiff to put in the certified copies of the extract from the record-of-rights and that the previous non-production is no sufficient ground for reviewing the decision. The High Court has the power, as the Original Court has, to allow a reasonable time for the production of the extracts if it has not been produced. AIR (Vol 9) 1922 Bom 114 : 23 Bom LR 745 : 46 Bom 79 : 64 Ind Cas 156 (DB).

(d) Want of notice.

——O. 47, R. 1 and S. 163, U. P. Tenancy Act.

An order of ejectment cannot be reviewed on the ground of want of notice, because that is not other sufficient reason within the meaning of O. 47, R. 1. (1946) 1946 AWR (Rev) 29 : 1946 RD 160 (DB).

19. Power of Court.

See also Note 3.

——O. 47, R. 1 — Order setting aside sale under S. 174 (3), B. T. Act, on condition of judgment-debtor depositing decretal dues by certain date — Deposit not made within time — Application for review of order — If competent.

Where on an application under S. 174 (3) of the Bengal Tenancy Act the Court passed an order to the effect that the sale would be set aside on the condition of the judgment-debtor depositing decretal dues with costs of execution by a certain date and that on default by him the sale would remain confirmed, and the deposit was not made within the time allowed, an application by the judgment-debtor for review of the order under O. 47, R. 1, C. P. Code, is not incompetent. The Court in a case of this nature has authority to grant relief against forfeiture upon a proper application being made to it. AIR (Vol 37) 1950 Dacca 13 (1) : 2 DR 188.

——O. 47, R. 1 — Judge has no power to review and modify his judgment when neither party has applied for review under O. 47, R. 1, Civil P. C. AIR (Vol 28) 1941 Lah 212 : 43 PLR 88 : 195 Ind Cas 157.

——O. 47, R. 1—A Court has no power to rely upon a decision pronounced subsequent to the original order for purposes of review. AIR (Vol 28) 1941 Mad 918 : 54 MLW 263 : (1941) 2 MLJ 390 : 1941 MWN 1047.

——O. 47, R. 1 — Order 47 and S. 151 are to be construed strictly and are not intended to be used to allow one Judge to sit in appeal on orders of his predecessor exercising an equal juridiction with his own. AIR (Vol 26) 1939 Sind 137 : ILR (1939) Kar 330 : 182 Ind Cas 154 (DB).

——O. 47, R. 1 — Court has power to review its judgment even when a particular law point was not brought to its attention on previous hearing. 1937 OWN (CC) 496 : 1937 RD 209.

——O. 47, R. 1 — A Court has no jurisdiction to grant the review on a re-consideration of the case on exactly the same materials. AIR (Vol 23) 1936 Lah 301 : 37 PLR 387 : 161 Ind Cas 765.

——O. 47, R. 1 — Court has no power to grant leave to apply for review in forma pauperis.

The Court has no inherent power to grant leave to prosecute on application for review of order in appeal in forma pauperis. The Court has also no power to grant such leave on the ground that an application for review should be regarded as a continuation of the appeal in which the order which it is desired to be reviewed was passed. AIR (Vol 17) 1930 Rang 280 (DB).

——O. 47, R. 1(1) (a) — Review — Inferior Court.

It is illegal for an inferior Court to review the judgment of a superior Court. AIR (Vol 6) 1919 Nag 143 : 50 Ind Cas 910.

20. Procedure.

——O. 47, Rr. 1 and 2 — Applicability and scope of — Compromise by guardian without leave of Court — Application for review by minor on ground of disregard of O. 32, R. 7 — Jurisdiction to entertain — Successor of Judge.

Rule 2 of O. 47, C. P. Code, has to be read as a proviso to R. 1 of that rule. Where a review is sought on the ground of mistake or error on the face of the record and not on the ground of a clerical or arithmetical mistake or error on the face of the decree or judgment, the application can only be made to the Judge who made the decree and not to his successor Where the ground urged is that in passing a decree in terms of a compromise agreed to by the guardian of a minor without obtaining the leave of the Court the Judge overloked the provisions of O. 32, R. 7, C. P. Code, even regarding it as mistake of law, the application has to be made to the original Judge and not to the successor. AIR (Vol 36) 1949 Nag 298: 1949 NLJ 185: ILR (1949) Nag 162.

——O. 47, R. 1 — Calcutta High Court Rules and Orders (Original Side), Chap. XXXII, Rr. 34, 2, 3 — Application for review.

Having regard to the language of the Rules and Orders of the Original Side of the Calcutta High Court, an application for review must be held to be made when the memorandum of review is filed. The person who files a memorandum of review takes a step which initiates proceedings for review, and by doing so applies for a review of judgment within the

meaning of O. 47, R. 1. (1937) 170 Ind Cas 653: 41 CWN 129.

——O. 47, R. 1 — Order rejecting plaint — Power to review without notice.

Where a plaint has been rejected after ample time has been given not merely for finding of the requisite court-fee but for putting Counsel in possession of all the relevant facts which he could urge as an excuse for the delay, then even assuming that an order rejecting a plaint can be reviewed without notice, it will be necessary to give the other side an opportunity at the earliest possible moment of contesting the propriety of the review.

—Quaere: — Whether or not an order rejecting a plaint can be reviewed without notice. AIR (Vol 23) 1936 Mad 503: 43 MLW 493: 70 MLJ 491: (1936) MWN 538: 59 Mad 975: 163 Ind Cas 96 (DB).

——O. 47, R. 1 — It is open to the Court granting review either to re-hear the case or to make such order in regard to the re-hearing as it thinks fit. AIR (V 22) 1935 All 435 : (1935) ALJ 436 : 57 All 781 : 1935 AWR (HC) 326: 157 Ind Cas 1084.

——O. 47, R. 1 — The grounds on which a review is competent are different from those on which a further appeal lies under Cl. 10, Letters Patent, after a certificate had been granted by the Judge who had decided the case. Hence when permission for appeal under Cl. 10 is refused the petition cannot be treated as an application for review. AIR (Vol 22) 1935 Lah 330 (1) : 16 Lah 602 : 37 PLR 708 : 157 Ind Cas 23 (DB).

——O. 47, R. 1 — Quaere — Whether an application for review should be accompanied by a copy of the judgment or order sought to be reviewed. AIR (Vol 22) 1935 Pat 486: 16 PLT 595: 1 BR 829: 157 Ind Cas 965.

——O. 47, R. 1 — Court cancelling order duly signed without notice to parties — What the Court had done held, was to review its own order — Proper procedure to be followed was one laid down in O. 47, R. 1 — The order being in contravention of O. 20, R. 3, held, was without jurisdiction. AIR (Vol 20) 1933 Pat 643 (2): 146 Ind Cas 458.

——O. 47, R. 1 — Dismissal of petition at second stage — Appeal against original order, whether becomes incompetent.

There are three stages in a proceeding for review and though, in one aspect, the result is the same whether the rule is discharged or on the re-hearing the original decree be repeated, in law there is a material difference: for in the latter case, the whole matter having been re-opened there is a fresh decree: in the former case, the parties are relegated to and still rest on the old decree.

An order was made dismissing a petition on January 10, 1928. Against that order an appeal was filed. An application for review was also made. On that review application notice was issued to the respondent and the Court passed an order on January 18, 1929, rejecting the petition. The appeal was thereupon rejected on the ground that inasmuch as the whole matter had been re-opened in the lower Court, there was a fresh decree and the appeal against the order of December 10, was incompetent:

Held, that the proceedings had not passed the second stage of review and the appeal was not incompetent. AIR (Vol 19) 1932 Mad 669: 36 MLW 242: 63 MLJ 357: 55 Mad 871: (1932) MWN 1124: 139 Ind Cas 436 (2).

——O. 47, R. 1 — Notice.

Under O. 47 the Court should re-hear the case on the merits after the review is granted. But where the review relates to the connection of an error apparent on the face of the decree all that the Court has to do is to decide after notice to the party whether or not to make correction. (1930) 1930 MWN 166.

——O. 47, R. 1 — A Judge is not justified in passing an order reviewing his prior order without giving notice to the person affected by the order. (1929) 116 Ind Cas 714 (Lah) (DB).

——O. 47, R. 1 — Who can apply — Director of a company.

A director of a company is an "aggrieved person" within the meaning of O. 47, R. 1, and can apply for review of an order made in a proceeding against the company if the said company was not represented by any of its directors or secretary in that proceeding. The fact that he was not a party to the original proceedings does not preclude him from filing an application for review. AIR (Vol 16) 1929 Nag 185: 116 Ind Cas 427 (DB).

——O. 47, R. 1 — The Court may, at its discretion, direct the whole case be re-opened if it is necessary in the interests of justice that such a course should be adopted; but there is no authority for the proposition that whenever a review is granted on a particular point the whole case must be re-opened. AIR (Vol 14) 1927 Cal 21: 53 Cal 856: 31 CWN 1035: 97 Ind Cas 731 (DB).

——O. 47, R. 1 — Refusal to grant — Review Court of appeal.

The appeal is not limited to the grounds set out in O. 47, R. 7. O. 47, R. 7 expressly provides that when an application for review is granted the party dissatisfied with the order may appeal against that order or may take the same objection in an appeal filed against the final decree. R. 7 read with Rr. 1 and 4 shows that it is open to the appellate Court to examine the ground upon which the review was admitted and if the ground for the review does not come within the words of R. 1, then the appellate Court is competent to hold that the review was improperly admitted. There can be no rehearing for the purpose of seeing whether a different conclusion on the merits should be adopted. AIR (Vol 13) 1926 Cal 217: 87 Ind Cas 770: 30 CWN 584 (DB).

——O. 47, R. 1 — If Court has jurisdiction to extend time upon an application for review there is no reason why his order should be disturbed because he made the order upon an application for extension and not upon an application for review. AIR (Vol 12) 1925 Pat 452: 90 Ind Cas 79: 1925 PHCC 151.

——O. 47, R. 1 — Probate proceedings.

The right of review is an entirely different right from that given by S. 234 of the Succession Act or S. 50 of the Probate and Administration Act. The powers of review given by the Code of Civil Procedure can be exercised by a Court which has been dealing with a contentious matter in proceedings for the grant of letters of administration. AIR (Vol 12) 1925 Rang 314: 91 Ind Cas 509: 3 Rang 261 (DB).

——O. 47, R. 1 — Form.

Where an order under S. 41, Presidency Insolvency Act, was made by the Registrar in Insolvency,

an application for review of his order must be made to the Registrar and not to the Court. AIR (Vol 11) 1924 Cal 83: 80 Ind Cas 840: 27 CWN 916.

——O. 47, R. 1 — Conversion of petition to one under O. 9, R. 13.

A successor-in-office has jurisdiction to change the registration of an application from one under O. 47 R. 1 to one under O. 9, R. 13 when the application is made under both the provisions, registration being purely a ministerial act. 62 Ind Cas 927: 1922 PHCC 76: 3 PLT 29: 1 Pat 48: AIR (Vol 9) 1922 Pat 376 (DB).

——O. 47, R. 1 — When a Judge other than one who passed the order can review.

The object of allowing a review is not to allow a further appeal, but to provide a means whereby the Judge who has passed an order may rectify a mistake that he has made. If the review comes before another Judge, the mere fact that that second Judge might disagree with his predecessor does not appear to be sufficient reason for granting a review. In order to succeed in review before a Judge other than the Judge who passed the order sought to be reviewed, it is necessary to satisfy the Court not only that the order complained of was wrong, but that there is good reason for supposing that the Judge who passed the order complained of could have been persuaded that it was wrong. AIR (Vol 9) 1922 UB 16: 4 UBR 27: 64 Ind Cas 895.

——O. 47, R. 1 — Setting aside decree against all.

Where the applicant had left India to serve under war conditions and immediately after his return applied to set aside a compromise decree passed against him.

Held, the decree could be set aside either under the latter part of S. 10 of the Indian Soldiers (Litigation) Act or under the general powers of review contained in O. 47, R. 1, C. P. Code, and where the decree or order is of such a nature that it cannot be set aside as against such a soldier only it may be set aside as against all or any of the parties against whom it is made. AIR (Vol 8) 1921 Cal 393: 27 CWN 193: 75 Ind Cas 262 (DB).

——O. 47, R. 1 (1) (c) — Other sufficient reason — Review in part.

An application for review of judgment can be granted in part; but when a decree is sought to be set aside on the ground that it was made in favour of a person who at that time had no subsisting title, the entire decree should be set aside. An order passed under an erroneously assumed state of circumstances, is a sufficient ground for review. In dealing with a review application, the Court is not restricted to the grounds mentioned in the application but it may enlarge those grounds even on an oral application. (1912) 15 CLJ 339: 11 Ind Cas 102 (DB).

——O. 47, Rr. 1, 4; S. 120 (2) (Ss. 623, 626, 639, Old Code) — Review of judgment — Order dismissing the rule granted — Appeal — Limitation.

An application for review commences ordinarily with an ex parte application under S. 623 of the Code. The Court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may neither be admitted nor rejected, and it is obvious that the bearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged, then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached; the case is re-heard on the merits and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the rule be discharged, or on the re-hearing the original decree is repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to and still rest on the old decree. If the rejection is in the second stage, there can be no appeal; if the rejection is in the third stage, there is a fresh decree and the time for appeal from that decree runs anew from the date of the rejection. (1905) 7 Bom LR 664: 30 B 56 (60) (DB).

——O. 47, R. 1 — Jurisdiction to go behind its former order.

Where the lower appellate Court, having expressed the opinion that the mortgagor was entitled to the interest for the period of his dispossession, referred the question as to the length of that period to the Court of first instance for determinaion, and subsequently dismissed the claim: — Held that the course adopted was justified, and assuming it was not, the whole case being before the High Court, the respondents were entitled to support the judgment on the ground of acquiescence. (1909) 6 ALJ 247 (250): 31 All 325: 2 Ind Cas 221.

21. Revision.

——O. 47, R. 1 — Lower Court granting review even though there was no sufficient ground for doing so.

Where the Court below has interfered when there was no sufficient reason for granting a review under O. 47, R. 1, it is certainly a case in which a question of jurisdiction is incidentally involved and if that question of jurisdiction is not covered by the provisions of O. 47, R. 7, then there is nothing wrong in the aggrieved party coming to High Court in revision under S. 115: AIR (Vol 27) 1940 Mad 203: 50 MLW 903.

——O. 47, R. 1 — Grounds for — Want of jurisdiction.

An appeal from an order granting an application for review can only be made on the grounds specified in O. 47, R. 7. But where the Court has acted wholly without jurisdiction, the High Court may interfere in revision. AIR (Vol 20) 1933 Lah 169: 34 PLR 88: 141 Ind Cas 188.

——O. 47, R. 1 — When the lower appellate Court has postponed the consideration of an application for review, there is no appeal as the order cannot be construed as a final order. Again such an order is not included in the list of appealable orders in O. 47, R. 1. Hence the only remedy is revision under S. 115. AIR (Vol 16) 1929 All 375: 119 Ind Cas 561.

——O. 47, R. 1 — Although the reversing Court's power is much wider under S. 25, Small Cause Courts Act, than under S. 115, C. P. Code every order in which, in granting a review, a Court fails to observe the terms of O 47, should not be interfered with in revision. AIR (Vol 15) 1928 Mad 56: 104 Ind Cas 746.

——O. 47, R. 1 — Enquiry as to due diligence.

The word "Evidence" as used in O. 47, R 1 is not confined only to "documentary" evidence but includes "oral" evidence. Whether or not the applicant could not with due diligence have discovered

the evidence at the stage of the original trial must depend upon facts to be proved and the Court should hold an enquiry into the facts relevant to the recovery. Failure to make such an enquiry amounts to a material irregularity justifying interference in revision. AIR (Vol 15) 1928 Nag 279: 108 Ind Cas 439.

——O. 47, R. 1 — New evidence.

A Judge is not likely to entertain a review of his own judgment unless he is prima facie satisfied that the new matter is important, and simply because the Court has not said in so many words that the matter is important, interference in revision is not competent. AIR (Vol 14) 1927 Mad 641: 103 Ind Cas 377. 39 MLT 11: 26 MLW 277: 50 Mad 891: 1927 MWN 806: 52 MLJ 682 (DB).

——O. 47, R. 1 — The order rejecting the application for review after hearing parties and deciding that the case is not fit for reviewing does not attract the application of S. 115. AIR (Vol 13) 1926 Cal 773: 53 Cal 679: 30 CWN 570: 96 Ind Cas 705 (DB).

——O. 47, R. 1 — Where the suit was dismissed on a preliminary point and the plaintiff who could have applied under O. 47, R. 1 and got the remedy but applied under S. 151 and the dismissal was set aside.

Held, that there was no ground for interference in revision. AIR (Vol 12) 1925 Pat 36: 84 Ind Cas 320: 6 PLT 309: 3 Pat 778 (DB).

——O. 47, R. 1 (1) (c) and O. 21, R. 96 — Grounds for review — Delivery of possession in execution — Review of order.

A Court has power to review its own order erroneously made delivering possession and the High Court will not interfere in revision. AIR (Vol 5) 1918 Pat 395: 3 Pat LJ 571: 48 Ind Cas 129 (DB).

22. Second appeal.

——O. 47, R. 1 — Review — Production of evidence which might have been produced earlier.

Where a decision in a second appeal is sought to be reviewed on the ground of the discovery of a will, the review cannot be granted, if it is found that the applicant knew of the will long before and could have filed it along with the second appeal or at least before its hearing. 1948 RD 188: 1948 AWR (Rev) 137.

——O. 47, R. 1 — Partition suit — Plaintiff awarded costs by preliminary decree which becoming final not having been appealed against — Appeal against final decree to District Judge dismissed with costs — Second appeal also dismissed — Application to District Judge for review not only of decree for costs passed against him in appeal but also of decree for costs embodied in preliminary decree.

In a suit for partition, the plaintiff by the preliminary decree was allowed his costs. The defendant appealed against the final decree which was subsequently passed to the District Judge. The appeal was dismissed with costs. The defendant went in second appeal to the High Court which summarily dismissed the appeal. The defendant subsequently filed, in the Court of the District Judge an application for review not only of the decree for costs passed by him in appeal but also of the decree for costs embodied in the preliminary decree. The application was allowed by the successor of the District Judge who had passed the decree:

Held, that no review could lie to the District Judge in respect of the costs awarded by the preliminary decree which not having been appealed against had become final. The application should have been made before the Court which passed the decree:

Held, also that as regards the costs awarded by the appellate decree passed by the District Judge, the application was not maintainable, since a second appeal was competent and had been preferred. AIR (Vol 29) 1942 Pat 76 : 8 BR 463 : 198 Ind Cas 743 (DB).

——O. 47, R. 1 — Discovery of new evidence since decision.

No application for review is maintainable against a judgment delivered in second appeal on the ground that the applicant has since the decision of the appeal discovered new evidence. AIR (Vol 27) 1940 Pat 197: 6 BR 841: 189 Ind Cas 646.

——O. 47, R. 1 — Dismissal of suit by Munsif—Appeal and second appeal—Dismissal of second appeal by the High Court:

Held, that the matter having been concluded by the decree of the High Court, the Munsif had no jurisdiction to re-open the matter by reviewing his original decree. If he did so, he acted with material irregularity justifying revision by the High Court AIR (V 21) 1934 All 250 : 1934 ALR (HC) 395 : 148 Ind Cas 496.

——O. 47, R. 1 — Second appellate decree.

Discovery of new and important evidence on a question of fact though a good ground for review of the decree of the first appellate Court is no ground for review of the decree of the second appellate Court, the finding of fact of the lower Court being final and binding on second appellate Court (Case law referred) AIR (Vol 16) 1929 Bom 225: 118 Ind Cas 255: 31 Bom LR 436.

——O. 47, R 1 — The High Court has no authority merely on the ground of alleged discovery of new important evidence to review an order dismissing an application for the admission of the second appeal under O. 41, R. 11 of the Code of Civil Procedure, AIR (Vol 9) 1922 Cal 165: 70 Ind Cas 408: 27 CWN 918: 36 CLJ 76. (DB).

——O. 47, R. 1 — Second appeal decided of facts—Application for review — Whether entertainable.

Held that the High Court in second appeal cannot entertain an application for review of judgment sought on the ground that since the disposal of the appeal, documentary evidence has been discovered which, if sufficiently proved would have led the Court below to come to a different finding. If the fact of the discovery of the new evidence is brought to the notice of High Court at the hearing of the appeal, it cannot then consider the weight of such evidence nor can it remand the case to the lower appellate Court with a view to the consideration of such evidence by the Court. It can however allow the appellant to withdraw the appeal with the view to apply to the lower appellate Court for review of judgment on the ground of the discovery of fresh evidence. (1909) 6. ALJ 979: 32 A 71: 4 Ind Cas 809 (810) (DB).

23. Small cause case.

——O. 47, R .1 — Decree of Small Cause Court — Revision to High Court dismissed — Application for review of judgment to lower Court.

A decree of a Small Cause Court is final and not appealable and although in certain circumstances it may be set aside or modified by a High Court in virtue of its revisional powers, it must remain a

decree of the Court which originally passed it when the High Court declines to interfere with it on the revision side and the lower Court accordingly is competent to entertain an application for review of the judgment. AIR (V 22) 1935 All 435 : (1935) ALJ 436 : 1935 AWR (HC) 326 : 57 All 781 : 157 Ind Cas 1084.

——O. 47, R. 1 — No review lies from the decision of a Presidency Small Cause Court in proceedings under Chapter VII of the Presidency Small Causes Courts Act. AIR (Vol 8) 1921 Bom 180: 61 Ind Cas 507 : 45 Bom 972 : 23 Bom LR 383 (DB).

——O. 47, R. 2.

——O. 47, R. 2 — Review application before successor — Judge — When maintainable and on what grounds — Non-consideration of a document — If a ground on which successor Judge can order review.

Rule 2 of O. 47, C. P. Code, provides that if an application for review is filed on the ground of discovery of some "new and important matter or evidence as is referred to in R. 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree" then the application may be filed before the successor of the Judge who had passed the previous order; but if the application is not filed on either of these two grounds, then the application can be dealt with by the successor Judge only if the application was filed before the very Judge who passed the decree or order and notice was issued by him. Hence, where the ground in such an application is the non-consideration of a particular document, it is neither a clerical nor arithmetical mistake or an error apparent on the face of the decree and the successor Judge can have no jurisdiction to entertain it. AIR (Vol 37) 1950 All 160 : 1949 ALJ 530 : 1950 AWR 14 (DB).

——O. 47, R. 2 — Power of review — Chief Commissioner exercising functions of Durbar under Himachal Pradesh Administration Order — If successor in office of His Highness the Ruler.

The Chief Commissioner exercising the functions of the Darbar under the Himachal Pradesh Administration Order is, in the eye of law, a successor in office of His Highness the Ruler. Therefore, under O. 47, R. 2, C. P. Code, he cannot entertain a review application directed against a judgment and decree passed by His Highness as a Judge other than a High Court Judge, if the review is sought upon grounds other than those mentioned therein. AIR (Vol 36) 1949 HP 6.

——O. 47, R. 2 — Application for review — Succeeding Judge entertaining — Objection not raised in lower Court — Interference in appeal.

Under O. 47, R. 2 of the C. P. Code an application for review should be made only to the Judge who passed the decree and cannot be made to his successor in office. Where, however, such an application is entertained by the succeeding Judge without any objection being raised by the other party and the case is dealt with on the merits, it is not open to that party in appeal to contest the validity of the order of the lower Court on the ground that the application should not have been entertained by the succeeding Judge. AIR (Vol 36) 1949 Mad 121 : (1947) 2 MLJ 585 : 1948 MWN 29 (DB).

——O. 47, R. 2 — Successor of Judge who passed order, if can grant review.

The application for review by the decree-holder on the ground that there is a mistake of law on the face of the record cannot be entertained by the successor of the Judge who made the order. AIR (Vol 24) 1937 Cal 425 : 41 CWN 893 : 67 CLJ 129 : 172 Ind Cas 682 (DB).

——O. 47, R. 2 — "Apparent on the face of the decree", meaning of — Judge awarding interest though not claimed by defendant — Review application before successor of the Judge who passed the decree.

The words in O. 47, R. 2, "apparent on the face of the decree", mean that an application for review based on an error apparent on the face of the decree can be presented to the successor of the Judge who passed the decree but one based on an error apparent on the face of the record, but not on the face of the decree, can only be made to the Judge who passed the decree.

Where it was an error on the part of the Judge to allow interest on a certain sum without its being claimed by the defendants and this error would appear from a perusal of the written statement of the defendants:

Held, that this was not an error which would be said to be apparent on the face of the decree. AIR (Vol 24) 1937 Oudh 267 : 1937 OWN (CC) 80 : 13 Luck 112 : 166 Ind Cas 459 (2) (DB).

——O. 47, R. 2 — Review after Judge's death — Application frivolous.

Where the application for review is completely frivolous on merits and upon a ground other than discovery of new important matter etc., there can be no review of the order of a deceased Judge of a Court other than a High Court as the application is to be made to the Judge who passed the decree. (1929) 120 Ind Cas 386 : 6 OWN 707 (DB).

——O. 47, R. 2 — Change of grounds.

There is authority for the proposition that a Court determining a review is not necessarily confined to the grounds upon which the review is being granted. It is only reasonable that considerable latitude should be allowed in the matter, but where a review is granted upon one ground, and then has been argued upon a totally distinct and unconnected ground in a case where the actual officer who heard the review would not have authority to admit the review upon the ground upon which it was argued and decided, he being a successor in office to the Judge who admitted the application for review.

Held, that the order on review is without jurisdiction. AIR (Vol 14) 1927 Oudh 131 : 13 OLJ 544 : 100 Ind Cas 425 (DB).

——O. 47, R. 2 — Accidental slip.

A review petition on the ground of an accidental slip is entertainable before the successor of the Judge who disposed of the case. AIR (Vol 13) 1926 Mad 1083 : 24 MLW 447 : 97 Ind Cas 545.

——O. 47, R. 2 — The order of the trial Judge who purports to act on the ground of "accidental slip" does not contravene the provisions of O. 47, R. 2 and therefore the order is not revisable on that ground. AIR (Vol 13) 1926 Mad 1083 : 24 MLW 447 : 97 Ind Cas 545.

——O. 47, R. 2 — Transfer of Judge.

Rule 2 declares that in cases other than those excepted therein an application for review can only be made to the Judge who is not only sitting at the same Court, but is further the individual Judge who passed the decree. If in such cases the individual Judge is transferred to another Court he has no jurisdiction to entertain the review application. AIR (Vol 12) 1925 All 804 : 47 All 751 : 23 ALJ 674 : 6 LRA Civ 372 : 89 Ind Cas 295 (DB).

——O. 47, R. 2 — Applicability.

Where the Judge who entertained the application for review is not the same who passed the order to be reviewed O. 47, R. 2 applies. AIR (Vol 11) 1924 Pat 809 : 75 Ind Cas 91 (DB).

——O. 47, R. 2 — "Judge who passed the decree", — Review by Judge who signed decree — Validity.

A Judge who merely signed the decree but did not write or deliver the judgment in the case cannot entertain a review of a decree on any ground other than new important matter of evidence or clerical or arithmetical mistake, though the Judge deciding the case had granted an application for review which was set aside on the ground of want of notice to the other side. AIR (Vol 4) 1917 Cal 673 : 20 CWN 391 : 32 Ind Cas 101 (DB).

——O. 47, R. 2 — Review, application — Entertained by the Judge who passed the decree, but disposed of by his successor.

An application for review made before the Judge who passed the decree could be disposed of by the successor. AIR (Vol 1) 1914 All 57 : 23 Ind Cas 394.

——O. 47, Rr. 2 and 7 — Application for review — Receipt by officer in charge of duties of Judge — Issue of notice — Review by successor in office — Appeal from order granting review.

Held the order of the successor of the District Judge granting a review was bad, being in contravention of O. 47, R. 2, C. P. C. The policy of the legislature was that the application for review should be received and considered by the Judge who made the original order and it was never intended that the application should be considered by his successor or by some person in charge of the duties of his office. An appeal under O. 47, R. 7 from an order granting an application for review is not controlled by S. 104, sub-s. (2), which provides that no appeal shall lie from any order passed in appeal under that section; and even if the final decree or order is one against which no appeal lies, an appeal from the order granting an application for review can be preferred at once. (1913) 17 CWN 403 : 16 Ind Cas 203 (DB).

Also AIR (Vol 1) 1914 Cal 146 : 18 CWN 22 : 19 CLJ 225 : 20 Ind Cas 670 (DB).

——O. 47, Rr. 2, 3, 4, S. 114 — (Ss. 623, 624, 626, old Code) — Review of judgment application for — Admission of review — Admission of truth of plaintiff's claim by defendant, evidence of — Appeal against order admitting review, if lies — Code of Civil Procedure (Act XIV of 1882), Ss. 623, 624, 626 — Court, jurisdiction of, to admit evidence after decree — evidence to matter, if should be existing at the time of the trial but was not precurable — "Discovery of new or important matter" meaning of — "Any other sufficient reason", meaning and scope of.

No appeal lies against an order which is not passed in contravention of the provisions of S. 624 or S. 626 of the Code of Civil Procedure Act XIV of 1882. Section 623 of the Code of 1882 in dealing with the discovery of new and important matter or evidence clearly indicates that that matter or evidence must be in existence at the time of the decree. The words "for any other sufficient reason" in S. 623 do not apply and cannot apply to something which came into existence after the decree was made and the section does not authorise the review of a decree which was made on the ground on the happening of some subsequent event, and a Court commits a material irregularity in admitting a review on such ground. (1910) 11 CLJ 26 : 14 CWN 244 : 5 Ind Cas 182 (183) (DB).

——O. 47, R. 3.

——O. 47, R. 3; O. 9, R. 9 — Application for review — Copy of order to be reviewed or affidavit — Plaintiff late owing to break down of lorry on way — If sufficient reason for non-appearance.

Order 47, R. 3, is to the effect that the provisions as to the "form of preferring appeals" shall apply mutatis mutandis to applications to review. Under this rule it is not necessary, nor is it the practice of the Courts in the Punjab to require a petitioner for review to file a copy of the order sought to be reviewed, as the application is made in the same Court and the previous order is on its own records. Nor does the law require than an application for review should invariably be accompanied by an affidavit.

The plaintiff was absent when the case was called on the date of the hearing and it was dismissed. The plaintiff came after half an hour being late due to the breakdown of the lorry on the way:

Held, that on facts there was sufficient reason for non-appearance under O. 9, R. 9. AIR (Vol 25) 1938 Lah 295 : 39 PLR 1046 : 175 Ind Cas 42 (DB).

——O. 47, R. 3 — Revision.

When in revision against an order granting a review of judgment it was objected that the review application was not accompanied by a copy of the decree and the court-fee paid was insufficient.

Held, that after the whole matter had been gone into and finally decided the High Court would not treat the proceedings as a nullity in revision on either of the grounds. AIR (Vol 12) 1925 All 777 : 6 LRA Civ 424 : 93 Ind Cas 996 (DB).

——O. 47, R. 3 — Appeal.

The marginal note to O. 47, R. 3 describes the rule as one really relating to the form of application and the rule itself says that the provisions of the appellate Court rules shall apply to forms in applications for review. That does not extend the right to the party who goes for a review and give him a right of appeal simply because under R. 1(t), O. 43 an order under R. 19 of O. 41, i.e., an ordinary appellate order, is made appealable. AIR (Vol 12) 1925 All 57: 47 All 1: 5 LRA Civ 608: 80 Ind Cas 649 (DB).

——O. 47, R. 4.

See also Civil P. C., O. 47, R. 7.

1. **Appeal.**
2. **Applicability and scope.**
3. **"Discovery of new matter or evidence."**
4. **Grant of application.**
5. **Limitation.**
6. **Notice.**
7. **Rejection.**
8. **Revision.**
9. **"Strict proof".**

1. Appeal.

——O. 47, Rr. 4, 7(1) — Order granting review on ground of error apparent on the face of the record — Appealability of.

No appeal lies from an order granting review under O. 47, R. 4, except on grounds mentioned in O. 47, R. 7(1). Where the ground for granting review is an error apparent on the face of the record, no appeal lies from the order. AIR (Vol 21) 1934 Lah 575 : 35 PLR 467 : 155 Ind Cas 130.

——O. 47, R. 4 — If an application for review is successful to however slight an extent it may be, the modified decree is the final decree for the purposes of an appeal and the fact that no decree was drawn up or that a decree was drawn up to the extent of the modification does not affect the question. Hence an appeal against a decree anterior to review, filed pending the review, without any appeal from the amended decree is not competent. AIR (V 18) 1931 Cal 323 : 34 CWN 1002 : 131 Ind Cas 258 (DB).

——O. 47, R. 4 — The effect of allowing an application for review is to vacate the decree originally passed. The decree that is subsequently made on the review, even if it does not modify the decree originally passed, is a new decree superseding the original one and therefore no appeal can lie from the decree originally passed. AIR (Vol 15) 1928 Cal 418 : 107 Ind Cas 751.

——O. 47, R. 4 — Where the order of the first Court granting a review did not indicate at all that it

considered whether the fresh matters are important, i.e., have really a relevant bearing on the case, nor had the lower appellate Court touched on this point, the petition was ordered to be reheard from this point of view. AIR (Vol 14) 1927 Mad 826 : 39 MLT 119 : 104 Ind Cas 290.

——O. 47, R. 4 — Appeal dismissed prior to admission.

Where an appeal was at first summarily dismissed under O. 41, rule 11, C. P. Code, and then on an application for review made by the appellant the same Bench cancelled that order dismissing the appeal summarily and directed that the appeal should be heard.

Held, that although this order was passed ex parte it was valid. 42 Cal 433, Dissented from. 84 Ind Cas 147 : 51 Cal 943 : AIR (V 12) 1925 Cal 114 (DB).

——O. 47, R. 4 — An appeal allowed under O. 43, R. 1(w) is only an appeal from the order granting the application for review and not an appeal from the final decree passed in the suit and therefore it would be absurd to allow a second appeal on the merits against a decree passed in a Small Cause suit of the value of less than Rs. 500, merely because the decree is one which has been passed in review. 60 Ind Cas 259 : 3 LLJ 166 : AIR (Vol 8) 1921 Lah 124.

——O. 47, R. 4 — The right of appeal under R. 1 (w), is subject to conditions laid down by O. 47, R. 7, and therefore an appeal, not coming under this rule, cannot be maintained. 42 All 626 : 18 ALJ 838 : 60 Ind Cas 81 : 2 UPLR (All) 283 : AIR (Vol 7) 1920 All 112 (DB).

——O. 47, R. 4 — Practice.

Where the Court of first instance grants an application for review on the ground of discovery of new and important evidence not within the knowledge or power of the applicant at the time of the trial, the appellate court will not generally consider the evidence afresh and disturb the conclusion of the lower Court. 64 Ind Cas 219: AIR (V 7) 1920 Cal 920 (DB).

——O. 47, R. 4 (2) — Review — Grounds of — Reasons — Appellate Court not to criticize — C.P. Code, O. 43, R. 1 (w).

The legislature in enacting O. 47, R. 4 (2) of the new Code and omitting the provision in the Old Code concerning the record of reasons for granting review intended that the grounds which satisfied a Court that its own judgment may be reconsidered should not be criticized by Court of appeal. The right of appeal under O. 43, R. 1 (w) against an order granting a review is controlled by O. 47, R. 7 (1). 31 MLJ 509 : (1916) 2 MWN 278 : 4 LW 408 : 36 Ind Cas 437 : AIR (V 4) 1917 Mad 965 (DB).

——O. 47, R. 4 (2) and O. 41, R. 11 — High Court — Review — Division Bench.

An order of a Division Bench of the High Court reviving an appeal dismissed under O. 41, R. 11 C. P. C. cannot be questioned by the Bench hearing the appeal. 22 CLJ 95 : 25 Ind Cas 880 : AIR (Vol 2) 1915 Cal 68 (DB).

——O. 47, Rr. 4 and 7 — There are three distinct stages through which an application for review has to pass. If the application is granted in the second stage, the decree already passed is set aside and the case is reheard and a fresh judgment and decree are passed and from the latter an appeal lies. If the application is rejected, the original decree subsists & an appeal lies from it. (1913) 20 Ind Cas 647 (All) (DB).

2. Applicability and scope.

——O. 47, R. 4 — Sub-rule (1) of R. 4, O. 47, Civil P. C. cannot be interpreted to mean that its provision is contravened if the Court grants the application though there is not sufficient ground for a review. Whether there is no such ground must appear to the Court which hears the application. If the Court considers that the application should be granted, the case falls under Sub-rule 2. AIR (Vol 27) 1940 Pat 7 : 18 Pat 777 : 20 PLT 859 : 6 BR 248 : 185 Ind Cas 769 (DB).

——O. 47, Rr. 4, 7, 8, S. 152 — Review application — Three stages — Mere correcting of error arising from accidental slip — Fresh decree, if brought into existence, when Court purports to act under S. 152 — Rejection of review petition in second stage.

There are three stages of a review application. The first is the ex parte stage when the Court may either reject the application at once or may grant a rule calling the other side to show cause why review should not be granted. In the second stage the rule may either be admitted or rejected. If the rule is discharged, the case ends then and there; if on the other hand the rule is made absolute, then the third stage is reached.

The case is then heard on the merits and may result in a repetition of the former decree or in some variation of it. In either case, the whole matter having been re-opend, there is a fresh decree. Where the Court refuses to grant review, the order must be deemed as one passed in the second and not in third stage. This being so there is no reason for holding that a fresh decree is passed superseding the original one.

If the rule is discharged in the second stage, the parties are relegated to, and still rest on the old decree. Similarly the correcting of an error arising from an accidental slip does not bring into existence a fresh decree, more so when the Court rectifying the error purports to act under S. 152 and corrects the error without issuing notice to the party who is likely to be affected prejudicially by its order :

Heid, on facts that the mere rectification of the error did not bring into existence a fresh decree superseding the old one. The order rejecting the application had been passed in the second stage and not in the third stage and that being so, no fresh decree could be said to have been passed superseding the old one and that second appeal by plaintiff from the decree could not be rejected on preliminary ground that it had been superseded by a fresh decree. AIR (Vol 25) 1938 Mad 573 : (1938) MWN 250 : 47 MLW 474 : (1938) 1 MLJ 796 : 182 Ind Cas 251 (DB).

——O. 47, R. 4 — Subsequent prayer for improvements.

Where a judgment fixed the price of redemption of property held by the applicant at a certain sum but an application for review was presented for the addition to that sum of the price of improvements made in the property by the applicant, who was a purchaser of the property without notice of the mortgage.

Held, that the way to get it was not by asking for a review of the appellate judgment in a case in which not a word was said about the matter in either Court. The proper course was to make a demand on the opposite party for one of the alternatives mentioned in S. 51, T. P. Act and if he refused, the remand would be enforced by a suit. 109 Ind Cas 95 : AIR (V 15) 1928 Nag 144 (DB).

——O. 47, R. 4 — When can be ordered — O. 41, R. 27.

It is open to an appellate Court to allow additional evidence to be adduced even at the instance of a party and an application for giving additional evidence can be heard and disposed of by the Appellate Court even before the appeal is heard and disposed of. O. 41, R. 27 and O. 47, R. 4 do not exclude the effect of each other and a party

who is entitled to let in additional evidence when the case is an appellate stage is not compelled to restrict himself to an application for review and an Appellate Court is not confined to merely the power of allowing the introduction of additional evidence in cases in which the Court finding a lacuna, of its own motion desires additional evidence. 85 Ind Cas 385 : 20 MLW 840 : AIR (Vol 12) 1925 Mad 181 : 48 MLJ 32.

——O. 47, R. 4 (1) — Discretion of Court,

If the Court thinks that an application for review should be granted, the rule does not stand in its way. 115 P R 1916 : 34 Ind Cas 769 : A I R (Vol 4) 1917 Lah 379 (DB).

——O. 47, R. 4 (1).

The discretion of the Court in saying what constitutes good and sufficient reason is unlimited. (1911) 9 Ind Cas 532 (Cal).

3. "Discovery of new matter or evidence"

——O. 47, R. 4 — Before granting review on the ground of discovery of new evidence, the Court is bound to consider reasons for the failure to produce it before the order is passed. 104 Ind Cas 746 : AIR (Vol 15) 1928 Mad 56.

——O. 47, R. 4 — Remand.

An appellate Court granted an application for review on the ground of the discovery of certain old sale deed relating to the land in dispute. But the Court did not decide whether the sale deed exactly referred to the land in dispute, it considered prima facie that it did appear to refer to the land but sent back the case for decision of the issue on the merits after allowing the opposite side to produce rebutting evidence.

Held, that under the circumstances this was a proper order to pass. 88 Ind Cas 653 : 47 All 881 : 23 ALJ 534 : 6 LRA Civ. 454 : AIR (Vol 12) 1925 All 552 (DB).

——O. 47, R. 4 (2) (b) — Discovery of document — Not produced at trial formerly.

When a party seeks a review of judgment saying that a document not produced at the trial was subsequently discovered, he must under Order 47 strictly show that the document was not available at the time of the trial, or that no diligence on his part was wanting to produce the document. 37 Ind Cas 399 : AIR (Vol 4) 1917 All 107.

4. Grant of application.

——O. 47, R. 4 — Effect of order granting application.

The granting of an application for review merely amounts to a decision to re-hear the case in which the decree or order (in respect of which a review is claimed) was passed. The Judge hearing the review is not entitled to do anything in the first stage beyond passing an order granting the review and giving his reasons for so doing.

If the review is granted, the Judge who has allowed the review becomes vested with jurisdiction to pass any order which the original Judge could have passed. It may be sufficient for him merely to alter the order of original Judge or it may be necessary for him to take some intermediate step such as an order in remand or referring an issue. 74 Ind Cas 214 : 9 OLJ 531 : 26 OC 24 : AIR (Vol 10) 1923 Oudh 93 (DB).

5. Limitation.

——O. 47, R 4 — The words "decision passed on review" in Art. 182, Lim. Act mean decision passed in review proceedings under O. 47, R. 4 and orders made in appeal against such orders. Whatever such a decision is, it gives a fresh starting point of limitation. AIR (Vol 23) 1936 Bom. 162 : 38 Bom. LR 215 : 162 Ind Cas 223.

——O. 47, R. 4 (2) (b) — Strict proof means legal conviction of the Court not necessarily by evidence. An application for review can be made even after 90 days if it is shown that new evidence has come to the knowledge of the plaintiff, which was not possible at the time of judgment. 27 CLJ 540: 35 Ind Cas 651 : AIR (Vol 5) 1918 Cal. 888 (DB).

6. Notice.

——O. 47, R. 4 (2), proviso — Notice to all judgment-debtors — Necessity for.

O. 47, R. 4 (2), proviso, C. P. Code, is a complete bar to an application for review being granted without previous notice to the opposite party. A Court has, therefore, no power to review its order dismissing an execution case without notice to all the judgment-debtors. The fact that some of them were aware of the application for review is not enough. AIR (Vol 36) 1949 Pat. 117. (DB).

——O. 47, R. 4(2) (a) — Pro forma defendant not taking interest in case — Proceeding against him through out ex parte—One of the plaintiffs guarding his interest — Notice to him of review application, if necessary.

Some of the reversioners instituted a suit to set aside an alienation. N, one of the reversioners, was made pro forma defendant. The proceedings against N were throughout ex parte. He took no interest in the litigation but the suit was ultimately decreed. One of the plaintiffs reversioners sufficiently guarded his interests. But on review it was dismissed. There was an appeal by the plaintiff against granting review. N was joined as appellant. It was contended by N that before granting review a notice to him was necessary :

Held, that under the circumstances of the case, N could not come within the definition of "opposite party" within the meaning of O. 47, R. 4 (2) (a), and, therefore, no notice to him was necessary. AIR (Vol 25) 1938 Lah 22 : 177 Ind Cas 732.

——O. 47, R 4 — Application for setting aside an order allowing the review application filed by the opposite party must be dismissed where it was found that the applicants deliberately avoided service of the notice served upon them in respect of the hearing of the application for review filed by the opposite party. 1937 OWN 497.

——O. 47, R. 4 — Under O. 47, R. 4, notice to the other side is imperative, and an order without such notice is illegal and not merely an irregular one and a party is not bound by the illegal order. Where an execution petition was dismissed for non-appearance of the decree-holder's pleader and on application it was restored to file without notice to the opposite party.

Held, that the order restoring the petition could not be considered to be a final order and was open to the objection of the other side on any ground it was open to it if notice had been issued. 97 Ind Cas 1008 : 50 Mad 67 : 1926 MWN 890 : 26 MLW 878 : AIR (Vol 13) 1926 Mad 980 : 51 MLJ 219 (DB).

——O. 47, R. 4 — Defendant having ample opportunities.

Where the defendant is given every opportunity to raise any objection that he could raise and he is in no way, therefore, prejudiced by reason of the fact that no notice was issued to him the order granting review should not be set aside by the Appellate Court. 75 Ind Cas 656 : AIR (Vol 10) 1923 Lah 303.

——O. 47, R. 4 — No order for review can be passed without notice to the party concerned. The rule is imperative. 70 Ind Cas 144 : 11 LBR 394 : 1 Bur LJ 200 : AIR (Vol 10) 1923 Rang. 49.

——O. 47, R. 4 — An appeal rejected, for non-payment of deficient Court-fee may be reviewed at the instance of the appellant. But though the respondent does not receive any notice of the appeal

dismissed before admission he is entitled to a notice of the application for review. The expression 'opposite party' in O. 47, R. 4 (2) (a) means the party interested to support the decree or order sought to be set aside or modified in the application for review. 63 Ind Cas 99 : 3 Pat LT 117 : 1921 PHCC 337 : 6 PLJ 625 : AIR (Vol 9) 1922 Pat 281 (DB).

——O. 47, R. 4(2) and O. 41, R. 11 — Notice to the respondent, if necessary.

An application for review of an order summarily dismissing an appeal under O. 41, R. 11, C. P. Code can be granted without the issue of any notice to the respondent. 42 Cal 433 Ref. The expression "opposite party" in the proviso to O. 47, R. 4 of the C. P. Code, means the party interested to support the order sought to be vacated or modified upon the application for review.

Where the order granting the review has been made irregularly or with material irregularity in the exercise of jurisdiction possessed by the Judges, it cannot be ignored or vacated by other Judges hearing the appeal. 43 Cal 178: 19 CWN 1077 : 22 CLJ 99 : 30 Ind Cas 298 : AIR (Vol 3 1916 Cal 741 (DB).

——O. 47, R. 4(2) (a) — Notice to opposite party.

Before granting an application for review notice to opposite party is necessary or else the granting is a nullity. 42 Cal 433: 30 Ind Cas 165: AIR (Vol 3) 1916 Cal 666 (DB).

Also 135 PWR 1913 : 237 PLR 1913 : 19 Ind Cas 864.

7. Rejection.

——O. 47, R. 4 (1) — Application rejected—Letters Patent Appeal.

A Letters Patent Appeal does not lie against an order rejecting, under O. 47, R. 4 (1) Civil P. C. an application for review. AIR (Vol 29) 1942 Nag 18 : 1941 NLJ 617 : ILR (1942) Nag 41 : 198 Ind Cas 130 (DB).

——O. 47, R. 4 (1) — Judge issuing notice to other side—If precluded thereafter from rejecting application under R. 4 (1).

Order 47, R. 4, Civil P.C. describes what the Court should do when it is satisfied that there either is or is not sufficient ground for a review. If it is of opinion that there is not sufficient ground, it will reject the application under R. 4 (1); if it is of opinion that there is sufficient ground then it will grant it under certain provisos. But merely because the Judge issued notices to the other side he is not precluded thereafter from rejecting the application under R. 4 (1). AIR (Vol 27) 1940 Rang 144: 189 Ind Cas 570.

——O. 47, Rr. 4 (2) and 8 — Review petition rejected without being admitted— Parties heard.

If a review petition is rejected after hearing the parties though not regularly admitted, the order of rejection is not one passed on the re-hearing of the original case. AIR (Vol 1) 1914 Mad 270: 15 MLT 224: 22 Ind Cas 953.

8. Revision.

——O. 47, R. 4 — An order of the lower Court cannot be revised merely because it came to an erroneous conclusion on a question of law raised before it and granted a review. AIR (Vol 15) 1928 All 392 : 113 Ind Cas 171 : 50 All 801 : 26 ALJ 477 (DB).

——O. 47, R. 4 — No revision lies from an order rejecting an application for review. AIR (Vol 12) 1925 Oudh 594: 88 Ind Cas 582 : 12 OLJ 443 : 2 OWN 419.

——O. 47, R. 4 — An order refusing to grant a review is not open to revision. The granting of a review is a matter peculiarly within the discretion of the judge who passed the decree. No other Judge can hear such an application and if the Judge who tried the case refuses to grant a review, his order is by rule 7, Order 47 expressly declared not to be appealable and hence no revision should be permitted. AIR (V 10) 1923 Oudh 153 : 74 Ind Cas 351 : 9 OLJ 623.

——O. 47, Rr. 4 (1), 7 and 9.

Where an application for review is rejected, on the ground of absence of sufficient ground for review the order is final. But where the Court erroneously refuses to entertain an application on the ground that it cannot lie, the order of rejection is not final and is open to revision. (1909) 6 ALJ 884 : 31 All 610: 4 Ind Cas 23.

9. "Strict Proof".

——O. 47, R. 4 (2), proviso (b)— Construction and scope—Strict proof—If implies formal proof only—Conclusion of trial Court—Interference in appeal—Order by appellate Court after discussing evidence and arriving at own findings — If illegal— Revision —Interference.

A party seeking review on the ground of discovery of new and important matter must not only give strict proof of the allegations made by him in his application but must adduce sufficient evidence thereof. "Strict proof" in proviso (b) to O. 47, R. 4 (2) does not mean merely formal proof or evidence admissible in accordance with the strict provisions of law.

The proof must convince the Court that the new matter or evidence was not within the knowledge of the applicant and could not be adduced by him when the decree or order was made. The question of sufficiency of proof is not matter solely for the Court of first instance. It is competent to the appellate Court to decide whether the conditions of R. 4 of O. 47 have ben complied with and whether the amount adduced before the Court of first instance amounted to proof or not.

The appellate Court in considering and discussing the sufficiency of evidence and arriving at its own conclusion, does not act illegally so as to render its order on appeal liable to be revised by the High Court under S. 115 C. P. Code. 42 Bom 295; 42 Cal 830; 45 Cal 60; 47 Cal 568 not foll. ILR (1949) Nag 502: 1949 NLJ 326.

——O. 47, Rr. 4 (2), proviso (b) and 7—Strict proof —Proof of ignorance after exercise of due diligence necessary before review can be ordered.

In execution of a decree, the decree-holder brought a certain property to sale in E. P. No. 9 of 1939. The sale was confirmed in E. A. No. 656 of 1941 and the decree-holder applied for delivery of the property to him and delivery was ordered. Thereafter the decree-holder filed another application E. A. No. 690 of 1944 praying again for delivery. This petition was dismissed on the ground that it was barred by limitation.

The decree-holder then filed E. A. No. 1438 of 1944 for review of the order on E. A. No 690 of 1944 on the ground that application was unnecessary because delivery was actually effected in E A. No. 656 of 1941, and prayed that the application should not be dismissed on the ground of limitation, but on the ground that it was unnecessary. The District Munsiff reviewed his previous order, but on appeal, the Subordinate Judge restored te order passed in E. A. No.

690 of 1944 dismissing that application on the ground of limitation. In revision,

Held, that though the proviso (b) to sub-r. (2) of R. 4 of O. 47, C. P. Code, makes no mention of the exercise of due diligence, the words "was not within his knowledge or could not be adduced by him when the decree or order was passed or made" must be taken to be qualified by the words "after the exercise of due diligence" and assuming that "strict proof" means not sufficiency of proof, but the formalities of proof in accordance with law, it is impossible to say that these formalities have been complied with by an affidavit which does no more than baldly state that something was not known to the petitioner at the date when the order was made, in respect of which the review petition had been filed, without offering any adequate explanation of his ignorance of what on the face of it, should have been perfectly well known to him and the lower appellate Court was quite justified in setting aside the order allowing the review. AIR (Vol 35) 1948 Mad 340: (1948) 1 MLJ 356: 1948 MWN 334: 61 LW 418.

——O. 47, R. 4 (2) (b) — The phrase "strict proof" does not refer to the sufficiency of proof, but only to the fact that formal proof is required, derived from anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. AIR (V 26) 1939 Mad 289 : 49 MLW 430 : (1939) MWN 406.

——O. 47, R. 4 — Review—Discovery of new matter alleged not to have been within applicant's knowledge — Strict proof— Affidavit, if sufficient.

An application for review should not be granted on discovery of new matter alleged not to have been within the applicant's knowledge without strict proof of such allegation. "Strict proof" means formal proof and when the applicant seeking review supports his application with an affidavit, the requirement as to strict proof is satisfied. AIR (Vol 20) 1933 Mad 217 : 145 Ind Cas 766.

——O. 47, R. 4 — The Court has no power to grant review without calling for strict proof of the allegation that the new matter said to have been discovered was not within the knowledge of the applicant for review when the decree was passed. AIR (Vol 12) 1925 Mad 578: 87 Ind Cas 391: 21 MLW 276 (DB).

——O. 47, R. 4 (2) (b) — Meaning of sufficiency of evidence if High Court can weigh.

"Strict proof" in O. 47, R. 4 (2) (b) refers to the formal correctness of the evidence offered and not to its sufficiency, effect or result. The Per Kemp J. contra High Court is entitled to satisfy itself if there was sufficient evidence before the lower Court and if it has been properly appreciated in granting the application for review. AIR (V 5) 1918 Bom 228 : 20 Bom LR 434 : 42 Bom 295 : 46 Ind Cas 14 (DB).

——O. 47, R. 4 (2) (b) — An application for review of judgment owing to discovery of new matter or evidence which was not within the knowledge of the applicant or could not be adduced at the trial should not be entertained without strict proof of such grounds. O. 47 should be strictly construed. AIR (Vol 5) 1918 UB 27 : 2 UBR (1916) 126 : 38 Ind Cas 403.

——O. 47, R. 4 (2) (b) — "Strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the law of evidence. It is the formality of proof which is prescribed and not the sufficiency in result. The Court of first instance is the proper Court, to determine whether or not there should be a review but before a review is granted, those safe-guards must be observed. Whether the proof is according to the law or not is within the jurisdiction of the Appellate Court to determine but the question of sufficiency of evidence is for the Court admitting the review. AIR (Vol 3) 1916 Cal 521: 42 Cal 830: 19 CWN 804: 29 Ind Cas 282 (DB).

Also AIR (Vol 5) 1918 Cal 618: 45 Cal 60: 21 CWN 1076: 26 CLJ 187: 42 Ind Cas 484 (DB).

——O. 47, R. 4 (2) (b) — Application for review on the ground of discovery of new evidence must be strictly proved. (1911) 9 Ind Cas 320 (Cal).

——O. 47, R. 5.

——O. 47, R. 5 — Judgment of High Court in first appeal.

An application for review of a judgment of the High Court in first appeal can be heard and decided only by the Judges who heard the appeal or where one of them is absent by the other sitting alone. AIR (Vol 29) 1942 Mad 23: 1941 MWN 898: 54 MLW 444: (1941) 2 MLJ 644: 201 Ind Cas 453.

——O. 47, R. 5 — Punjab Courts Act (VI of 1918), S. 18—District Judge—Power to review order of Additional Judge attached to the same District.

A District Judge has jurisdiction to hear an application for review of a decree or order made by an Additional Judge on which the latter has issued notice, even though the Additional Judge is still attached to the district. Order 47, R. 5, applies only to a Court consisting of more than one Judge and a District and an Additional Judge are not members of the same Court but different Courts under the Punjab Courts Act. AIR (Vol 20) 1933 Lah 130: 34 PLR 229: 141 Ind Cas 392 (1).

——O. 47, R. 5 — When can be heard by a judge other than the Judge who decided the case.

Order 47, R. 5, only provides that if on account of the absence of the Judge for a period of six months after the filing of the application, the application cannot be heard by that Judge, then it can be heard by another Judge of the Court. AIR (Vol 20) 1933 Fat 433: 14 PLT 234: 145 Ind Cas 810 (2).

——O. 47, R. 5—Transfer of application for review.

Transfer of application for review by District Judge to Additional District Judge is not permissible—If District Judge be transferred, his successor in-office can hear applications for review. AIR (Vol 17) 1930 All 785: 128 Ind Cas 771 (DB).

——O. 47, R. 5 — Review, when lies—Procedure—O. 22, R. 4.

While an appeal was pending in the High Court before the Division Bench, one of the appellants (defendants) died, whose legal representatives were not brought on record and the fact of his death was not intimated to the Court when the appeal was heard. Appeal was allowed and the case remanded for consideration. The lower appellate Court dismissed the suit of the plaintiff deciding the appeal in favour of the defendants. Plaintiff preferred a second appeal to the High Court & the heir of the deceased was added as a party respondent. An application was made by the plaintiff to the Division

Bench whose members were different from the previous Bench of the High Court for vacating the previous order of remand,

Held, that the proper procedure was to place the matter before the members of the Division Bench, who had decided the previous appeal.

Held further, that the proper remedy was to make an application for review under O. 47, R. 5, C.P. Code. AIR (Vol 15) 1928 Cal 654: 112 Ind Cas 225: 47 CLJ 623.

——O. 47, R. 5 — Court of review— High Court— Practice.

Where a case is decided by a Bench of two Judges and an application for review of that decision is made when one of the two Judges is on leave, the review application should be heard only by the other Judge and if he grants the application he is to forward the papers to be laid before the Chief Justice for the appointment of a Bench to hear the review. AIR (Vol 14) 1927 Rang 20: 98 Ind Cas 417: 4 Rang 265: 5 Bur LJ 187.

——O. 47, R. 5 — Must be composed of the same Judges.

A Court which is composed of Judges who did not decide the case originally have no power to review it. R. 1 of O. 47 must be read as in itself definite of the limits within which review is, under the new Code permitted and reference to practice under former and different statues is misleading. So construing the words, "any other sufficient reason," are to be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. Such an interpretation excludes from the power of review conferred. consideration of other grounds of appeal which have not been decided by a former Bench or Judge as being immaterial. AIR (Vol 9) 1922 P.C. 112: 72 Ind Cas 566 : 3 Lah 127 : 16 MLW 37: 26 CWN 697 : 3 Pat LT 435 : 17 PWR 1922 : 30 MLT 295 : 49 IA 144 : 24 Bom LR 1238 : 36 CLJ 459 : 41 PLR 1922 : 43 MLJ 332.

——O. 47 R. 5 — Single Judge of a Bench of two Judges — Jurisdiction — Order passed on review —Appeal.

One Judge of a Bench of two High Court Judges who disposed of an appeal having left the Court on a month's leave, an application for review of the judgment was heard and dismissed by the remaining Judge. Held, that the Judge had no jurisdiction to dispose of the application by reason of R. 5 and an appeal lay against that order under cl. 15 of Letters Patent. AIR (Vol 6) 1919 Cal 1033: 22 CWN 550: 44 Ind Cas 999 (DB).

——O. 47, R. 5 — Successor of Judge deciding case —When can grant review.

When the Judge deciding a case issues notice on an application for review his successor can dispose of the application. O. 47 R. 5 applies to Courts composed of more than one Judge. AIR (Vol 2) 1915 Mad 1068: (1915) MWN 22: 26 Ind Cas 366.

——O. 47 R. 5 — High Court—Procedure.

Where an appeal is heard by two Judges, one of whom has since left, the continuing judge alone is competent to hear the review but in case the rule is made absolute the appeal should be heard by two Judges. (1911) 9 Ind Cas 532 (Cal).

——O. 47 R. 5 — Judgment passed by Bench — Review.

An application for review of judgment passed by a Bench of two judges of the High Court can be heard and decided by a Bench of Judges and not by a single member. A single Judge can direct that the judgment passed by Bench of two judges of the High Court be reviewed but he cannot hear and decide the application for review himself. (1909) 2. Ind Cas 204 (Mad). (DB).

——O. 47, R. 7.

See also Civil P. C. O. 43, R. 1 and O. 47 R. 4.

1. **Appeal from original decree after review.**
2. **Refusal to readmit application for review dismissed for default — No appeal.**
3. **Objections to order granting review may be taken in appeal from the final decree.**
4. **Insolvency proceedings.**
5. **Order granting review.**
6. **Order rejecting review.**
7. **Revision.**
8. **Scope and applicability.**
9. **"Sufficient cause" — Sub-r. (2).**

1. Appeal from original decree after review.

——O. 47, R. 7 (1) — Appeal — Original decree modified — Appeal from original decree.

Where a decree is modified on an application for review, the original decree is superseded and so no appeal lies from that decree, the remedy of the aggrieved party being to appeal from the decree passed on review. 9 ALJ 183: 34 All 282: 14 Ind Cas 472 (DB).

2. Refusal to readmit application for review dismissed for default — No appeal.

——O. 47, R. 7 — Refusal to restore — Appeal.

An order refusing to re-admit an application for review of judgment which had been dismissed for default is not appealable. AIR (Vol 14) 1927 Rang 204: 102 Ind Cas 706: 5 Rang 121 (DB).

——O. 47, R. 7 — Order refusing restoration of an application for review dismissed in default is not appealable. AIR (Vol 12) 1925 Cal 430: 81 Ind Cas 1017 (DB).

3. Objections to order granting review may be taken in appeal from the final decree.

——O. 47, R. 7 — S. 100, Civil P. C., must be read subject to O. 47, R. 7 — Order granting review by 1st Appellate Court — Order cannot be challenged in second appeal on grounds not mentioned in O. 47, R. 7.

It is true that S. 100 mentions certain grounds in language of a very general character; but in the first place, those grounds relate to the decision itself and not to any interlocutory orders which are dealt within S. 105 and in the second place, the general provision contained in S. 100 must be read as subject to the specific provision contained in O. 47, R. 7 in the sense that what is an error of law or defect of procedure in an order granting an application for review is defined there. Therefore, it cannot be said that by reason of the provisions of S. 100 an order granting an application for review, made by a first Appellate Court, can be challenged in a second appeal from the final decision on grounds other than those mentioned in O. 47, R. 7. AIR (Vol 33) 1946 Cal 530 (FB).

——O. 47, R. 7 — Order granting review — Objection to order taken in appeal from final decree in suit — Non-existence of grounds specified in O. 47, R. 1 is not available as ground of such objection.

The scope of objections to an order granting an application for review cannot possibly be wider in an appeal from the final decree than in an appeal from the order itself. Were it so, the position

would be that a person aggrieved by such an order might first prefer an appeal against it on one or more of the grounds specified in O. 47, R. 7 and if he failed in the appeal, fresh decision would be given on a review of the previous judgment. But he might then return to the attack in an appeal from the final decision and urge other objections against the same order and if he succeeded this time, as he conceivably might, the original judgment would be restored and all the time and money spent on all the proceedings since then except the second appeal, would be absolutely thrown away. A procedure which may confuse the course of litigation in this manner cannot be held to be contemplated by the Code, unless the language used by the Legislature compels such construction. The language of O. 47, R. 7, however, points in an opposite direction. The implication clearly is that whether in the one appeal or the other, the grounds available to the appellant are the same and the only grounds that can be taken are those mentioned in the rule.

Therefore, when an application for review is granted and an objection is taken to the order granting the review in an appeal from the final decree passed in the suit, non-existence of the grounds of review as specified in O. 47, R. 1 is not available as a ground of such objection. A I R (Vol 33) 1946 Cal 530 (FB).

(Overrules AIR (V 13) 1926 Cal 217 : 87 Ind Cas 720.)

——O. 47, R. 7 — Propriety of order granting review.

In hearing an appeal from the revised decree passed after the granting of a review, the Appellate Court has no power to revise the order granting review. A I R (Vol 18) 1931 All 329 : 131 Ind Cas 518.

——O. 47, R. 7 — Decree after review — Powers of appellate Court.

When a review is granted, the case is re-opened for consideration and it is open to the parties to appeal against that order only on grounds falling under O. 47, R. 7. When that stage has passed and on re-hearing a fresh decree is passed the Court, on appeal from that decree or order has full power to go into the whole case on the merits and see whether on the evidence the decree passed after review is proper. A I R (Vol 16) 1929 Mad 261 : 1927 MWN 411 : 106 Ind Cas 172 (DB).

——O. 47, R. 7 — Order granting review — Grounds.

Where a plaintiff bases his claim on two grounds and the Court decrees it on one of them only without discussing the other but on a review application by the defendant, rejects the ground on which it had based its decision formerly and maintains the decree on the second ground in an appeal by the defendant although his application for review was limited only to the first ground, the plaintiff can re-open in the Court of appeal the question concerning the second ground as well. AIR (Vol 13) 1926 Cal 243 : 29 CWN 1027 : 90 Ind Cas 456 (DB).

——O. 47, R. 7 — Order granting review — Final decree — Appeal — Power of appellate Court if review is proper.

The appeal is not limited to the grounds set out in O. 47, R. 7. O. 47, R. 7, expressly provides that when an application for review is granted the party dissatisfied with the order may appeal against that order or may take the same objection in an appeal filed against the final decree.

Rule 7 read with Rr. 1 and 4 shows that it is open to the appellate Court to examine the ground upon which the review was admitted and if the ground for the review does not come within the words of R. 1, then the appellate Court is competent to hold that the review was improperly admitted. There can be no rehearing for the purpose of seeing whether a different conclusion on the merits should be adopted. A I R (Vol 13) 1926 Cal 217 : 87 Ind Cas 770 : 30 C W N 584 (DB).

——O. 47, R. 7 — Order granting review — Appeal against final decree — Grounds.

An appeal against an order granting review may be challenged only on one of the grouds specified in O. 47, R. 7. In an appeal from the decree passed on review if the grounds of appeal relate to the granting of the review, the grounds must be those that are set out in R. 7. The appellant will not, however, be precluded from arguing the appeal on its merits. AIR (Vol 11) 1924 Mad 602 : 83 Ind Cas 548 : 19 MLW 649 : 34 MLT 224 : 1924 MWN 355 : 46 MLJ 463.

——O. 47, R. 7 (1) — Appeal — Objection to admission of evidence.

The objection that the Court admitted in review, inadmissible evidence may be taken on appeal from the final decree i.e., original decree amended on review. A I R (Vol 6) 1919 Cal 287 : 23 C W N 242 : 50 Ind Cas 119 (DB).

——O. 47, R. 7 (1) — Appeal — Review — Appeal from final decree — Order granting review challenged.

In an appeal against the final decree the propriety of an order granting a review can be challenged only on the grounds specified in S. 629 of the Code of 1882. A I R (Vol 1) 1914 Cal 146 : 18 C W N 22 : 19 C L J 225 : 20 Ind Cas 670 (DB).

——O. 47, R. 7 (1) — Appeal — Grounds for objection.

Under rule 7 (1) an objection that the lower court granted a review can be taken in appeal from the final decree only upon one of the three grounds specified in the sub-rule (1). 108 PWR 1913 : 181 P L R 1913 : 109 P R 1913 : 19 Ind Cas 481 (DB).

——O. 47, R. 7 (1) — Appeal — Grant of review — Reason for.

An order of a Judge granting review considering the grounds to be 'the other sufficient reason', is not appealable whether the appellate Court would hold them sufficient or not. But an appeal would lie ordinarly from the final judgment and the decree passed on review. 17 P L R 1913 : 278 P W R 1913 : 11 P R 1913 : 16 Ind Cas 995 (DB).

——O. 47, Rr. 7, 9 (Ss. 623, 591, 584, old Code) — Appeal from final decree — Objection to be taken, limit to — Review granted for "any other sufficient reasons" — No appeal.

Sections 584, 591, C. P. C., do not control S. 629, C. P. C. so as to confer a right of appeal in a case where the appeal is not based on one of the objections mentioned in S. 629; and, consequently in an appeal against the final decree, no objection against the order granting the review can be taken, except on one of the grounds mentioned in S. 629, C. P. C. When an application for review of judgment is granted "for any other sufficient reasons" within the meaning of S. 623, C. P. C., the sufficiency or otherwise of the reason is not a good ground of appeal. (1907) 17 MLJ 603 (604) : 2 MLT 519 : 31 Mad 49 (DB).

4. Insolvency proceedings.

——O. 47, R. 7 — Section 75, Prov. Insol. Act clearly provides, for a right of appeal to the District Court from an order made in the exercise of insolvency jurisdiction by a Court subordinate to it, and this provision must be taken to override O. 47, R. 7, Civil P. C., in so far as it has a right of appeal from an order rejecting an application for review. A I R (Vol 28) 1941 Mad 588 : (1941) 1 M L J 537 : 53 M L W 466 : 1941 M W N 350 : 199 Ind Cas 480.

——O. 47, R. 7 — When the right of appeal is expressly regulated by S. 75, Prov. Insol. Act it should not be taken to be governed by the provisions of O. 47, R. 7, Civil P. C. A I R (Vol 24) 1937 Lah 568 : 174 Ind Cas 857.

——O. 47, R. 7, S. 115 — Order refusing review in insolvency proceedings — Appeal.

No appeal lies from an order refusing review even in proceedings in insolvency. A I R (Vol 22) 1935 Pat 177 : 2 B R 455 : 17 P L T 475 : 162 Ind Cas 490.

——O. 47, R. 7 — Order granting review — Interference by High Court.

The District Judge as an Appellate Court in insolvency jurisdiction can exercise the same power under the C. P. Code which he would exercise ordinarily. He also can grant a review. The High Court will be guided by the procedure laid down in C. P. Code in dealing with an appeal preferred under S. 75 (3) of the Provincial Insolvency Act, from an order of the District Judge granting review of judgment in an appeal and it will not interfere with the order under appeal unless it is one to which objection could be taken under the provisions of R. 7, O. 47, C. P. Code. A I R (Vol 9) 1922 All 206 : 67 Ind Cas 317 : 20 A L J 517 : 44 All 605 (DB).

5. Order granting review.

(a) General.
(b) Grounds of appeal.
(c) Interference.

(a) General.

——O. 47, R. 7, O. 43, R. 1 (w) — Order granting review under O. 47, R. 4 — No appeal lies.

The provisions of O. 43, R. 1 (w) must be read subject to O. 47, R. 7. The two rules read together make it clear that an order under O. 47, R. 4 granting review on the ground that there is an error apparent on the face of the record is not appealable. A I R (Vol 32) 1945 Oudh 183 : 1945 O W N (CC) 108 : 20 Luck 380 : 1945 A W R (CC) 76 (1) (DB).

——O. 47, R. 7 — Court granting review on ground that there is error in judgment apparent on face of record — Appeal.

Where the lower Court has made it clear that he had to grant the application for review, because there is an error in its judgment which was apparent on the face of the record, the order cannot be successfully attacked in appeal, because the scope of the appeal is a limited one. (1939) 181 Ind Cas 455 : 5 B R 580 (DB).

——O. 47, R. 7 — O. 47, Rr. 2, 7, O. 43 — Application for review on ground of mistake on face of decree — Judge finding that there was an error of that nature — Appeal — Competency of.

The provisions of O. 47, which contain rules specifically framed to govern procedure in regard to applications for review, and which, moreover follows later in the Code than O. 43, must modify the provisions of O. 43. Under R. 7 of O. 47, an appeal will lie from the order of the Court granting an application in contravention of the provisions of R. 2. A I R (Vol 20) 1933 All 778 : 17 R D 921 : 146 Ind Cas 231.

——O. 47, R. 7 — Where an application for review is made on the ground that there was a mistake or error apparent on the face of the decree and the Judge has not found that there was a mistake or error apparent on the face of the record, but merely that there was an error of that nature, no appeal lies from the order. A I R (Vol 20) 1933 All 778 : 17 R D 921 : 146 Ind Cas 231.

——O. 47, R. 7 — Order granting application for review is not a final order within the meaning of S. 109 (a), so as to be appealable to the Privy Council. A I R (Vol 19) 1932 All 318 : (1932) A L J 235 : 54 All 401 : 140 Ind Cas 110 (DB).

——O. 47, R. 7 (1), S. 16 — Review — Appeal from order granting review without appeal from revised decree — Competency of.

Where an application for review has been granted and the decree has been altered, it is open to the aggrieved party to appeal from the order granting the review, without appealing from the altered decree itself. If the order granting review is set aside all subsequent, proceedings taken under that order including the altered decree must also be regarded as having been set aside. A I R (Vol 19) 1932 Cal 552 : 36 C W N 212 : 55 C L J 98 : 138 Ind Cas 713 (DB).

——O. 47, R. 7 — Limit.

The right to appeal against an order passed in review is limited by O. 47, R. 7, which controls the general provisions of O. 43, R. 1 (w). (1929) 117 Ind Cas 849 : 32 C W N 693 (DB).

——O. 47, R. 7 — Order granting review — Limit.

Right of appeal given by O. 43, R. 1 (w) against the acceptance of review is qualified and limited by O. 47, R. 7. A I R (Vol 16) 1929 Lah 26 : 116 Ind Cas 221.

——O. 47, R. 7 — Extension of time — Appeal.

Under provisions of R. 7 (1) (c) the only question that can be gone into in appeal is whether there is sufficient cause for the extension of the period of limitation and nothing else. AIR (Vol 16) 1929 Lah 26 : 116 Ind Cas 221.

——O. 47, R. 7 — Review — Powers of Court.

Where a Court in considering an application for review and in granting the same passed an order which went beyond the scope of application for review.

Held, that the order was without jurisdiction and can be set aside in appeal. AIR (Vol 15) 1928 Cal 73 : 105 Ind Cas 4 (DB).

——O. 47, R. 7 — Order granting review.

It is competent for a party aggrieved to appeal against an order allowing review under the provisions of O. 43, R. 1 (w). However, the powers of the appellate Court are limited by R. 7, O. 47. A I R (Vol 15) 1928 Lah 608 : 112 Ind Cas 518 : 9 Lah 298 : 29 P L R 403 (DB).

——O. 47, R. 7 (1) — Review — Grant of — Appeal.

An appellate Court ought not to reverse the order of the lower court granting review of its own judgment without coming to a finding that the conditions laid down by O. 47, R. 7 have not been fulfilled. A I R (Vol 5) 1918 All 229 : 15 A L J 899 : 40 All 68 : 43 Ind Cas 490.

——O. 47, R. 7 (1) — Appeal — Grant of review — Appeal.

Against an order granting an application for review of judgment and restoring the appeal to the file, an appeal lies. (1913) 21 Ind Cas 943 (Cal) (DB).

——O. 47, R. 7 (1) — Appeal — Order granting review.

No appeal is allowed from an order granting an application for review of an order dismissing a suit for default on the ground that review could not be granted when an application for restoration was dismissed. (1912) 10 A L J 396 : 17 Ind Cas 661.

——O. 47, R. 7, O. 43, R. 1 (a) — Appeal — Grounds for ex parte judgment on appeal.

Order 43 should be read with O. 47, R. 7; and there is no appeal from an order granting a review of an ex parte judgment passed on appeal except on any of the grounds mentioned in R. 7 of O. 47. (1912) 14 Ind Cas 39 (Cal) (DB).

——O. 47, R. 7 — Execution proceedings — Review — Appeal.

An appeal lies from an order on review of a previous order passed in execution proceedings. (1910) 5 Ind Cas 483 (Cal) (DB).

——O. 47, R. 7 (1) — Appeal — When lies.

If an order does not contravene the provisions of S. 624 or 626 C. P. C. 1882 it is not appealable hence an order admitting a review on the ground that the deft. admitted plff's claim after the dismissal of the plff's. appeal, is not appealable. (1910) 14 C W N 244 : 11 C L J 26 : 5 Ind Cas 182 (DB).

(b) Grounds of appeal.

(i) General.
(ii) In contravention of the provisions of rule 4.
(iii) After expiry of period of limitation.

(i) General.

——O. 47, R. 7 — Review is in discretion of Judge — Exercise of discretion can be attacked only on ground of transgression of jurisdiction or violation of procedure — But parties are not left without any remedy — Remedy pointed out.

The Legislature, through the successive Codes, seems to have left the matter of review of judgment more and more to the discretion of the Judge. It has enjoined that a review should be granted only in cases where one or more of the grounds specified in the Code exist, but at the same time it has provided that if the Judge himself thinks that his decision should be reconsidered, the exercise of his discretion cannot itself be made the subject of attack on the ground of the non-existence of sufficient reasons, but it is liable to question only on the ground that some transgression of jurisdiction or gross violation of procedure happened. But the Legislature has not left the parties to the arbitrary will of the Judge without any remedy. The parties are only affected by the ultimate decision, and since an appeal will always lie from that decision, any error of fact or law can, in most cases, be corrected in that appeal, without going behind to see whether the review was rightly or wrongly granted. AIR (Vol 33) 1946 Cal 530 (FB).

——O. 47, R. 7 and S. 47 — Order granting review rejecting application for stay of execution.

Where the net result of the review was that the application of the Deputy Commissioner, for a stay of the original execution proceedings was rejected, the order, determining, as it did, a question within S. 47, relating to the execution of the decree is itself a "decree" within the meaning of S. 2 (2) of the Code and therefore, an appeal lies from it as from a decree and consequently it can be attacked upon any ground which the appellant chooses to take. AIR (Vol 26) 1939 Cal 628 : 69 CLJ 573 : 43 CWN 913 : 184 Ind Cas 689 (DB).

——O. 47, R. 7 (1), O. 43, R. 1(w), whether gives general right of appeal against all orders granting an application for review.

Order 43, R. 1 (w), does not give a general right of appeal against all orders granting an application for review, the provisions of O. 43, R. 1 (w) must be read with the provisions of O. 47, R. 7 with the result that no appeal can be entertained against an order granting an application for review except on one of the grounds mentioned in O. 47, R. 7 (1). AIR (Vol 23) 1936 Oudh 409: 1936 OWN (CC) 836: 1936 RD 454: 12 Luck 362: 165 Ind Cas 19 (DB).

——O. 47, R. 7 — Order granting review — Appeal.

When a review is granted, an appeal is permissible only on the specified grounds and they are, if the order contravenes the provisions of R. 2 or R. 4 of O. 47, Civil P. C., or if the application for review is barred by limitation. AIR (Vol 23) 1936 Pat 310: 2 BR 531: 17 PLT 766: 162 Ind Cas 992 (DB).

——O. 47, R. 7, O. 43, R. 1 — Order granting review — Rule in Bombay — Insufficiency of court-fee on application for review — Whether ground for review.

In the Presidency of Bombay an appeal from an order granting a review can lie on the grounds mentioned in O. 47, R. 7, since O. 43, R. 1 Cl. (w), has been repealed by the Bombay High Court. Consequently, an appeal does not lie on the ground of insufficiency of court-fee stamps, this not being a ground of appeal under O. 47, R. 7. AIR (Vol 20) 1933 Bom 183: 35 Bom LR 280: 144 Ind Cas 728.

——O. 47, R. 7 — The general right of appeal given by O. 43, R. 1 (w) is subject to the specific provisions of O. 47, R. 7 as regards the grounds on which an appeal can lie. AIR (Vol 19) 1932 Oudh 63: 7 Luck 350: 8 OWN (CC) 1267: 135 Ind Cas 695 (DB).

——O. 47, R. 7 — Order granting review — Appeal, if lies.

Appeal from an order granting a review is governed by the provision of O. 47, R. 7, as cl. (w) R. 1, O. 43, is deleted by a rule under S. 122 made by the Bombay High Court and, therefore, no appeal lies from an order of review granted on the ground of clear error on the face of the record. 116 Ind Cas 227 : 31 Bom LR 137 : AIR (Vol 16) 1929 Bom 183 (DB).

——O. 47, R. 7 — Appeal on other grounds — O. 43, R. 1(w) — Grounds.

Order 43, R. 1 (w) enables a party to appeal on grounds other than those mentioned in O. 47, R. 7, since there is nothing in the Code which expressly limits the grounds of an appeal under O. 43, R. 1 (w). AIR (Vol 16) 1929 Nag 73 : 25 NLR 104 : 12 NLJ 13 : 116 Ind Cas 645.

——O. 47, R. 7 — Limit of grounds — Absence of sufficient ground — Validity of decree.

Rule 7 limits the grounds on which an order granting an application for review can be attacked in appeal and the object of the rule is to confine the applicant to those grounds. The appellate Court is not entitled to set aside the decree of the trial Court passed on review merely on the ground that the same was a nullity as no sufficient ground for granting the application for review was made out. AIR (Vol 15) 1928 Lah 755: 112 Ind Cas 46.

——O. 47, R. 7 — Order granting review — Grounds.

Rule 7, O. 47, lays down three cases and three only in which an appeal against a review order is available; and if any matter does not fall within any of these cases, no appeal lies. AIR (Vol 14) 1927 Bom 599 : 29 Bom LR 1355 (DB).

——O. 47, R. 7 — Order granting review — Grounds.

Clause (w) of O. 43, R. 1 has to be read along with O. 47, R. 7, which specifically lays down that an order granting an application for review can be objected to in appeal only on one or the other of the three grounds specified therein. There is no real inconsistency between the two rules, the former rule merely gives a party aggrieved by an order granting a review a right of appeal, but it does not deal with the grounds on which the order appealed against can be objected to. The two provisions of the Code are not mutually inconsistent, but are really complementary of each other. The one gives the right to appeal and the other defines the extent to which that right can be exercised and according to the well-established rule of construction that where two co-ordinate provisions in an

enactment are apparently inconsistent, an effort be made to reconcile them; the two must be read together and taken together and thus they do not give an unlimited right of appeal. And even assuming that the rule that "if two sections of a statute are repugnant, the last must prevail and override the earlier" applies. Order 47, R. 7, should be held to control and restrict the earlier rule. AIR 1926 Bom 121, Diss. from. AIR (Vol 14) 1927 Lah 435 : 8 Lah 617 : 29 PLR 81.

——O. 47, R. 7 — Order granting review — Grounds.

Though the phraseology used in R. 7 is that "an order granting an application for review may be objected to" on the three specified grounds, and other grounds are not specifically excluded, it is obvious that the language used in permissive only in the sense that it is not obligatory on the person aggrieved by the order granting the application for review to appeal against it, but if he chooses to so appeal, the rule forbids him from objecting on any other ground. AIR (Vol 14) 1927 Lah 435: 8 Lah 617 : 29 PLR 81.

——O. 47, R. 7 — Order granting review — Grounds.

The provisions of O. 43, R. 1(w) are to be read subject to the provisions of O. 47, R. 7, and an order granting a review can be appealed against only on one of the grounds set out in O. 47, R. 7. AIR (Vol 14) 1927 Mad 641 : 52 MLJ 682 : 39 MLT 11 : 26 MLW 277 : 50 Mad 891 : 1927 MWN 806 : 103 Ind Cas 377 (DB).

——O. 47, R. 7 — Order granting review — Grounds.

The appeal under R. 7 will be confined to a disregard of the provisions of R. 2 or 4 only and not to any matter on which the granting of the review is based. Where the ground of attack is that the Court was incorrect in thinking that there was a mistake or error apparent on the face of the record, no appeal is provided for in such a case under O. 47. AIR (Vol 13) 1926 All 492 : 94 Ind Cas 78 (DB).

——O. 47, R. 7 — O. 43, R. 1(w) — Grounds.

The right of appeal granted by O. 43, R. 1(w) is not restricted by the grounds set out in O. 47, R. 7. 41 Cal 746, Diss. Order 43, R. 1(w) is a new provision and was perhaps not in the minds of the authors when they reproduced the old S. 629 of 1882 Code in the form of O. 47, R. 7. AIR (Vol 13) 1926 Bom 121 : 27 Bom LR 1446 : 94 Ind Cas 591 (DB).

——O. 47, R. 7 — Order granting review — Grounds.

An order granting an application for review of a judgment can only be objected to on the grounds specified in R. 7. AIR (Vol 13) 1926 Cal 259 : 90 Ind Cas 504 (DB).

——O. 47, R. 7 — Grounds.

Where a decree passed by the High Court on review was not open to objection on some ground recognised by O. 47, R. 7 the case cannot be certified as a fit case under C. P. Code, S. 109(c). AIR (Vol 13) 1926 Oudh 17 : 90 Ind Cas 332 (DB).

——O. 47, R. 7 — Order granting review — Grounds.

Under O. 43, R. 1 an appeal is allowed against an order granting an application for review of judgment, but that rule is obviously controlled by the provisions of O. 47, R. 7. Taken together, the effect of the two rules is that, though an appeal against such an order lies, it must be supported only on the one or other of the grounds set forth in O. 47, R. 7 and must fail unless it can be brought within the scope of the grounds set forth in that rule. AIR (Vol 12) 1925 All 364 : 47 All 361 : 23 ALJ 56 : 6 LRA Civ 159 : 86 Ind Cas 168 (DB).

——O. 47, R. 7 — O. 47, R. 1 restricts the scope of O. 43, R. 1(w) as regards grounds of appeal from an order granting review of judgment. AIR (Vol 12) 1925 Oudh 266 : 28 OC 4 : 11 OLJ 682 : 84 Ind Cas 515.

——O. 47, R. 7 — Insufficiency of reason.

Under R. 7 the sufficiency or otherwise of the reason for granting a review is not a ground for appeal. (1921) 63 Ind Cas 171 (All).

——O. 47, R. 7 — Order granting review — Grounds.

Although O. 43, R. 1(w) allows an appeal against an order granting a review, that clause must be read with R. 7 of O. 47 by which the grounds, on which an order granting a review can be set aside on appeal, are limited. AIR (Vol 8) 1921 Cal 66 : 25 CWN 884 : 66 Ind Cas 909 (DB).

——O. 47, R. 7 — An order granting an application for review can be attacked only on one of the grounds mentioned in O. 47, R. 7(1), C. P. Code. AIR (Vol 8) 1921 Lah 395 : 3 Lah LJ 572.

——O. 47, R. 7(1) — Appeal — Order granting review — Grounds for appeal.

In an appeal from an order granting a review, the only grounds that can be taken are those mentioned in O. 47, R. 7, C. P. C. AIR (Vol 7) 1920 Mad 633 : 38 MLJ 224 : (1920) MWN 228 : 11 LW 217 : 55 Ind Cas 444 (DB).

——O. 47, R. 7 (1) and O. 43, R. 1 (w) — Appeal — Order granting review.

An order granting a review is not appealable under O. 43, R. 1(w) except on the grounds specified in O. 47, R. 7. AIR (Vol 5) 1918 Mad 1060 : 31 MLJ 827 : 5 LW 472 : 38 Ind Cas 373 (DB).

——O. 47, R. 7 (1) (b) and O. 43, R. 1 (u) — Appeal — Review — Grant of — Appeal when lies.

Order 43, R. 1(u) does not give a general right of appeal but is controlled by O. 47, R. 7. The order granting a review application is not appealable merely on the ground that it is not made on satisfactory grounds. The Court need not record full grounds for granting review application. AIR (Vol 4) 1917 Mad 965 : 31 MLJ 509 : (1916) 2 MWN 278 : 4 LW 408 : 36 Ind Cas 437 (DB).

——O. 47, R. 7 (1) and O. 43, R. 1 (w) — Appeal — Order granting review — Grounds for.

An order granting a review is not appealable except on the grounds mentioned in O. 47, R. 7. AIR (V 3) 1916 Mad 544 (1) : 2 LW 366 : 28 Ind Cas 707 (DB).

——O. 47, R. 7(1) — Appeal — Order granting review — Grounds.

An appeal against an order granting review lies only on the grounds specified in O. 47, R. 7 and on no other grounds. There can be no appeal against the order granting review on the objection that the case was decided before plaintiff's evidence was over. Order 43, R. 1 does not carry the right of appeal any further than O. 47, R. 7 Both must be read together. There is no difference in this respect between the old and the new Code. 10 PLR 1912 : 221 PWR 1911 : 12 Ind Cas 624.

——O. 47, R. 7(1) — Objection to review.

An application for review made without any good reason, cannot be regarded as made bona fide, merely because it was admitted in the first instance. (1909) 10 CLJ 39 : 2 Ind Cas 961 (DB).

——O. 47, Rr. 7 (1) and 9 — Appeal order granting review.

An appeal does not lie from an order granting an application for review of judgment except on the grounds mentioned in clauses (a), (b) and (c) of S. 629. (1909) 12 OC 151 : 2 Ind Cas 834.

——O. 47, Rr. 7, 9 — Review of decree, after appeal — Order pending review if illegal — Remedy either in appeal or revision — Jurisdiction.

An objection to the jurisdiction of the Judge in granting the review may be taken in an appeal under S. 620, C. P. C., from the order granting the review, although such objection is not mentioned

in the section as one of the grounds upon which an appeal against the order granting the review may be allowed. (1904) 14 MLJ 321 (326) : 27 Mad 602.

(ii) In contravention of the provisions of R. 4.

——O. 47, Rr. 1 and 4 — Application for review not in accordance with O. 47 — Application does not contravene R. 4 — Hence grounds mentioned in R. 7 do not cover non-existence of grounds specified in R. 1.

It cannot be contended that an application for review contravenes O. 47, R. 4 when it is not in accordance with R. 1 of the Order, for R. 4 is not addressed to the nature and contents of the application at all; the phrase "application for review" in R. 4(2) simply means an application, and any application, by which a review is prayed for. Hence the grounds of objection mentioned in O. 47, R. 7 do not cover non-existence of the grounds of review as specified in R. 1. AIR (Vol 33) 1946 Cal 530 (FB).

——O. 47, Rr. 7, 4(2), Proviso (b) — Words "strict proof" in R. 4(2), Proviso (b) — Meaning of — 'Proof' and 'evidence', distinction — Appellate Court while deciding whether R. 4, has been complied with, if can see whether evidence adduced before lower Court did or did not amount to proof.

The phrase "strict proof" in O. 47, R. 4(2), Proviso (b) does not merely mean formal proof, or evidence admissible in accordance with the strict provisions of law. There is a difference between 'proof' and 'evidence'. 'Proof' is the effect produced upon the mind of the Judge by the evidence or evidence sufficient to satisfy the Judge to whom it is presented. A fact is said to be proved when the Court after considering all the matters before it comes to the conclusion that it exists or that a reasonable man ought to act upon the assumption that it does exist. The Legislature having used the words "strict proof", in R. 4(2), Proviso (b), there is no reason why the Appellate Court in deciding whether the conditions of R. 4 have been complied with or not, should be precluded from seeing whether the evidence adduced before the lower Court amounted or did not amount to "proof". The Appellate Court has jurisdiction to discuss the merits of the petitioner's allegation that he had discovered new matter or evidence which was not within his knowledge or could not be adduced by him at the time of the trial of the suit. AIR (Vol 29) 1942 Mad 511 : 50 MLW 93 : 1942 MWN 132 : (1942) 1 MLJ 278 : 202 Ind Cas 86.

——O. 47, R. 7(1) — Appeal from order granting review.

An appeal lies from an order admitting an application for review, but, it is a limited right of appeal on one or other of the three grounds set out in O. 47, R. 7(1) of the Code. Order 43, R. 1 (w) which allows the appeal, must be read with the provisions of O. 47, R. 7(1). Where a Court bearing in mind the provisions of O. 47, R. 1, grants an application for review, it cannot be said to contravene the provisions of O. 47, R. 4, merely because it may have taken a wrong view as to the meaning of R. 1. An Appellate Court would be acting without jurisdiction, if on this ground alone it sets aside an order of the lower Court granting a review. AIR (Vol 26) 1939 Rang 59 : 179 Ind Cas 946 (DB).

——O. 47, Rr. 7, 4; O. 43, R. 1(w) — Review — Appeal from granting review — Whether open to attack only on grounds in O. 47, R. 7.

The powers of the Appellate Court under O. 43, R. 1(w) to hear an appeal from an order under R. 4 of O. 47, granting an application for review, are limited by R. 7 of O. 47. An order granting review is, therefore, open to attack on the grounds mentioned in O. 47, R. 7. AIR (Vol 21) 1934 Lah 617 : 37 PLR 342 : 148 Ind Cas 1126.

——O. 47, Rr. 7(1) and 4 — Appeal — Order granting review.

Where the Lower Appellate Court had first decided that the dismissal of suit for default did not render pending arbitration proceedings null and void and subsequently on review took the contrary view and thought that "the application for review should be granted". Held having regard to the wide discretion given by O. 47, R. 4(2) that Court did not act in contravention of R. 4, and consequently no appeal was competent under R. 7(1)(b). AIR (Vol 4) 1917 Lah 379 : 115 PR 1916 : 38 Ind Cas 769 (DB).

(iii) After the expiry of the period of limitation.

——O. 47, R. 7 — Whether contemplates discussion of sufficiency of cause by Appellate as well as trial Court.

Rule 7 of O. 47, does contemplate the discussion of the sufficiency of the cause by the Appellate Court as well as by the trial Court. It says that an order granting an application may be objected to on the ground that the application was after the expiry of the period of limitation prescribed and without sufficient cause. If that objection may be based upon the allegation that there was no sufficient cause, the sufficiency of the cause is a matter for the Appellate Court as well as for the trial Court. AIR (Vol 29) 1942 Mad 511 : 55 MLW 93 : 1942 MWN 132 : (1942) 1 MLJ 278 : 202 Ind Cas 86.

——O. 47, R. 7(1) — Interlocutory order — Appeal — Review of judgment.

An interlocutory order admitting or excluding a document is not ordinarily appealable but an order holding a document inadmissible in evidence on reviewing a previous order to the contrary is appealable. 49 PWR 1913 : 94 PLR 1913 : 18 Ind Cas 309.

——O. 47, R. 7 — Review, order granting — Appeal, scope of — C. P. C. (Act XIV of 1882), S. 373.

When an appeal had been preferred under O. 47, C. P. C., against an order granting an application for review of judgment, if it is established that the application is barred by limitation or was presented to a Judge who had no jurisdiction to deal with it, the Court of appeal is bound to reverse the order. The powers of the appellate Court in such an appeal are strictly bound to the grounds upon which alone an appeal is competent.

When a plaint is amended by the omission of certain parties and prayer clauses in response to an objection that the suit as framed is bad for misjoinder of parties and causes of action, leave under S. 373, C. P. C. entitling the plaintiff to institute fresh suit against the omitted parties need not be expressly reserved. A second suit brought without such leave is not open to objection under S. 373, C. P. C. (1910) 5 Ind Cas 725 : 11 CLJ 161 (163, 164) (DB).

(c) Interference.

——O. 47, R. 7 — Appeal — Order granting review for fresh evidence — Interference.

Whether a new evidence is important or not, is not a question which an appellate Court, on an appeal from an order granting review on the ground of discovery of fresh evidence is free to decide. The question must be left to the judgment of the Court which decides the application for review. AIR (Vol 17) 1930 Cal 424 : 34 CWN 265 (DB).

——O. 47, Rr. 7(1) and 1 — Appeal — Order granting review — Sufficient cause — Interference by appellate Court — Prov. Sm. C. C. Act, S. 25 — Revision.

Where a review is granted for sufficient cause the control to be exercised by an appellate Court need not be strict and when the Court has applied its mind to the circumstances, such control may be exercised with reference to every presumption in favour of its having done so correctly. The simple fact that fresh evidence will alter or is expected to alter a decision already arrived at, is ordinarily not a sufficient cause for granting a review. Although O. 47, R. 7 of the C. P. Code is not applicable to Sm. C. Courts, its provisions will guide the discretion which the High Court possesses under S. 25 of the Prov. Sm. C. C. Act. AIR (Vol 6) 1919 Mad 111 : 53 Ind Cas 44.

6. Order rejecting review.

——O. 47, R. 7 — Appeal.

No appeal lies from the rejection of review application. AIR (Vol 21) 1934 Lah 301 : 151 Ind Cas 427.

——O. 47, R. 7(1) — Appeal — Duty of appellate Court.

In an appeal from an order granting a review, the appellate Court must decide whether the allegation that the new evidence was not within the knowledge of the applicant when the decree was passed has been strictly proved. (1911) 9 Ind Cas 320 (Cal).

——O. 47, R. 7(1) — Appeal — Order rejecting a review.

Order rejecting an application for review is final under S. 629, C. P. C., and is not subject to appeal or revision. The provisions of the new Code cannot help a petitioner whose application for revision was presented before the new Code came into force. 35 PWR 1911 : 10 Ind Cas 725.

7. Revision.

——O. 47, R. 7 — Where an ordinary appeal does not lie in view of the restrictive provisions of O. 47, R. 7, Civil P. C., nevertheless the Court may treat the appeal as revision. AIR (Vol 23) 1936 Lah 301 : 37 PLR 387 : 161 Ind Cas 765.

——O. 47, R. 7 — Maintainability — Revision.

The contention that if the Court wrongly applies the provisions of R. 1, the Court has acted in contravention of the provisions of R. 4 cannot be upheld if after bearing in mind provisions of R. 1 the Court is of opinion that the application should be granted, the granting of the application is not in contravention of the provisions of R. 4 even though the Court had taken a wrong view as to the meaning of R. 1. Order allowing appeal on any other ground in acting without jurisdiction and is liable to be set aside in revision. AIR (Vol 16) 1929 Rang 105 : 7 Rang 187 : 118 Ind Cas 120.

——O. 47, R. 7 — Order granting review — Revision.

An appeal against an order granting a review of judgment is strictly limited to the ground set out in O. 47, R. 7. Allowing an appeal on grounds not covered by O. 47, R. 7 is open to revision. AIR (Vol 12) 1925 All 395 : 6 LRA Civ 157 : 86 Ind Cas 917.

——O. 47, R. 7 — Appellate order upholding review by lower Court — If revisable.

Where the trial Court found that a decree had been given to a party as if he had been alive, when as a matter of fact he was known to be dead, and granted an application for review on that ground and set aside the decree and the order was upheld in appeal.

Held, that there was a mistake apparent on the face of the record and that the Appellate Court did not act without jurisdiction, or illegally or with material irregularity in upholding the order of the trial Court so as to justify interference. AIR (Vol 12) 1925 Oudh 223 : 11 OLJ 700 : 87 Ind Cas 204.

——O. 47, R. 7 — Order refusing review.

An order refusing to grant a review is not revisable under S. 115, C. P. Code. AIR (Vol 11) 1924 Bom 344 : 26 Bom LR 284 : 80 Ind Cas 267 (DB).

——O. 47, R. 7(1) — Appeal — Grant of review, "other sufficient reason" — Revision.

No appeal lies under O. 47, R. 7 against an order granting review for "other sufficient reason" within R. 1. Such an order cannot be revised especially when there is a right of appeal from the final decree. AIR (Vol 3) 1916 Lah 420 : 48 PWR 1916 : 32 Ind Cas 860.

——O. 47, R. 7 (1) (a) and (b) — Appeal — Order granting review — Power of High Court in revision.

An order granting review under O. 47, R. 7 is appealable only when it either contravenes the provisions of Rule 2 or 4 or the application for review is barred by time or is based upon insufficient grounds. But such an order can be interfered with by the High Court in revision, only if it is irregular and has led to miscarriage of justice. 49 PWR 1911 : 12 Ind Cas 246.

——O. 47, R. 7 — Revision — Order refusing to grant review.

No revision lies against an order refusing to grant review. (1910) 6 Ind Cas 707 (All).

——O. 47, Rr. 7, 9 (Ss. 629, 623 old Code) — Review — Provincial Small Cause Courts, Act, S. 25 — Objection as to the admission of a review in a small cause suit in revision.

Objection as to the admission of a review in a small cause suit can be taken in revision against the final decree, and S. 629, C. P. C., is no bar to such an objection being taken in a small cause revision. (1909) 19 MLJ 56 (57) : 5 MLT 73 : 2 Ind Cas 488.

——O. 47, Rr. 7, 9, 115 (Ss. 629, 622 old Code) — Review of judgment — Revision — Application for revision of an order rejecting an application for review.

Semble:— It was the intention of the Legislature that the Court which originally heard a case should be the Court to decide whether an application to review its judgment should or should not be granted, and where that Court rejects such an application its decision should not be open either to appeal or to revision by a Higher Court. (1904) AWN 130 : 1 ALJ 298 (300) (DB).

8. Scope and applicability.

——O. 47, R. 7 — If an application under O. 47, R. 1, Civil P. C. can be filed in proceedings under U. P. Encumbered Estates Act (XXV of 1934), there is no reason why R. 7 of O. 47, Civil P. C., should be excluded. There is nothing in O. 47, R. 7, which is inconsistent with provisions of Encum. Estates Act. AIR (Vol 30) 1943 Oudh 214 : 1943 OWN (CC) 83 : 1943 AWR Rev (CC) 19(1) and 6(2) : 205 Ind Cas 456.

——O. 47, R. 7(1) — Difference between old and new Code.

The change in the language of O. 47, R. 7(1) is due to a mistake on the part of the Legislature and there is no deliberate departure from S. 629 of the C. P. Code, 1882. AIR (Vol 4) 1917 Mad 965 : 31 MLJ 509 : (1916) 2 MWN 278 : 4 LW 408 : 36 Ind Cas 437 (DB).

9. "Sufficient cause" — Sub-r. (2)

——O. 47, R. 7 — Improper dismissal — Failure to appear by applicant for review — Effect.

Where the applicant for review failed to appear on a date by which the notice was to be returned and the Court dismissed the application for this non-appearance:

Held, that there being no obligation on applicant to appear on that date, the dismissal was not proper. AIR (Vol 14) 1927 Rang 204 : 5 Rang 121 : 102 Ind Cas 706 (DB).

——O. 47, R. 8.

——O. 47, R. 8 — Effect of order on starting point of limitation for appeal.

Rule 8 of O. 47, C. P. Code, makes it clear that the granting of a review application is a matter distinct and separate from the passing of a final order after re-hearing the original case under the review application. The order passed after re-hearing the original case under the review application becomes the final order of the Court in that case irrespective of the fact whether the order sought to be reviewed is modified or confirmed, and it is from the date of this final order of the Court that limitation for filing an appeal, where an appeal lies, is to be counted. 1949 RD 326.

——O. 47, R. 8 — Attachment before judgment effected in suit — Suit dismissed — Review granted — Effect of.

The moment the review is allowed the decree already passed is vacated and the suit must be considered to have been restored to file and with the restoration of the suit all the ancillary orders also get restored and the decree passed subsequently is the decree of the trial Court itself. Hence where a suit in which an attachment before judgment is obtained, is dismissed but subsequently a review application is allowed and the suit is decreed, along with the restoration of the suit, the attachment also revives and enures for the benefit of the decree-holder as against purchasers of the property subsequent to the passing of the decree after review. AIR (Vol 30) 1943 Mad 515 : 1943 MWN 248 : (1943) 1 MLJ 394 : 56 MLW 313 : 210 Ind Cas 454.

——O. 47, R. 8 — Case heard in full — Court can still consider in review any point not raised by party before passing fresh order.

Rule 8 of O. 47, clearly lays it down that when the Court grants an application for review it may, at once "re-hear the case". That surely means that it may hear the case in full and deal with every point (though not raised by any party) which it is necessary to consider before passing a fresh order. AIR (Vol 29) 1942 Mad 235 : 55 MLW 811 : (1942) 2 MLJ 716 : 1942 MWN 676 : 205 Ind Cas 557.

——O. 47, R. 8 — Grounds for extension — Review time barred — Order extending time — Revision.

If a review, apparently time barred, is admitted without cause being shown for the delay the entire proceedings consequent on the review must be set aside as of no legal effect. Where there were no materials to determine whether the lower Court complied with the requisition contained in O. 47, R. 8.

Held, in revision that the order granting review must be set aside. AIR (Vol 17) 1930 All 815 : 1930 ALJ 1057.

——O. 47, R. 8 — Fresh evidence — Admissibility in re-hearing.

A party is confined at the re-hearing, so far as additional evidence is concerned, to those pieces of evidence which actually formed the subject-matter of the application for review.

At the re-hearing of the case the Court ought to take into consideration the evidence adduced at the trial and the additional evidence, if duly proved, upon which the review was granted, and any relevant evidence in rebuttal of such additional evidence. The Court is also entitled to admit evidence, even if it was available to the party tendering it at the time when the case was first heard, if the Court is of opinion that it was relevant to an issue raised at trial and to be re-considered at the re-hearing, and that the party tendering the evidence was prevented by some cause for which such party was not responsible from adducing the evidence at the trial; or if the party refrained at the trial from adducing such evidence because in the absence of the additional evidence upon which the review was granted it was not reasonable or necessary that the party should have adduced it at the trial. But the Court at the re-hearing ought not to allow a party to adduce evidence which was available or with reasonable diligence might have been procured by such party at the time of the trial merely in order to re-inforce at the re-hearing of a case which the party raised or ought to have raised at the trial. AIR (Vol 14) 1927 Cal 21 : 53 Cal 856 : 31 CWN 1035 : 97 Ind Cas 731 (DB).

——O. 47, R. 8 — Application for review — Procedure — Stages.

When an application for review is granted, the decree previously made is vacated, with the consequence that an appeal preferred against that decree can no longer be prosecuted. When a Judge decides to grant an application for review, he should record an order to that effect, and a note thereof should be made in the register under O. 47, R. 8. The order should state clearly whether the decree is to be vacated in its entirety or not. A review proceeding commences ordinarily with an ex parte application. The Court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected and the hearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged, then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached, the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though in one aspect, the result is the same whether the rule is discharged or on the rehearing the original decree be repeated, in law there is a material difference, for in the latter case the whole matter having been re-opened, there is a fresh decree; in the former case the parties are relegated to and still rest on the old decree. Consequently an order appropriate to a discharge of the rule is the rejection of the application; an order so made terminates the second stage of the proceedings, and there is no third stage for the rehearing of the case. AIR (Vol 10) 1923 Cal 113 : 36 CLJ 484 : 73 Ind Cas 34 (DB).

——O. 47. R. 8 — Scope of — Whole case if open on review.

Two Judges of the Division Bench of the High Court heard an appeal and retired. An application for review was made, admitted and the decree amended. Subsequently the Judge was moved to re-hear the case and he made a similar order, which was set aside an appeal on the ground that the Judge as a single Judge could not hear the case, he not being a Division Bench. The Division Bench on hearing the appeal only considered the point involved in the review and made a similar order against which an application for review was made on the ground that the Division Bench ought to have heard the whole case.

Held, (Per Sanderson, C. J.) All the proceedings after the amendment of decree in the review application were superflous.

(Per Mookerjee, J.) The judgment of Division Bench need not be interfered with as it repeats the decision of the Judge who granted the review, but the Division Bench ought to have heard the whole appeal. A review may be granted either as to the

whole or part, and according to R. 8 on admitting of a review the whole case is not re-opened. AIR (V 5) 1918 Cal 879 : 20 CWN 1165 : 27 CLJ 326 : 34 Ind Cas 592 (DB).

——O. 47, R. 8 — Procedure.

A Court can under O. 47, R. 8 grant a review and at once proceed to re-hear the case. AIR (Vol 2) 1915 Mad 1068 : (1915) MWN 22 : 26 Ind Cas 366.

——O. 47, R. 8 — Procedure — Discovery of new evidence — Review.

The discovery of new evidence which, with the diligence, could not be produced at the original trial is a good ground for review; and the Court, on being satisfied with the same, should first record an order admitting the review and then give directions under O. 47, R. 8, C. P. Code for the rehearing of the suit. (1911) 14 CLJ 103 : 11 Ind Cas 720 (DB).

——O. 47, R. 9.

——O. 47, R. 9 — Order of review setting previous irregularity right and restoring status quo.

Before a revision can be entertained, it must be shown that the Court has either acted without jurisdiction or has acted with material irregularity prescribed in S. 115. But where by its subsequent order of review the lower Court sets right the obvious irregularity committed by it in its obvious order, and thus restores the status quo, no revision lies against the order of review. AIR (Vol 24) 1937 Nag 385 : ILR (1938) Nag 395 : 172 Ind Cas 433 (DB).

(Overrules AIR (Vol 16) 1929 Nag 73 : 12 NLJ 13 : 25 NLR 104 : 116 Ind Cas 645.)

——O. 47, R. 9 — Effect of review on original decree.

Where an appeal from a decree and an application for review of the decree are filed at one and the same time, if the application for review is successful before the appeal is heard and a second decree is passed in substitution of the first, then the appeal must be directed against the second decree and not against the first. AIR (Vol 23) 1936 Sind 53 : 29 SLR 445 : 163 Ind Cas 30 (DB).

——O. 47, R. 9 — Appeal — Order refusing review.

An order dismissing an application for review is not appealable. AIR (Vol 14) 1927 Lah 809 : 26 PLR 237 : 105 Ind Cas 724.

——O. 47, R. 9 — Foreign judgment — After second or third review — Enforceability in British India.

A foreign judgment based on a second or third review on the same grounds is one based on miscarriage of justice and a suit based on such judgment cannot be entertained in British Indian Courts. AIR (Vol 14) 1927 Lah 200 : 8 Lah 54 : 102 Ind Cas 523 (DB).

——O. 47, R. 9 — Repealed applications — Maintainability.

Although a second application for review on new grounds can be entertained if within limitation, it does not follow that a plaintiff can go on forever presenting petition after petition containing the same grounds until somehow he succeeds and has the obnoxious order reviewed and reversed. A second review could be allowed only if the first was rejected as founded on insufficient ground. AIR (Vol 14) 1927 Lah 200 : 8 Lah 54 : 102 Ind Cas 523 (DB).

——O. 47, R. 9 — Order to pay process at once — Validity of.

An order to pay "process at once" militates against both the spirit and the letter of O. 48, R. 1(2), C. P. Code. The fixation of time within which to pay process, conveys an idea of giving reasonable facilities to a litigant who seeks the help of the Court in the matter of summoning witnesses to obey the order. It means that the Court with due regard to the provisions of O. 16, R. 9, C. P. Code, makes terms with the party who requires its help and declares to him that it will try to procure the attendance of the witnesses to be summoned for the hearing provided the process-fee is paid, within the time to be fixed by it and that if he delays such payment, he will do so at his own risk. To call upon him to pay process at once is virtually to insist on immediate payment of process and to decline to help in the matter of enforcing the attendance of witnesses and in effect to penalize the default by the dismissal of the suit ultimately. AIR (Vol 11) 1924 Nag 271 : 20 NLR 131 : 78 Ind Cas 996.

——O. 47, R. 9 — Review — Subsequent review.

Where a plea of res judicata, has been wrongly accepted between the parties, by a single Judge of the Chief Court, the question cannot be re-opened afterwards by a Division Bench of that Court in an application to revise the orders of the Courts below, forming basis of the judgment of the single Judge as a revision of these orders would not benefit the party against whom the single Judge's ruling subsists.

A second review of the order is barred by O. 47, R. 9 as it is practically for the review of the order passed on review. (1911) 25 PWR 1911 : 10 Ind Cas 679 (DB).

——O. 48, R. 1.

——O. 48, R. 1 — Notice under O. 45, R. 8(b) — Process fees.

The notice required to be given under O. 45, R. 8(b) is not a process and is not issued on behalf of either party but it is a mere intimation given by the Court to the respondents that the appeal to the Privy Council has been admitted. The notice does not call upon the respondents either to appear or to oppose any prayer made by the appellant. Such a notice is not liable to any process fee under O. 48, R. 1(1). AIR (Vol 33) 1946 Bom 168 : 47 Bom LR 861 (DB).

——O. 48, R. 1 — Applicability — Parties.

The provisions of O. 48, R. 1, operate as between party and party, and not between the Government and the party. AIR (Vol 14) 1927 Pat 318 : 8 PLT 756 : 102 Ind Cas 791.

——O. 48, R. 1 — Duty of Court to fix.

Order granting adjournment without fixing time for payment of process-fee followed by an order of dismissal for want of prosecution is bad and would be set aside in revision. AIR (Vol 11) 1924 Nag 298 : 79 Ind Cas 123.

——O. 48, R. 2.

——O. 48, R. 2 — S. 80, Civil P. C., is not controlled by O. 48, R. 2 which should be read as subject to the special procedure as to service contained in S. 80. Service of notice under S. 80 on the son of the public officer is not valid. AIR (Vol 18) 1931 Cal 503 : 35 CWN 161 : 58 Cal 860 : 132 Ind Cas 634 (DB).

——O. 49, R. 1.

See Civil P. C., O. 21, R. 54.

——O. 49, R. 1 — Service — Headman — Validity.

There is no provision of law for handing the notice to a village headman to serve upon a party resident in his village by specially authorizing the headman through the client. AIR (Vol 13) 1926 Cal 977 : 30 CWN 734 : 96 Ind Cas 375.

——O. 49, R. 2.

——O. 49, R. 2 — Applicability.

Order 41, R. 31 and O. 20 and the rules thereunder do not apply to the Chartered High Courts as the rules relating to judgments were in force

when the C. P. Code was enacted. AIR (Vol 16) 1929 All 403 : 1929 ALJ 713 : 116 Ind Cas 23 (DB).

——O. 49, R. 3.

——O. 49, R. 3 (4) and O. 18, R. 15 — Death of Judge of High Court before completion of trial — Evidence taken by him — If can be treated as evidence in suit by another Judge.

The phrase "so far as relates to the manner of taking evidence" in O. 49, R. 3(4), C. P. Code, qualifies only R. 16 which occurs immediately before it, and not the other rules of O. 18 set out before that phrase. Order 18, R. 15, C. P. Code, does not, therefore, apply to the Original Side of the High Court. Consequently, if a Judge of a chartered High Court dies after commencing the trial of a suit and before its completion, another Judge of that Court cannot continue the suit from the stage at which he had left it or treat the evidence already taken by him as evidence in the suit. (1949) 53 CWN 569 (DB).

——O. 49, R. 3 — Security for costs — Original Side appeal — Applicability.

Order 41, R. 10, and its proviso apply to Original Side appeals, and security for the costs of the respondent can be ordered in an Original Side appeal. AIR (Vol 12) 1925 Mad 1132 : 21 MLW 662 : 87 Ind Cas 346.

——O. 49, R. 4 (Cal).

——R. 4 (Cal) of O. 49, is not ultra vires.

Order 49, R. 4 (Cal), Civil P. C., is not ultra vires. It is a rule made in accordance with the procedure laid down in Part 10, Civil P. C. It is not inconsistent with any of the provisions contained in the body of the Code. But even apart from that rule the judgment of a Judge of the High Court on leave or during his absence can be delivered by his colleague who sat with him on the Division Bench. AIR (Vol 29) 1942 Cal 98 : 47 CWN 9 : 202 Ind Cas 551 (SB).

——O. 50.

——O. 50 — Attachment of immovable property — Powers of Small Cause Court.

A Small Cause Court has power to attach immovable property before judgment under O. 38, R. 5. AIR (Vol 12) 1925 Mad 589 : 48 MLJ 406 : 1925 MWN 169 : 48 Mad 488 : 22 MLW 103 : 87 Ind Cas 399 (DB).

——O. 50 — Powers of Small Cause Court — C. P. Code, 1908.

Under the Code of 1908, Provincial Small Cause Court has no power to attach immovable property before judgment and to decide a claim case thereon. AIR (Vol 11) 1924 Cal 193 : 28 CWN 16 : 80 Ind Cas 300 (DB).

——O. 50, R. 1.

——O. 50, R. 1 — Application of Order 20.

Order 20 of the Code relating to judgments and decrees is not exempted from application to the Provincial Small Cause Courts. AIR (Vol 15) 1928 All 688 : 110 Ind Cas 818.

——Sch. 1, App. A.

——Sch. 1, App. A — Forms in Civil Procedure Code, if can be varied.

The forms prescribed in the Civil P. C., are merely to be used as a guide in framing decrees; they can be varied and adapted according to the circumstances in each case. A I R (Vol 23) 1936 Lah 879 : 168 Ind Cas 105 (DB).

——Sch. 1, Appendix A, Form (1) — Title — Insolvent and Official Assignee as one defendant — Propriety.

Obiter :— Where the plaintiff desired to sue the defendant as well as his Official Assignee.

Held, the title of the suit as "Govindji Jivabhai insolvent and on behalf of him Official Assignee" is absolutely wrong. Govindji should have been the 1st defendant, and the Official Assignee, as assignee of the estate and effects of the insolvent Govindji, the 2nd defendant. A I R (Vol 10) 1923 Bom 392 : 73 Ind Cas 240 : 25 Bom L R 378 (DB).

——Sch. 1, App. B.

——Sch. 1, App. B — Notices and prohibitory orders should be in proper form.

It is important that notices and prohibitory orders should be in proper form, and a failure to scrutinise and correct them may well cause subsequent difficulties in the administration of justice. A I R (Vol 23) 1936 Nag 237 : 38 Cr. L J 230 : I L R (1937) Nag 185 : 166 Ind Cas 303.

——Sch. 1, App. C.

——Sch. 1, App. C — Interrogatories.

Defendant can answer the interrogatories through recognised agent unless he has been expressly ordered to do so personally. A I R (Vol 28) 1941 Nag 205 : I L R (1942) Nag 258 : 1941 N L J 418 : 193 Ind Cas 707.

——Sch. 1, App. D, Form 4.

——Sch. 1, Appendix D, Form No. 4 — Applicability — Subsequent mortgage held by same mortgagee over other property.

Form No. 4 given in Appendix (d) of the first schedule of the C. P. Code would not be applicable in a case where there was a second mortgage which the mortgagee held at the time of the decree covering property other than that included in his first mortgage. The form must be construed to mean all documents relating to the mortgaged property and having reference to the mortgage in respect of which the decree is given. A I R (Vol 12) 1925 Oudh 379 : 86 Ind Cas 748 : 12 O L J 127 (DB).

——Sch. 1, App. D, Form 5.

——Sch. 1, App. D, Form No. 5, Side-note (a) — Significance of — Costs, how to be dealt with.

Per Baguley, J — The side note (a) at the beginning of Form No. 5, Appendix D to the Civil P. C., is intended to show that the special order for costs is only meant to be filled up and to become operative when there is a special order for costs against some special defendant. When costs are payable, as they usually are, by the original mortgagors, they are merely added to the sum for which the mortgaged properties are to be sold. A I R (Vol 22) 1935 Rang 514 : 160 Ind Cas 588 (DB).

——Sch. 1, App. D, Form 5-A.

——Sch. 1, App. D, Form 5-A — Suit by Corporation against owner of premises for consolidated rates and a declaration of first charge over premises and decree according to Form No. 5-A of Appendix D, to Sch. 1 — Under circumstances of case the Corporation, held strictly entitled under law to reliefs claimed. A I R (Vol 28) 1941 Cal 602 : 198 Ind Cas 632.

——Sch. 1, App. D. Form 8.

——Sch. 1, App. D, Form 8 — Form No. 8 in Sch. 1 of Appendix D is provided merely for use and adaptation according to the circumstances of the case and is not specifically referred to in O. 34, R. 6. A I R (Vol 20) 1933 Cal 251 : 60 Cal 19 : 143 Ind Cas 679.

——Sch. 1, App. D, Form 9.

——Sch. 1, App. D, Form 9, S. 5 (a) — A person whose right to enforce his morgage is barred under O. 2, R. 2 is not entitled to insist on provisions of S. 5 (a) in Form 9, App. D. A I R (Vol 20) 1933 Bom 51 : 34 Bom L R 1615 : 57 Bom 346 : 142 Ind Cas 370 (DB).

——Sch. 1, App. D, Form 21.

——Sch. 1, App. D, Form 21 — Procedure for a suit to enforce the right provided in S. 46, Partnership Act is governed by O. 20, R. 15 and the ordinary form for the preliminary decree is given as Form

No. 21, in Appendix D. A I R (Vol 25) 1938 Lah 758 : 40 P L R 753 : I L R (1939) Lah 178 : 180 Ind Cas 638.

——**Sch. 1, App. E, Form 29.**

——Sch. 1, App. E, Form 29 — The effect of condition No. 3 in Form 29, Appendix E, Civil P. C., is to give the Court a quasi revisional discretion in the matter, and not to require the Court itself to 'knock down' the property. A I R (Vol 19) 1932 Rang 17 : 9 Rang 608 : 135 Ind Cas 651 (DB).

——**Sch. 1, App. E, Form 31.**

——Sch. 1, App. E, Form 31 — The absence of a certificate in accordance with Form No. 31, Appendix E, Civil P. C., by the officer holding the sale would not prevent the decree-holder from recovering the deficiency arising on a re-sale. A I R (Vol 20) 1933 Nag 123 : 29 N L R 52 : 141 Ind Cas 367.

——**Sch. 1, App. F, Form 6.**

——**Sch. 1, App. F, Form 6 — 'May adjudge', meaning.**

Per Kemp, Ag. C. J. — The words "Court may adjudge" in form 6, Appendix F. mean that the Court is to be the arbitrator not that it is merely to decree what the parties consent to. Per Blackwell, J. — The words "Court may adjudge" apply only to questions which might arise in execution in proceedings against the surety, he the surety being called upon in default of the judgment-debtor placing at the disposal of the Court the property specified or the value of it or such portion thereof as may be sufficient to satisfy the decree. The words have no reference to the decree which the Court may pass. A I R (Vol 17) 1930 Bom 122 : 31 Bom L R 1442 : 54 Bom 118 (DB).

——**Sch. 1, App. F, Form 9.**

——Sch. 1, App. F, Form 9 — The Form No. 9 shows that the appointment of a Receiver is to be made by name. A I R (Vol 25) 1938 Nag 540 : I L R (1938) Nag 174 : 174 Ind Cas 148 (DB).

——**Sch. 1, App. G, Form 3.**

——**Sch. 1, App. G, Form 3 — "Appellate Court" — All further Appellate Courts, if included.**

The words "by the Appellate Court" in Form 3 of Appendix G, Civil P. C., do not necessarily connote "by all further Appellate Courts". It is a question of intention in each case in what sense the words were understood by the parties to the bond.

(Amendment to the Form suggested). A I R (Vol 30) 1943 Bom 243 : I L R (1943) Bom 636 : 45 Bom 510 : 209 Ind Cas 161 (DB).

——**Sch. 1, App. G, Form 2 — Security — Proper form — Assignment by Court — Validity of assignment.**

In India, the common form of security bonds in connection with proceedings in Courts is a bond in favour of the presiding officer of the Court either expressed by name with the qualification that he is the presiding officer of that Court or expressed as Judge of that District. Security bonds so executed are not invalid and they can be duly assigned by the officer or Judge in whose name they are executed.

The mere omission of the title from such a document and the name of the presiding officer would not make it invalid. A I R (Vol 18) 1931 All 65 : (1930) A L J 913 : 52 All 964 : 30 Ind Cas 712 (DB).

——**Sch. 1, App. G, Form 11.**

——Sch. 1, App. G, Form 11 — Form No. 11 in Appendix G, should not be interpreted in a way which will modify the provisions of the Civil P. C. laid down in O. 41, Rr. 1 and 2. This Form refers to cases where notice is given to the respondent with respect to the enquiry relating to the pauperism of the appellant and in such cases the respondent may argue that the appellant is not a pauper. A I R (Vol 19) 1932 Mad 523 : 55 Mad 982 : (1932) M W N 537 : 63 M L J 28 : 36 M L W 33 : 139 Ind Cas 652 (DB).

——**Sch. 2.**

See also (1) Arbitration.
(2) Arbitration Acts, 1899 and 1940.

1. **Applicability —Effect of S. 141, Civil P. C.**
2. **Execution proceedings.**
3. **When company is party.**
4. **Scope.**
5. **Suit under S. 92, Civil P. C.**

1. Applicability — Effect of S. 141, Civil P. C.

——**Sch. 2 — Applicability.**

It cannot be said that Sch. II, becomes applicable to proceedings under S. 144 by reason of the provisions of S. 141, Civil P. C. AIR (Vol 29) 1942 All 85 : ILR (1941) All 807 : 1941 AWR (CC) 302 : (1941) ALJ 596 : 199 Ind Cas 346 (DB).

——Sch. 2 — Schedule 2 merely provides for the manner in which, after a suit has been constituted, the right may be exercised. Schedule II is, therefore, covered by S. 141, Civil P. C. AIR (Vol 28) 1941 All 101 : (1941) ALJ 63 : 1941 OWN (CC) 393 : 1941 RD 185 : ILR (1941) All 193 : 1941 AWR (CC) 25 : 193 Ind Cas 17 (FB).

——Sch. 2 — Schedule 2, applies to proceedings under S. 271, Agra Ten. Act by virtue of S. 141, Civil P. C. AIR (Vol 28) 1941 All 101 : (1941) ALJ 63 : 1941 OWN (CC) 393 : 1941 RD 185 : ILR (1941) All 193 : 1941 AWR (CC) 25 : 193 Ind Cas 17 (FB).

2. Execution proceedings.

——Sch. 2 — The provisions of Sch. 2, are not applicable in applications for execution proceedings, and an award thereon is illegal and without jurisdiction. AIR (Vol 24) 1937 Bom 111 : 38 Bom LR 1303 : ILR (1937) Bom 144 : 167 Ind Cas 750.

——Sch. 2 — Proceedings under O. 21, R. 58 are proceedings in execution and they cannot be held to be an "original matter" and to such proceedings the provisions of Sch. II, Civil P. C. do not apply. AIR (Vol 23) 1936 All 378 : (1936) ALJ 142 : 1936 AWR (HC) 251 : 58 All 797 : 161 Ind Cas 107 (DB).

——**Sch. 2 — Scope and applicability.**

Schedule II, which applies to suits, does not entitle the parties to an execution proceedings to file an application for reference to arbitration. AIR (Vol 22) 1935 All 125 : 4 AWR (CC) 1366 : 161 Ind Cas 103 (1).

——**Sch. 2 — Reference to arbitration.**

The execution Court has no jurisdiction to refer the dispute between the parties to arbitration under the second Schedule of C. P. Code. AIR (Vol 12) 1925 Cal 812 : 29 CWN 886 : 52 Cal 559 : 42 CLJ 26 : 87 Ind Cas 633 (DB).

3. When company is party.

——Sch. 2 — An arbitration with Court's intervention and in which company is interested is governed by Sch. II, Civil P. C., and not by Arbitration Act. AIR (Vol 28) 1941 Cal 127 : ILR (1940) 2 Cal 237 : 44 CWN 828 : 193 Ind Cas 553.

4. Scope.

——**Sch. 2 — Applicability — Proceedings in the nature of arbitration.**

Where proceedings have assumed the character of an arbitration, they shall be governed by the provisions framed for the purpose of regulating references and other proceedings thereunder. AIR (Vol 17) 1930 Bom 431 (DB).

——Sch. 2 — Withdrawal from arbitration.

The provisions of the schedule were framed with a view that as far as possible parties having once referred the matter to arbitration may not be permitted to change their mind. AIR (Vol 15) 1928 All 674 : 1929 ALJ 31 : 111 Ind Cas 559.

——Sch. 2 — Provisions, nature of — If, mandatory.

Schedule 2 is not mandatory, but provides for reference to arbitrators at the will of the parties and also provides that certain procedure must be followed, if they take action under that schedule. It does not, however, say that there shall be no arbitration other than what is dealt with by Sch. 2, if parties to the suit choose to refer to arbitration it is open to them to adopt the provisions of Sch. 2 or not as they please. AIR (Vol 15) 1928 Mad 1025: 51 Mad 800 : 28 MLW 321 : 55 MLJ 429 : 113 Ind Cas 632 (FB).

——Sch. 2 — Permissive.

The main provisions of Sch. 2 are only permissive and not compulsory or exhaustive. AIR (Vol 14) 1927 Bom 565 : 51 Bom 908 : 29 Bom LR 1254 : 105 Ind Cas 516 (FB).

——Sch. 2 — Blackwell, J. — If parties to a suit, who desire to refer their differences to arbitration desire to avail themselves of the provisions of Sch. 2, they can do so only under paras. 1 to 16 of that schedule. AIR (Vol 14) 1927 Bom 565 : 51 Bom 908 : 29 Bom LR 1254 : 105 Ind Cas 516 (FB).

——Sch. 2 — Proceedings under Arbitration Act.

Once the matter is converted into one under the Arbitration Act, there is no power either for the parties or the arbitators or the Court to Act under the Schedule and all steps so taken must be regarded as having been taken without jurisdiction. AIR (Vol 13) 1926 Cal 730 : 43 CLJ 292 : 94 Ind Cas 177 (DB).

——Sch. 2 — Where, the parties intend that no further steps should be taken in Court and that the arbitration should be one without the intervention of Court, the rules in Second Schedule apply to such cases also. AIR (Vol 13) 1926 Cal 116 : 90 Ind Cas 624 (DB).

——Sch. 2 — Failure — Arbitration through Court falling through — Application to record adjustment by previous arbitration out of Court — Maintainability.

The parties to a suit referred their disputes to arbitration without the intervention of the Court. The arbitrator having made the award, the plaintiff presented an application to file the award as an adjustment under O. 23, R. 3, of the C. P. Code. Subsequently the parties applied to the Court to appoint an arbitrator through the Court for the sake of settling disputes between the parties. The Court made the order, but the arbitration fell to the ground. The plaintiff thereupon pressed his previous application under O. 23, R. 3.

Held, when the parties applied to the Court subsequently for the appointment of an arbitrator through Court, they had agreed that all the previous arbitration proceedings should be annulled and the petition under O. 23, R. 3 was not competent. AIR (Vol 9) 1922 Bom 436 : 24 Bom LR 361 : 46 Bom 854 : 67 Ind Cas 913 (DB).

5. Suit under S. 92, Civil P. C.

——Sch. 2 — Public trust — Suit under cannot be referred to arbitration.

Matters in difference between parties to litigation which affect private rights only may be referred to arbitration a suit under S. 92, C. P. Code, 1908 is not a suit for the determination of private rights as between the plaintiffs and the defendants and matters in difference in such a suit cannot be referred to arbitration. Jurisdiction to try a suit under S. 92 is confined to the District Court or any other Court empowered in that behalf by the Local Government within the limit of whose jurisdiction the whole or any part of the subject-matter of the trust is situate and cannot be exercised by arbitrators. AIR (Vol 10) 1923 Nag 112 : 6 NLJ 7 : 72 Ind Cas 1016 (DB).

——Sch. 2, Para 1.

See also Arbitration Acts, 1899 and 1940.

1. Agreement for reference.
   See also, C. P. C., O. 32, R. 7.
2. Appeal from decree.
3. Applicability and scope.
4. Court as arbitrator.
5. Interested party.
6. Non-joinder of parties.
7. Power of Appellate Court to refer.
8. Presentation of application.
9. Private reference.
10. Revision.
11. Subject of reference.
12. Validity of reference and award.
    See also N. 1, 5 and para 20.

1. Agreement for reference.

See also, C. P. C., O. 32, R. 7.

——Sch. 2 Para 1 — On construction of vakalatnama counsel held had such authority.

Fullest possible powers were expressly given to a Counsel by the vakalatnama executed by a party. He could withdraw or compromise the case and admit the claim and he could appoint a punch or sarpanch or referee. He had also the power to conduct the case in all sorts of ways:

Held, that though the exact words "refers to arbitration" were not used in the vakalatnama it was very clearly implied and the Counsel had the power to refer to arbitration. AIR (Vol 30) 1943 Oudh 128 : 1942 OWN (CC) 685 : 1942 AWR (CC) 350 : 204 Ind Cas 257 (DB).

——Sch. 2, Para 1 — Next friend or guardian ad litem can refer.

Order 32, R. 7, applies to agreement by next friend or guardian ad litem to refer matter in controversy to arbitration. AIR (Vol 27) 1940 Sind 178 : ILR (1940) Kar 327 : 191 Ind Cas 291 (DB).

——Sch. 2, Paras. 1, 17, 19 — Parties agreeing to refer dispute to certain three named persons — One unwilling to act as arbitrator — Court, if can replace it.

An agreement to have a dispute settled by one or more individuals is one thing, an agreement to go to arbitration rather than to litigate in the Courts is quite another.

Where it is at all possible, if parties desire arbitration, they should be as free as possible under the guidance of the Court to have their dispute settled by arbitrators they chose themselves. Where the agreement was that the dispute should be decided by three named gentlemen, the Court cannot infer from that, that in the event of one of the arbitrators either being unable or unwilling to act, the Court should appoint another in his place. AIR (Vol 24) 1937 Cal 388 : 41 CWN 981 : ILR (1937) 2 Cal 434 : 172 Ind Cas 243 (DB).

——Sch. 2, Para 1 — Parties agreeing that arbitrator should decide matter in dispute as set out in pleadings — Reference if definite.

Where the proceedings of the Court show that the parties had agreed that the arbitrator should "decide the matter in dispute between the parties as set out in the pleadings" the reference cannot be said to be vague and it is sufficiently definite as regards the points of difference between the parties. AIR (Vol 22) 1935 Oudh 499 : 1935 OWN (CC) 1069 : 11 Luck 475 : 158 Ind Cas 300 (DB).

——Sch. 2 Para 1 — Schedule II, R. 1, does not require that an agreement to refer should contain the actual signature of the parties. AIR (Vol 18) 1931 All 320 (1) : (1931) ALJ 904 : 133 Ind Cas 606 (DB).

——Sch. 2, Para 1 — Agreement for reference — Statement of points in dispute.

Any agreement as contemplated by Sch. 2, Para 1, between the parties should clearly set forth what are the matters in difference between the parties on which the arbitrators are required to arbitrate. Such points should be set forth clearly in the form of issues. AIR (Vol 17) 1930 All 319 (DB).

——Sch. 2, Para 1 — Defect in signature — Effect.

The technical defect in the agreement of reference to arbitrator, in that three out of four plaintiffs did not sign the agreement, is cured, if their pleader, duly empowered by them to appear on their behalf and having power even to refer the case to arbitration, appears before the arbitrator on behalf of these plaintiffs. AIR (Vol 17) 1930 Lah 523 : 31 PLR 192 : 122 Ind Cas 100.

——Sch. 2, Para 1 — Omission of signature of decree-holder — Effect.

The omission of signature of the decree-holder causes no defect in an application for reference to arbitration as para. 1, sub-para. 2, Sch. 2 does not require the application to be actually signed. AIR (Vol 16) 1929 All 763 : 1930 ALJ 239 (DB).

——Sch. 2, Para 1 — Subsequent agreement — Effect.

If there is no agreement of all the parties at the time of reference, then a subsequent agreement cannot make the reference itself valid though under certain circumstances it may amount to estoppel. AIR (V 13) 1926 All 238 : 48 All 239 : 24 ALJ 235 : 91 Ind Cas 930 (DB).

——Sch. 2, Para 1 — Ouster of — Jurisdiction of Court on matters referred.

A careful scrutiny of the provisions contained in paragraphs 1 to 16 of the Second Schedule makes it very clear that the scheme underlying these provisions contemplates that since the moment the order of reference is made, the Court's jurisdiction to deal with the merits of the matter in difference referred to arbitration is suspended and it revises only in the event of the arbitration being ordered to be superseded under paragraphs 5, 8 and 15 of the Schedule.

Unless and until an order superseding the arbitration is passed by the Court on any of the grounds mentioned in those paragraphs, the Court cannot assume jurisdiction over the matters in difference already referred to arbitration and cannot proceed with the suit. The language of the statute is very clear and emphatic and admits of no doubt. It is only when the award remitted under paragraph 14 becomes void on failure of the arbitrators or umpire to re-consider it, or is set aside under Cl. (1) of paragraph 15, that the Court gets jurisdiction under Cl. (2) of the said paragraph to pass an order superseding the arbitration and in that event alone it can proceed with the suit. AIR (Vol 13) 1926 Nag 37 : 89 Ind Cas 782.

——Sch. 2, Para 1 — Nature of provision — If permissive.

The section is not mandatory but is permissive. The Court must keep control over the proceedings only when the parties apply to the Court for an order for reference. The parties may, however, get their suit dismissed without a reference to the Court. Where the suit is withdrawn the agreement to refer to arbitration stands because parties can make such an agreement during pendency of a suit. AIR (Vol 11) 1924 Pat 488 : 3 Pat 443 : 1924 PHCC 110 : 6 PLT 122 : 3 Pat LR Civ 52 : 81 Ind Cas 994 (DB).

——Sch. 2, Para 1 — Reference including matters extraneous to suit — Report relating to subject-matter of suit.

An agreement to refer is not bad merely for the reason that it includes disputes other than that before the court, if there is a distinct clause to the effect that the arbitrators would only report to the Court their decision on the subject-matter of the suit. AIR (Vol 10) 1923 Lah 411 : 76 Ind Cas 1007.

——Sch. 2, Para 1 — Claim relating to office.

An agreement to refer to an arbitration, even if relating to an office, is not necessarily unlawful or opposed to public policy, but must be scrutinized by the Court before which it is pleaded for the purpose of ascertaining whether it is in violation of the trusts of the institution or affects adversely the interests of the public. AIR (Vol 9) 1922 Mad 429 : 15 MLW 111 : 31 MLT 52 : 1921 MWN 423 : 70 Ind Cas 410 (DB).

——Sch. 2 Para 1 — Several disputes under one contract — Successive awards.

Where the parties agree to refer all disputes arising out of a contract to arbitration, the right to submit is not exhausted though one dispute is finally decided. Successive dispute as they arise may be referred and successive awards passed. 60 Ind Cas 195 : 24 CWN 775 : AIR (Vol 7) 1920 Cal 808.

——Sch. 2, Para. 1 — Indefiniteness.

If an agreement of reference to arbitration is so vague as to make it impossible to ascertain what the dispute was which the parties referred to arbitration the agreement to refer is bad for indefiniteness. 49 Ind Cas 522 : AIR (Vol 6) 1919 Pat 74 (DB).

——Sch. 2, Para 1 — General terms — Question of costs.

When a reference to arbitration in a suit is a general one of the whole case, the power of dealing with costs rest with the arbitrator. 46 Ind Cas 182 : AIR (Vol 5) 1918 Nag 108.

——Sch. 2 Para 1 — Signature.

The mere fact that one of the parties did not sign the petition of reference is not conclusive that he was not a party to the case sent to arbitrators and the award will not be invalid by reason of such omission. 38 Ind Cas 226 : AIR (Vol 4) 1917 Cal 8 (DB).

——Sch. 2 Para 1 — Petition.

It amounts to a request to make a reference to an arbitrator under Sch. 2, S. 1, Para. 1 already approved by the parties, when an application is made for adjustment is made before the Court in which it is asked to send the records to a certain arbitrator to whom the parties had already referred the matter in dispute in the pending suit. 3 LW 375 : 34 Ind Cas 741 : AIR (Vol 4) 1917 Mad 556 (DB).

——Sch. 2 Para 1 — Form of Reference — Court — Commissioner Resiling from agreement.

Under para 1 an application for a reference to arbitration is to be made to the Court and the Commissioner appointed to examine a witness cannot receive such an application. So long as there is no final agreement to refer the matters in dispute to arbitration the parties may resile from the position. (1909) 10 CLJ 449 : 4 Ind Cas 370 (DB).

2. **Appeal from decree.**

——Sch. 2 Para 1 — Invalid reference.

When the reference is invalid, the decree passed in accordance with the award is appealable. AIR (Vol 25) 1938 Oudh 154 : 1938 OWN (CC) 475 : 174 Ind Cas 766 (DB).

——Sch. 2, Para 1 — Court-fee.

Where a decree is passed in terms of an award on a reference under C. P. Code, Sch. 1, R. 1,

Court-fee for an appeal from such decree is ad valorem. 94 Ind Cas 646 : AIR (Vol 13) 1926 Lah 403.

——Sch. 2, Para 1 — Parties — Unnecessary party — Suit for portion —Widow in possession in lieu of maintenance.

A Hindu widow, in possession of property in lieu of maintenance is not a necessary party to suit for partition, and her not joining in a reference to arbitration in such a suit does not make the reference illegal. A decree passed on the award on such a reference is not appealable. (1913) 35 All 107 : 11. ALJ 66 : 18 Ind Cas 609 (DB).

——Sch. 2 Para 1 — Court as arbitrator.

When both parties agreed to be bound by the decision of the Court acting extra cursum curiae, no appeal lies from the decree, the decision of the Court being in the nature of an award. (1911) 38 Cal 421 : 9 Ind Cas 296 (297) (DB).

——Sch. 2, Paras. 1, 3 (Ss. 506, 508, old Code) — Award with due submission by all the parties and without an order of reference.

An award passed without the submission to arbitration of all the parties interested in the subject-matter of it, and without an order of the court as prescribed by S. 508, referring the matter in dispute to the determination of arbitrators and fixing a time for the making of an award is not an award in law.

Held, therefore that where an award is made without the submission of all the parties and without fixing a time for the making of the award and a decree is made in accordance with it, an appeal not thereby barred. (1909) 1 Ind Cas 146 (147) : 6 ALJ 333 (DB).

3. Applicability and scope.

——Sch. 2, Para 1 — Application to refer issue of propriety title submitted to Civil Court under S. 271, Agra Ten. Act, to arbitration is an application in a suit and therefore governed by Sch. II, Civil P. C. AIR (Vol 28) 1941 All 101 : 1941 ALJ 63 : 1941 OWN (HC) 393 : 1941 RD 185 : 1941 AWR (HC) 25 : ILR (1941) All 193 : 193 Ind Cas 17 (FB).

——Sch. 2 Para 1 — Applicability to execution proceedings.

Schedule II, Civil P. C. does not apply to execution proceedings. AIR (V 25) 1938 Pesh 80 : 1938 Pesh LJ 89 : 178 Ind Cas 255

——Sch. 2, Para 1 — Compromise petition — No award contemplated — Aribitration.

The Code of Civil Procedure uses words "arbitration" and "reference to arbitration" as used in common parlance but lays down certain forms and steps for a reference to arbitration & for the award made by the arbitrator to be embodied in the decree of the Court, and unless these forms and steps are followed, it is idle to appeal to the provisions of the schedule of the C. P. Code. Where the petition of compromise does not contemplate that any award was to be made by the arbitrator and that it should be embodied in the judgment of the Court, provisions of Sch. II, do not apply. 46 CLJ 353 : 106 Ind Cas 509 : AIR (V 15) 1928 Cal 108 (DB).

——Sch. 2, Para. 1 — Commissioner and arbitrator — Difference.

The essential difference between a Commissioner appointed to effect a partition and an arbitrator is that the former is an officer selected and appointed by the Court in whose selection the parties have not, as of right, any choice, whereas the latter is a person selected by the parties in whose selection the Court has no choice. In the former case the parties express no consent to be bound by the decision of the Commissioner who is appointed by the Court under the provision of S. 75 and O. 26, R. 13 of the C. P. Code, and whose decision the parties may challenge before the Court passing a final decree. In the latter case they express such consent and cannot challenge the arbitrator's decision on questions of fact or law except on the limited grounds contained in the 2nd Schedule of the Code. 1926 PHCC 161 : 7 PLT 739 : 95 Ind Cas 321 : AIR (Vol 14)) 1927 Pat 135. (DB) .

——Sch. 2, Para 1 — Applicability.

Para. 1, 2nd Schedule, Civil Procedure Code, 1908, is not applicable to reference to arbitration made without intervention of the Court. 71 Ind Cas 860 : AIR (Vol 8) 1921 Nag 176.

——Sch. 2, Para 1 — Insolvency proceedings — Reference.

A Court cannot refer to arbitrators, a proceeding in insolvency as Sch. II does not apply to proceeding under the Prov. Ins. Act. 50 PR 1916 : 135 PWR 1916 : 151 PLR 1916 : 34 Ind Cas 549 : AIR (Vol 3) 1916 Lah 170.

4. Court as arbitrator.

——Sch. 2, Para. 1 — Request for decision personal inspection — Judge if constituted arbitrator.

Where a judgment-debtor caused removal of his property from the decree-holder's land through a bailiff, and where the bill submitted by the bailiff being deemed excessive, the Munsif before whom the case was asked to decide the matter personally by a visit to the spot, and where it was contended that the Munsiff's decision on the matter could not be challenged in appeal he having been appointed an arbitrator.

Held, that the munsif, was not and could not be so appointed and as such his decision could be challenged in appeal, and that he was merely asked to inspect the locality, the parties agreeing to accept his decision. 118 Ind Cas 816 : 6 OWN 391 : AIR (V 16) 1929 Oudh 287.

——Sch. 2, Para 1 — Reference to Court — Presiding Judge — Validity — Award by majority — Final and binding nature — Per Chief Justice.

A reference of a suit to the presiding Judge must be held to be altogether extra cursum curiae and not the less so when two others are joined with him and the decree passed in accordance with their decision must be regarded as a concent decree, and as not subject to the provisions of the second schedule.

Per Seshagiri Aiyar, J. — Where parties have chosen to entrust their case to a judge and two others, they must be deemed to have agreed to accept the decision of that body as final and as not being open to the attack to which otherwise a judgment is liable. 42 Mad 625 : 36 MLJ 291 : (1919) MWN 221 : 25 MLT 397 : 51 Ind Cas 827 : AIR (Vol 7) 1920 Mad 800 (DB).

——Sch. 2, Para 1 — Reference to Court — Judge acting as an arbitrator — Appeal — Decision on personal inspection and not on evidence.

A consent given by the parties to abide by the decision of a Court as an arbitrator is not such a reference as falls within Sch. II to the C. P. Code. Consequently the provisions of Sch. II do not govern the proceedings of the Court acting as such arbitrator. The award of the Court is nevertheless not open to appeal for the reason that a party cannot go back on his consent to abide by the decision of an arbitrator after the award is given just as he cannot resile from an executed contract.

Where the Court departs from its function of deciding in the ordinary way and decides the question of fact extra cursum curiae at the request of parties, the Court should follow the rules laid down in Sch. II of the C. P. Code and refuse to act as arbitrator unless all the parties interested

agree. 37 MLJ 100 : 52 Ind Cas 569 : AIR (Vol 6) 1919 Mad 150 (DB).

——Sch. 2, Para 1 — Reference to court — Procedure — Arbitrator — Finality of award.

An award is final and cannot be questioned except upon such grounds as corruption of an illegally apparent upon the face of the award. There is no reason for departing from the principles where the Court itself has been appointed and has the office of arbitrator. Where the Court itself is appointed to act an arbitrator, no separate award need be passed inviting the parties to put in objection before passing a decree. 3 UBR 36 : 44 Ind Cas 622 : AIR (V 5) 1918 UB 14.

——Sch. 2, Paras 1 and 16 — Court as arbitrator — Appeals.

Where both parties agreed to be bound by the decision of the Court acting extra cursum curiae no appeal lies from the decree the decision of the Court being in the nature of an award. (1911) 38 Cal 421 : 9 Ind Cas 296 (DB).

5. Interested party.

——Sch. 2 Para 1 — Pro forma party not interested in dispute — His agreement to reference if necessary.

Where a person is a mere pro forma party to the suit and has no dispute with either party he is not a "party interested" in the suit, within the meaning of Sch. II Para. 1 Civil P. C. and hence his agreement to the reference to arbitration is not necessary. AIR (Vol 27) 1940 Lah 186: 190 Ind Cas 399 (DB).

——Sch. 2, Para. 1, S. 115, Cls. (b), (c) — Fact that certain defendant has not appeared and suit ordered to proceed ex parte, whether final and conclusive in deciding whether he is interested party — Taking it final amounts to failure to exercise jurisdiction— High Court's power of interference — Revision.

The fact that a defendant to a suit has not appeared and that the suit has been ordered to proceed ex parte is a question of fact to be considered when the question of his interestedness in the case of a reference of the subjct-matter of the suit to arbitration, is to be considered but it is not necessarily in itself a final and conclusive answer. Where the Judge treats such circumstances as final and conclusive on the question of interestedness, there is either failure to exercise jurisdiction or the exercise of jurisdiction with material irregularity and whether his act or omission falls under Cl. (b) or Cl (c), S. 115, Civil P. C. the High Court has power to intervene in revision. AIR (Vol 22) 1935 Sind 212: 29 SLR 399: 159 Ind Cas 188 (DB.)

——Sch. 2, Para 1 — Reference to arbitration only by parties interested—Parties interested, test to find out.

A reference to arbitration by parties interested in the subject-matter in difference between them is a good reference under Sch. II, Para, 1, Civil P.C. In order to find out whether the parties have interest in the subject-matter in difference, it is necessary to see the nature of the suit in which that question is raised and not the possibility of their having any interest in a future litigation which may arise as the result of the decree in the suit. The award on a reference made by parties so interested is a legal award on the ground that certain defendants who were not persons interested in the matter in difference did not join in making the reference. AIR (Vol 21) 1934 Pat 19: 148 Ind Cas 512.

——Sch. 2, Para 1 — Under Para, 1, Sch II, Civil P. C. all the parties interested must agree to refer their dispute to arbitration but the question whether a party is interested within the meaning of this paragraph must be decided on the facts of each case. AIR (Vol 18) 1931 Lah 126: 32 PLR 44: 12 Lah 408 : 131 Ind Cas 348 (DB).

——Sch. 2, Para. 1 — Who is — Absentee defendant.

No doubt it is a legal question whether a reference to arbitration is legal or not. But it is a question of fact in each particular case whether any particular person is interested in the specific dispute which is referred to arbitration or not and that question is to be decided from the whole circumstances of the case including his conduct up to the end of the proceedings, and the Court is not merely to be guided by the written statements. In a suit, plaintiffs and defendants 1 to 3 referred the suit to arbitration giving up so far as reference was concerned the rest of defendants who did not take any part in the proceedings and when the award was passed, they did not even apply to the Court that award adverse to them was passed.

Held, that these defendants were not persons interested in the reference although they had submitted written statements. Defendants 1-3 would not be able to upset the award on. the ground that the rest of the defendants were not parties to the reference. AIR (V 17) 1930 Sind 256 (DB).

——Sch. 2, Para 1 — Who is—Test.

A person who has chosen to remain absent and allow ex parte proceedings to be taken against him is not necessarily a person not interested in the subject-matter of the suit. An important test is to consider whether he is a necessary party or such that if not originally impleaded the Court would direct nim to be joined under O. 1, R. 10. AIR (Vol 16) 1929 All 763 : 1930 ALJ 239 (DB).

——Sch. 2, Para 1 — Validity of award and decree thereon.

One partner of a firm is not entitled, unless under a deed of authority to enter into an agreement to refer the matter in dispute to arbitration so as to bind the other partners who have not joined in the application to refer. In such a case it is open to a partner, who had not agreed to the reference to challenge in revision the award and the decree passed thereon upon the ground that the reference was in its inception illegal and beyond the jurisdiction of the Court. (1929) 118 Ind Cas 906 (Lah).

——Sch. 2, Para 1 — Who is—Party to suit.

The words "all the parties interested" in para. 1 Sch. II do not mean necessarily all the parties to the suit, but all the parties interested in any matter in difference between them which they wish to refer. No general rule can be laid down whether a defendant, who has not put in an appearance and who does not contest the suit, is or is not a party interested within the meaning of this paragraph: and each case must be decided upon its own particular facts. AIR (V 15) 1928 Bom 248 : 52 Bom 408 : 30 Bom LR 530: 110 Ind Cas 343 (DB).

——Sch. 2, Para 1 —Who is — Party whose right is not in dispute.

Where a reference is made to arbitration by all parties to the suit except one whose rights are not in dispute, the reference is not invalid. AIR (Vol 14) 1927 Cal 619 : 45 CLJ 458 : 103 Ind Cas 625 (DB).

——Sch. 2, Para 1 — Who is — Interest in matter of reference.

It is not the consent of all the parties interested in the suit, but that of all the parties interested in the subject-matter of the specific dispute referred to arbitration, which is a condition precedent to the order of reference. It is open to the parties in certain cases to refer to arbitration through the intervention of the Court only some of the disputes in a pending suit and the expression "all the parties interested" in para. 1 can only refer to the parties interested in the subject-matter of the arbitration, and not in the subject-matter of the whole suit where the two are not identical. 14 SLR 156, Diss. from. AIR (V 14) 1927 Sind 239 : 104 Ind Cas 342 (DB).

—Sch. 2, Para 1 — Jurisdiction.

If a Judge refers a case to arbitration, without the consent of the parties interested, he is exercising a jurisdiction not vested in him by law. AIR (Vol 12) 1925 Mad. 1209: 50 MLJ 100: 91 Ind Cas 313: 22 MLW 395: 1925 MWN 744.

——Sch. 2, Para 1 — Interested but ex parte.

Where agreement to refer to arbitration is not signed by a party who is ex parte, the award is without jurisdiction if the party is interested in the result of the suit;

Where vendor had covenanted to convey a title to the plaintiff vendee and was interested in the plaintiff's suit to establish that title, as otherwise he might be sued for damages, he is interested in the result of the suit. AIR (Vol 12) 1925 Mad 1209 : 50 MLJ 100 : 91 Ind Cas 313 : 22 MLW 395 : 1925 MWN 744.

——Sch. 2, Para. 1 —Party against whom no relief is prayed.

The words 'parties interested in the suit' should not be restricted only to those persons against whom relief is claimbed. A person against whom no relief is claimbed may be interested in the result of the suit inasmuch as his liability to the plaintiff may ultimately arise by reason of any decision that may be given in that suit. AIR (Vol 12) 1925 Mad 621: 48 MLJ 142 : 86 Ind Cas 839 : 21 MLW 498 : 1925 MWN 97.

——Sch. 2, Para. 1 — Who is—Party admitting liability but remaining ex parte.

When a person admits the plaintiff's claim unconditionally without reference to the liability of his co-defendants and absents himself from subsequent proceedings he is not interested in the suit within the scope of Schedule II para 1 and it is not necessary to implead him with respect to a reference to arbitration as between the plaintiff and the other defendants. AIR (Vol 12) 1925 Oudh 201 : 80 Ind Cas 821.

——Sch. 2, Para 1 — Who is.

The words "all parties interested" do not mean necessarily all the parties to the suit. But all the parties interested in any matter in difference between them which they wish to refer. in difference

It is not necessary that all the parties to a suit should concur in an application for an order of reference in order to make the submission valid. It is only necessary that all the parties interested in the subject-matter of the reference should have joined in the submission. AIR (Vol 11)1924 Pat 33: 76 Ind Cas 2 : 2 Pat 777 : 1923 PHCC 225 : 2 Pat LR Civ 76 : 5 PLT 239.

——Sch. 2, Para 1 — Who are.

It is enough if all the parties interested in the litigation are parties to the application for reference to arbitration. It is a question of fact who are the parties interested in the litigation. AIR (V 4) 1917 Pat 136 : 45 Ind Cas 321.

——Sch. 2, Paras 1 and 2 — Limited owner — Reference by — If can confer on arbitrator a more extensive power.

A person having a limited interest in the land cannot by a reference to arbitration confer on him an authority to alienate a more extensive interest than he himself has. AIR (V 1) 1914 Sind 88 : 8 SLR 86 : 25 Ind Cas 949 (DB).

——Sch. 2, Para. 1 — Parties — Ex parte defendant — Interested party — Who is.

An award based on a reference to arbitration, is not vitiated by the fact that one of the parties has not joined in the reference unless that party is a person who is interested in the matter. A defendant who has not filed a written statement nor put in an appearance nor contested the suit is not a person interested in the suit. (1910) 32 All 657: 7 ALJ 807 : 7 Ind Cas 68 (DB).

6. Non-joinder of parties.

(a) General
(b) Parties absent in proceedings.
(c) Waiver of right to object.

(a) General.

——Sch. 2, Para 1 — Non-contesting defendant not joining in reference—Award if invalid as between plaintiff and contesting defendant.

In a reference to arbitration when all the defendants do not agree to the arbitration, if the non-concurring defendant is a non-contesting defendant, the reference as between the plaintiff and the contesting defendants is valid and if the non-contesting defendant has by his subsequent conduct consented to the reference by being in Court throughout the whole of the arbitration proceedings, it is not open to him or to the plaintiff to maintain that he was not a party to the arbitration. AIR (Vol 21) 1934 All 658 : 4 AWR 852 : 1934 ALJ 694 : 148 Ind Cas 1168 (DB).

——Sch. 2, Para 1 — All parties not agreeing to refer matter to arbitration—Award, if valid.

Where all the parties interested in the matter in dispute have not agreed that the matter should be referred to arbitration, the award that is given by the arbitrators is invalid.

Quaere—Whether an application for referring a matter to arbitration should be in writing? AIR (V 20) 1933 Oudh 384 : 10 OWN (CC) 790 : 17 RD 764 : 9 Luck 73 : 147 Ind Cas 189 (DB).

——Sch 2, Para 1 — Reference by some partners—Validity of award.

Where some of the partners of a firm agree to refer a partnership dispute to arbitration, the award would be valid so far as they are concerned though the remaining partners may not be bound by it.

If one or more interested parties submit their dispute to arbitration, they cannot bind the other interested parties without express authority but they still bind themselves nonetheless effectually for that. AIR (Vol 19) 1932 Lah 69: 33 PLR 128: 134 Ind Cas 99.

——Sch. 2, Para 1 — Interest of defendants distinct —Failure of all to join, whether vitiates reference.

Paragraph 1 of Sch. II of the Civil P .C. does not mean that all the parties who are contesting a suit must necessarily join in arbitration. In cases in which the interest of the defendants may be severed, there is no bar to some of the contesting defendants joining with the plaintiffs in referring the matter in difference between them to arbitration. AIR (Vol 18) 1931 All 453 : (1931) ALJ 442 ; 53 All 669 : 133 Ind Cas 31.

——Sch. 2, Para. 1 — Legality of award.

An award passed on reference to which all the parties interested in the dispute are not parties is illegal and should be set aside.

Defendants 6 to 9 were lessees holding from the other defendants. The plaint asked for relief against them and the award specifically gave relief against them. But they were not parties to the reference.

Held, that defendants 6 to 9 were parties interested in the dispute, and as they were not parties to the reference the award was illegal. AIR (Vol 17) 1930 Mad 646.

——Sch. 2, Para. 1 — Interested party not joining.

The award is binding as between the parties to the reference even if some of the parties interested were not parties thereto. (1929) 115 Ind Cas 680: 10 PLT 53 (DB).

——Sch. 2, Para. 1 — Validity of reference.

There cannot be a valid reference to arbitration in a suit unless all the parties to the suit join in asking for the reference. AIR (Vol 15) 1928 Cal 249 (DB).

——Sch. 2, Para. 1 — Legality of reference.

Where all the parties to the proceeding did not join in the reference to arbitration but the Court passed an order of reference all the same.

Held, in revision that the order of reference was invalid. (1928) 121 Ind Cas 378: 31 PLR 55.

——Sch. 2, Para 1 — Invalidity of award in whole or in part.

The plaintiff who, along with his brother, defendant 4, was entitled to 1/12th share in a partnership, sued for dissolution of the partnership and accounts and recovery of his share. The case was by order of the Court referred to arbitration and defen dant 4 did not join in the reference, nor was a party to it. The award gave the plaintiff and defendant 4 their 1/12th share and on objection to the award on the ground of the non-joinder of defendant 4 in the reference, the District Munsif modified the award by giving the plaintiff a half of the 1/12th share.

Held, in revision, that as the defendant was a necessary party to the reference under S. 1, Sch. II, C.P.C., the reference to which defendant 4 was not a party was invalid, and the decree giving effect to the award, even in a modified form, should be set aside. AIR (Vol 14) 1927 Mad 1154: 102 Ind Cas 2.

——Sch. 2, Para. 1 — Reference by one partner on on behalf of firm — Validity.

One partner of a firm cannot enter into an agreement to refer a matter in dispute to arbitration on behalf of a firm unless all partners join in it. AIR (Vol 13) 1926 Lah 91: 92 Ind Cas 705: 7 LLJ 603.

——Sch. 2, Para. 1 — Subsequent consent — Effect.

In order to make a valid reference it is necessary that all the parties should give their consent. But after a reference is made, subsequent consent by one of the parties who did not join in the reference at the time it was made cannot make the proceedings valid; for the foundation of the Court's jurisdiction is the consent of all the parties. The award passed in such proceedings is void and it need not be set aside. Its existence does not preclude a subsequent suit on the same subject-matter. AIR (Vol 12) 1925 Mad 621: 86 Ind Cas 839: 21 MLW 498: 1925 MWN 97: 48 MLJ 142.

——Sch. 2, Para. 1 — Jurisdiction.

The entire foundation of the Court's jurisdiction to make the reference disappears if all the persons interested had not joined in the application for submission. AIR (Vol 11) 1924 Cal 353 : 71 Ind Cas 326 (DB).

——Sch. 2, Para. 1 — Validity of award.

All parties interested at the time of the reference to the Arbitration should join in the reference, otherwise the reference and the award would be invalid. AIR (Vol 10) 1923 Mad 502: 73 Ind Cas 202: 17 MLW 424: 32 MLT 298: 1923 MWN 296: 44 MLJ 359.

——Sch. 2, Para. 1 — Validity of award.

All the parties interested in a suit must join in the reference to arbitration and where only some of the parties agree to refer the award on such reference is void. (1922) 64 Ind Cas 221 (Cal) (DB).

——Sch. 2, Para. 1 — Parties — Ex parte deft. — Person interested.

A defendant who is ex parte may be a party "interested" within Sch. II, Para (1), C. P. C.

Where an ex parte deft. who was interested in the whole suit as well as in the particular subject-matter of the reference, was not a party to the same.

Held, that the order of the reference was ultra vires and is without jurisdiction. AIR (Vol 7) 1920 Mad 852: 42 Mad 632: 36 MLJ 538: 51 Ind Cas 155 (DB).

——Sch. 2, Para. 1 — Validity of award.

A Court has no jurisdiction to make an order of reference to arbitration unless, all the parties interested assent to such reference. An order of reference made without such assent is invalid and an award based thereupon is liable to be set aside. AIR (Vol 7) 1920 Sind 107: 61 Ind Cas 451: 14 SLR 156

——Sch. 2, Para. 1 — Parties — Ex parte defts award — Question of Jurisdiction.

The agreement to refer to arbitration and the application to the court must have the concurrence of the the parties concerned and if all the defts. including those who have not appeared and contested the suit, do not join in the reference the award is wholly invalid and not only against these who did not join it and is liable to be set aside on the application of any of the parties. 11 CWN 1152 Diss.

An objection to the validity of any reference as well as of the award on the ground that all the parties to the suit had not joined in the reference, though not taken in the Court of the First Instance and not taken specifically in the grounds of appeal before the High Court, must be given effect to, as it relates to the jurisdiction of the Court, to make a reference and the subsequent invalidity of the award. AIR (Vol 5) 1918 Cal 336: 27 CLJ 339: 43 Ind Cas 169 (DB).

——Sch. 2, Para. 1 — Parties — Non-joinder of some parties to reference — Validity — Objections to award — Determination by Court, ordering reference.

When some of the defts. to a suit do not join in a reference to arbitration, the court should examine the facts of each case before coming to the conclusion that the arbitration is invalid since no relief may have been claimed against them.

Objections to the award on the ground of invalidity from any cause whatever should be decided by the Court which has made the order of reference to arbitration and by no other Court. AIR (V 4) 1917 A 183: 39 All 489: 15 ALJ 427: 41 Ind Cas 357.

——Sch. 2, Paras. 1 and 15 — Parties Non-joinder — Validity.

The Court has jurisdiction to make an order of reference only if all the parties interested in the suit agree to the reference. Otherwise the order or reference is invalid not only against those who have not agreed but also against those who have agreed. An award made upon such an invalid reference is not valid and no decree can be based upon it. Paragraph 15 of the schedule assumes a valid reference to arbitration and contemplates only cases where the propriety of an award on the basis of such a reference is in question. AIR (Vol 4) 1917 Cal 481: 25 CLJ 339: 21 CWN 387: 41 Ind Cas 295 (DB).

——Sch. 2, Para. 1 — Parties — Non joinder of.

An award is not invalid because certain defts. having no interest in the suit or only nominally on the record do not join in the reference to arbitration by the other parties. (1912) 14 Ind Cas 562 (Mad).

——Sch. 2, Para 1 — Parties — Non-joinder of — Reference — Award — Invalid.

If all the parties interested at the time of the reference to the arbitrator have not joined in the reference the reference is invalid and the award which follows such reference is also invalid. (1911) 8 ALJ 645: 10 Ind Cas 559 (DB).

——Sch. 2, Para. 1 — Parties — Non-joinder of.

An agreement to refer where one of the parties interested has not joined is not governed by para. 1, Sch. II. 36 Mad 353: 21 MLJ 990: 10 MLT 248: (1911) 2 MWN 249: 12 Ind Cas 372 (DB).

(b) Parties absent in proceedings.

——Sch. 2, Para. 1 — Proceeding ex parte against person interested — Matter referred to arbitration — Such person not joining in submission — Award — Decree on award — Validity.

If a person is ex parte in a suit, he does not thereby cease to be a party interested in the reference within the meaning of Para. 1 of the Second Schedule of the Civil P. C. Hence if such person has not joined the reference to arbitration made by the remaining parties, the reference to arbitration is invalid and the award is wholly void. AIR (Vol 25) 1938 Oudh 154: 1938 OWN (CC) 475: 174 Ind Cas 766 (DB).

——Sch. 2, Para. 1 — Validity of award.

In making a reference to arbitration, if the parties against whom proceedings have been taken ex parte or who did not appear at the trial have not joined, the reference to arbitration is invalid and the award is wholly void. AIR (Vol 16) 1929 Lah 477: 119 Ind Cas 235.

——Sch. 2, Para 1 — Validity of award.

The objection that a "party interested" was not joined as party to the reference, and therefore the reference was without jurisdiction can be taken by any party to the award, as the omission to make an ex parte defendant a party to the award is fatal to the jurisdiction of the arbitrators to make an award. (1926) 96 Ind Cas 273: 23 MLW 769: 1926 MWN 391.

——Sch. 2, Para 1 — Interested but ex parte.

Reference without a party interested in the litigation joining in it is not a valid reference though he may be a defendant who is ex parte. AIR (Vol 12) 1925 Mad 621: 48 MLJ 142: 86 Ind Cas 839: 21 MLW 498: 1925 MWN 97.

——Sch. 2, Para 1 — Parties — Non-appearance — Reference — Consent of all parties — Award otherwise invalid.

A Court has no jurisdiction to make an order of reference under Sch. II, para. 1 without the consent of all the parties including the party who does not appear. If an order be made without the consent of such non-appearing party it is illegal, and an award made on such reference is also illegal. AIR (Vol 7) 1920 Cal 113: 47 Cal 555: 31 CLJ 150: 55 Ind Cas 747 (DB).

(c) Waiver of right to object.

——Sch. 2, Para 1 and O. 1, R. 13 — Parties — Non-joinder — When can be raised — Waiver.

Where in a reference to arbitration some of the defts. were not joined and no objection was at any stage taken on ground of non-joinder, the reference is not bad under O. 1, R. 13, the right to object has been waived. AIR (Vol 1) 1914 Cal 497: 23 Ind Cas 862 (DB).

——Sch. 2, Para 1 — Parties — Non-joinder of — Waiver of right to object to irregularity.

The conduct of the parties amounting to waiver of the right to object to an irregularity in the reference to arbitration, empowers a Court to construe very strictly the words 'all the parties interested' in Sch. II, para. 1 and to exclude therefrom persons who did not take the trouble to appear in Court. 78 PLR 1913: 18 Ind Cas 761.

——Sch. 2, Para. 1 — Objection — Waiver — Acquiescence.

A person having an option to avoid an award is deemed to have consented to it if he voluntarily submits to the proceedings before arbitrators. (1912) 6 SLR 146: 19 Ind Cas 374 (DB).

7. Power of Appellate Court to refer.

——Sch. Para 1 — Appellate Court, if can on application of parties, refer matter to arbitration.

An application for reference to arbitration under Sch II, Civil P. C., may be made to the Appellate Court as well as to the Court of original jurisdiction and the Appellate Court can refer the matter in dispute to arbitration on such application being made to it by the parties. AIR (V 30) 1943 Sind 22: ILR (1942) Kar 177 : 204 Ind Cas 473 (DB).

8. Presentation of application.

——Sch. 2, Para 1 — Agreement recorded in Court's proceedings bearing signature of parties — Whether constitutes sufficient compliance with requirements of Para 1.

The provision of Sch. II, Para 1, Civil P. C., that the application for reference to arbitration should be in writing is only directory and not mandatory. The record of the agreement in the Court's proceeding and bearing the signature of the parties constitutes sufficient compliance with the requirements of Para. 1. Sch. II. AIR (V 22) 1935 Oudh 499 : 1935 OWN (CC) 1069 : 11 Luck 475 : 158 Ind Cas 300 (DB).

——Sch. 2, Para. 1, Cl. (2) — Application to refer dispute to arbitration — Whether should be in writing.

The expression "application shall be in writing" in Para. 1, Cl. (2) of the Second Schedule of the Civil P. C., is merely directory and not mandatory and hence there was valid reference to arbitration even when the application has not made in writing. (1935) 155 Ind Cas 290 : 1935 OWN (CC) 642 and 1003 : 11 Luck 263 (DB).

——Sch. 2, Para. 1 — Commissioner appointed to examine witnesses — Application by parties stating they had agreed to refer case to arbitration presented to Commissioner — Whether constitutes valid presentation — Oudh Civil Rules, Chap. II, R. 18.

A Commissioner appointed for examining a party's witnesses is in the position of an officer of the Court and has authority to act as such in all matters connected with or arising out of the examination of witnesses which he is required to carry out. When the parties present to him an application under Sch. II, Para. 1, Civil P. C., addressed to the Court which is seized of the case, the presentation is sufficient and constitutes sufficient compliance with the provisions of Sch. II, Para. 1. Nor does the presentation offend against the provisions of R. 18 of Chap. II of the Oudh Civil Rules. AIR (V 20) 1933 Oudh 521 : 10 OWN (CC) 1102 : 9 Luck 203 : 147 Ind Cas 855 (DB).

——Sch. 2, Para. 1 — Joint application by all parties, necessity of.

In order that a reference to arbitration under Para. 1, Sch. II, Civil P. C., may be valid, not only the writing out of an application to refer a pending suit to arbitration but the presentation of it also must have the concurrence of all parties concerned. (1933) 142 Ind Cas 678 : 34 PLR 247.

——Sch. 2, Para. 1 — Writing.

The provision of para. 1, that the application shall be in writing is directory only and not mandatory. It is also not necessary that all the parties must sign the application. It is enough if it is proved that all the parties consented. AIR (V 15) 1928 Mad 48 : 105 Ind Cas 105 (DB).

——Sch. 2, Para. 1 — Writing.

Where a Court in the presence of the parties but without a written application from them, but on their consent, made an order of reference in a pending suit.

Held, that the award by the arbitrators was valid. Oral statements by the parties or their pleaders recorded by the Court is an agreement in writing and supplies the place of a written application by the parties or pleaders. AIR (V 11) 1924 All 540 : 79 Ind Cas 816 : 46 All 208 : 22 ALJ 67.

——Sch. 2, Para. 1 — Writing.

Clause (2) of Para. 1 of the second Schedule requiring that an application contemplated by that clause shall be in writing is not merely directory but the parties are estopped from raising the plea that application for reference was not in writing with the object of defeating the entire arbitration proceeding and the award following it, where the matter had advanced a stage further and the order had actually been made. AIR (V 11) 1924 Oudh 400 : 78 Ind Cas 378 : 11 OLJ 142.

——Sch. 2, Para 1 — No written application — Jurisdiction.

Where the parties to an appeal had agreed to abide by the statement of one H and not to refer the matter in dispute for decision by H and no application in writing showing the agreement to refer the matter in dispute was ever filed in Court nor did the defendant ever apply to the Court to refer the matter to H.

Held, the provisions of Section 1, sub clauses (1) and (2) of Schedule II, C. P. Code, were not complied with, and accordingly the Court was not deprived of its jurisdiction to hear the appeal. AIR (V 10) 1923 All 65 : 79 Ind Cas 246.

——Sch. 2, Para. 1 — Form of Reference— No application in writing — Waiver — Effect.

The parties could ratify a reference to arbitration though the procedure laid down in para 1 the 2nd Schedule has not been strictly followed by appearing before the arbitrator and giving evidence. (1911) 9 Ind Cas 412 (Oudh).

9. Private reference.

——Sch. 2, Para. 1 — Review application pending — Parties, if can refer privately matter in dispute to arbitration.

The judgment contemplated by Para. 1, Sch. II, Civil P. C., is a judgment in a suit and review proceedings are not a suit. Paragraph 1 predicates the pendency of a suit. The mere filing of an application for review will not re-open the suit. Hence the words 'at any time before judgment is pronounced' in Para. 1 cannot apply to an order upon an application for review. The parties to a suit are, therefore, at liberty to refer privately to arbitration, the matters in dispute between them, after the decision of the suit, notwithstanding the pendency of a review application. AIR (V 29) 1942 All 36 : (1941) ALJ 770 : 1941 AWR (HC) 371 : 198 Ind Cas 385 (DB).

——Sch. 2, Para. 1 — Court has no jurisdiction to refer dispute on award made by arbitrator outside Court so as to modify award.

When an award is made by arbitrator outside Court and afterwards an application is made to the Court under R. 20 to file the same, the Court has no jurisdiction to refer to the disputes on the award to arbitration so as to modify the award inasmuch as it cannot itself do so, but has either to order the award to stand filed and to pass a decree in accordance with it or to order that the application to file an award be dismissed. AIR (V 16) 1929 Sind 107 : 23 SLR 349 : 116 Ind Cas 102 (DB).

——Sch. 2, Para. 1 — Suit for partition — Reference to private arbitration on counsel's motion — Consent decree passed — Validity of decree.

In a suit for partition, on the motion of the counsel of the parties, a particular person was appointed as a special referee to go into accounts and a consent decree was passed fixing the shares of the parties. Thereupon one of the parties moved the Court to set aside the decree on the ground that the counsel consented to arbitration contrary to his instructions. The Court found that the counsel had limited authority and proceeded with the case.

Held that if a client objected to important matters of account being referred to private arbitration and to a private referee, and if that was done by mistake of his counsel, the Court was not wrong in taking steps to see that the suit should proceed in the ordinary way. AIR (V 15) 1928 Cal 378 : 32 CWN 44 : 106 Ind Cas 309 (DB).

——Sch. 2, Para. 1 — Pendency of suit — Enforceability of award.

Once a suit has been instituted, all proceedings in arbitration are subject to the control of the Court. It is not permissible to the parties to deprive the Court of its jurisdiction by private reference to arbitration, and no award made on such reference, unless consented to by both parties, can be enforced in the suit, either by treating it is an adjustment of the matters in dispute under R. 3 O. 23, or under the general law of contract. AIR 1921 Bom 310, Diss. from. AIR (V 14) 1927 Cal 887 : 104 Ind Cas 360 : 47 CLJ 59 : 33 CWN 390 (DB).

——Sch. 2, Para. 1 — Pendency of suit — Validity— Powers of Court — Procedure — Parties to a suit pending in Court having jurisdiction can refer the

subject-matter to arbitration without Court's intervention but award cannot be filed either under Sch. II or Arbitration Act — It can be filed only as adjustment under C. P. Code, O. 23, R. 3 — Arbitration Act, S. 11, C. P. Code, O. 23, R. 3.

Per Kennedy, J. C. — The parties have power to refer a matter without the leave of the Court, which matter forms subject-matter of suit pending in a Court of competent jurisdiction, to arbitration. But if they do so, the Court has not the power to file the award as an award and pass a decree on it under the Second Schedule of the C. P. Code, or to allow the award to remain filed under the Indian Arbitration Act, but should act under O. 23, R. 3, C. P. Code.

Per Madgavkar, A. J. C. — When parties to a suit desire to refer the subject-matter of the suit to arbitration, the Indian Arbitration Act has no application and the procedure which the law contemplates and favours is that they should apply to the Court, as laid down in paragraph 1 of the Second Schedule of the C. P. Code. This paragraph is not, however, mandatory nor is the 2nd Schedule exhaustive, and reference by parties without the leave of the Court is not illegal or invalid. But paragraphs 17 to 22 of the Second Schedule of the C. P. Code, do not apply to such reference, which can only be treated as ordinary agreement.

If, on such a reference an award is passed by private arbitration the Court cannot file it under the Arbitration Act nor pass a decree under the Second Schedule but the award can be brought to the Court's notice under Order 23, Rule 3, C. P. Code, as an adjustment by lawful agreement and if proved to the satisfaction of the Court, can be recorded. and a decree passed in accordance therewith. AIR (V 8) 1921 Sind 65 : 81 Ind Cas 653 : 16 SLR 174 (FB).

——Sch. 2, Para. 1 — Private reference — Pending suit — If competent.

Parties to a pending litigation cannot make a reference to private arbitration without reference to the Court. Neither an agreement to refer without the intervention of the Court, nor a disputed award made thereon is within O. 23, R. 3. 40 B 386 not Foll. AIR (V 5) 1918 N 237 : 46 Ind Cas 902.

——Sch. 2, Paras 1 and 20 — Private reference — Pendency of suit — Procedure.

If a matter in dispute is during the pendency of a suit, referred to arbitration without the intervention of the Court the reference does not fall within Sch. II but the award may be recorded as an agreement adjusting or compromising the suit, and a decree may be passed in the terms of the award. AIR (V 5) 1918 Nag 30 : 49 Ind Cas 746.

——Sch. 2, Para 1 — Private reference — Pending suit.

Parties can refer disputes to Private arbitration though a suit between them is pending. They need not apply to Court for the purpose. AIR (V 4) 1917 M 312 : (1916) 1 MWN 203 : 19 MLT 228 : 33 Ind Cas 67 (DB).

——Sch. 2, Para 1 — Private reference — Pending suit — Legality of.

Parties to a pending suit are legally competent to refer the matters in dispute to a private arbitration without the help of the Court; and especially so when the reference is even by person other than the parties to the suit.

S. 525 of the Old Code applied to an award made on a private reference by parties pending a suit in Court. (1912) 23 MLJ 290 : (1912) MWN 1091 : 12 MLT 133 : 16 Ind Cas 478 (DB).

10. Revision.

——Sch. 2, Para. 1, S. 115 — Judgment-debtors jointly and severally liable for sum due to decree-holder — Application for reference to arbitration by decree-holder and only some of them — Order of reference by Court — Legality — Revision.

Where out of seven judgment-debtors who were jointly and severally liable for a sum due to the decree-holder, five joined the decree-holder in the application for the reference of the question as to the amount for which they were liable to arbitration, and the reference was ordered by the Court :

Held, that as all the judgment-debtors were jointly and severally liable and the decree-holder was in a position to execute it against all, any one or more of them and they were, therefore, one and all interested in the suit at the stage which it had reached when the reference to arbitration was made, the reference was illegal and should be set aside and the application in revision against the order was competent. AIR (V 22) 1935 All 34 : (1934) ALJ 1131 : 4 AWR (HC) 890 : 57 All 482 : 152 Ind Cas 397.

——Sch. 2, Para. 1 — Validity of award — Revision.

A Court referring a matter to arbitration at the request of some only of the parties, is acting beyond the jurisdiction allowed by Sch. II of the C. P. Code, consequently, if an award is passed on such reference, and a decree is passed, a revision lies. AIR (V 14) 1927 All 563 : 102 Ind Cas 236 : 49 All 812 : 25 ALJ 606 (DB).

——Sch. 2, Para. 1 — Order of reference — Jurisdiction of Court.

When the jurisdiction of the Court to make the order of reference is attacked, the High Court has power to revise the order in revisional jurisdiction. AIR (V 14) 1927 Cal 52 : 98 Ind Cas 803 : 44 CLJ 224 (DB).

——Sch. 2, Para. 1 — Decree in accordance with award — Revision or appeal.

No appeal or revision lies from the decree which is in accordance with the award. Arbitration proceedings are not compulsory and when parties agree to refer their dispute to a tribunal other than that of recognised Courts, they must abide by the consequences of their procedure. It is immaterial whether the Court does or does not give proper opportunities for hearing all the objections to the award or whether it is right or wrong in deciding that the objection statement put in was not a proper application to set aside the award. AIR (V 9) 1922 Mad 429 : 70 Ind Cas 410 : 15 MLW 111 : 31 MLT 52 : 1921 MWN 423 (DB).

11. Subject of reference.

——Sch. 2, Para. 1 — Suit for restitution of conjugal rights, if can be referred to arbitration.

The question whether a person should be given a decree for restitution of conjugal rights against his wife is a matter in difference between the husband and wife in suits for restitution of conjugal rights and there is no legal bar in Sch. II, Civil P. C. to its being referred to arbitration. Hence, there is nothing to prevent a reference of the whole suit for restitution of conjugal rights to arbitration and to a decree being passed in accordance with the award. AIR (V 28) 1941 Pesh 43 : 1946 Pesh LJ 43 : 194 Ind Cas 466 (DB).

——Sch. 2, Para. 1 — Parties agreeing as to their respective shares — Agreement incorporated in preliminary decree and division of properties referred to arbitrators — Final decree wholly based on award — Case, if falls under Sch. II.

There is nothing in the Civil P. C. to prevent the parties from referring the matter in difference between them to arbitration at any stage of the suit. Where in a partition suit, the parties have agreed among themselves as to their respective shares and this agreement is incorporated in the preliminary

decree but the division of the properties is referred to the arbitrators and the division of the properties which is wholly a subject of the final decree, is wholly based upon the award of the arbitrators, the case falls under Sch. II. AIR (V 26) 1939 Pat 526 : 18 Pat 193 : 6 BR 88 : 185 Ind Cas 52 (DB).

——Sch. 2, Para. 1 — Parties not agreeing as to mode of division of properties and referring matter to arbitration — Such case, if covered by Para. 1.

The expression "the matter in difference between the parties" which has been used in Para. 1, Sch. II, Civil P. C. is quite general and fuly covers a case where in a partition suit the parties not having agreed among themselves as to how the property was to be divided, referred the matter to the arbitrators. AIR (V 26) 1939 Pat 526 : 18 Pat 193 : 6 BR 88 : 185 Ind Cas 52 (DB).

——Sch. 2, Para. 1 — Suit for title and possession of muth — Reference to arbitration — Legality of.

The parties were litigating in their own rights and were claiming that each of them was of right entitled to the muth. They did not ask the Court to appoint a trustee on the supposition that the office was vacant.

Held, that in these circumstances, the Court could not possibly have investigated the rights and interests of a third party outside the litigation and even if satisfied that such a third party is the real trustee, could not have appointed him as trustee. The sole question was whether the plaintiff was entitled to possession of the property or whether it should remain in the possession of the defendant and the claim should be dismissed.

The dispute, therefore, was clearly of a private nature and there was nothing on the face of it on the record which would suggest that a reference to arbitration of such a dispute was in any way illegal or forbidden by law or contrary to any well-known rule of public policy :

Held, also that the decision of the rights of the parties will be only inter se and will in no way prejudice any other person who may have a better right to be the trustee. AIR (V 21) 1934 All 368 : (1934) ALJ 711 : 4 AWR (HC) 1584 : 56 All 721 : 151 Ind Cas 148 (DB).

——Sch. 2. Para 1 — Suit for restitution of conjugal rights — Whether can be referred to arbitration.

Although it is entirely within the discretion of the Civil Court to grant or refuse to grant a decree for restitution of conjugal rights, a suit for restitution of conjugal rights can be referred to arbitration as such suits come within the ambit of Para. 1, Sch. II, Civil P. C. The function of the Civil Court to grant or refuse to grant a decree for restitution of conjugal rights is not delegated to arbitrators, when such a suit is referred to the decision of arbitrators under the provisions of Sch. II, of the Civil P. C.

The Court has ample powers to remit the award for re-consideration to the arbitrators or to refuse to make the award a decree of the Court. Even if it be deemed that to some extent the discretionary powers of the Civil Court to grant or refuse to grant a decree for restitution of conjugal rights have been taken away from it, when such a suit is referred to arbitration, it cannot be held that such suits for restitution of conjugal rights, in the absence of any provision to that effect, do not come within the ambit of Para. 1 of Sch. II of the Civil P. C. AIR (V 21) 1934 Oudh 494 : 11 OWN (CC) 1203 : 10 Luck 228 : 152 Ind Cas 90 (DB).

——Sch. 2, Para. 1 — Restitution of conjugal rights — Suit for — Whether can be referred to arbitration.

It is not competent to a Court to delegate to arbitrators a question whether a suit for restitution of conjugal rights should be decreed. When such a question has been referred to arbitration and on the award a decree has been made, the decree should be set aside. AIR (V 20) 1933 Lah 532 (1) : 34 PLR 282 : 144 Ind Cas 179 (1) (DB).

——Sch. 2, Para. 1(3) — Subject of reference — Court cannot delegate its functions to private individual — Genuineness of a will.

Judge has no jurisdiction to allow the dispute relating to the genuineness of a will in a probate proceeding pending before him to be referred to the arbitration of an arbitrator. He has got to be satisfied that the will is a genuine document before the order of granting probate is passed. He cannot delegate these functions to a private individual and decide the point through him. AIR (V 17) 1930 All 840 : 128 Ind Cas 817 : 1930 ALJ 1584 (DB).

——Sch. 2, Para. 1 — Subject of reference — Future disputes.

There is no provision in Sch. 2, metting an agreement to refer to arbitration which sets forth that any matters which might in future arise between the parties might also be referred to the decision of the arbitrators on application of the parties. AIR (Vol 17) 1930 All 319 (DB).

——Sch. 2, Para. 1 — Personal right.

There is no bar to refer to arbitration under the provisions of Sch. 2, C. P. Code, a suit which relates to personal rights between the parties, e. g., a claim for past and future maintenance and residence, cognizable by Civil Court, of a widow though a question of the validity of her marriage is involved. AIR (V 17) 1930 Sind 195: 121 Ind Cas 164.

——Sch. 2, Para. 1 — Criminal complaint.

A criminal complaint cannot be referred to arbitration, and therefore, the award following it cannot be made a rule of a Civil Court. AIR (V 16) 1929 Lah 394: 116 Ind Cas 215: 30 PLR 122: 11 LLJ 89.

——Sch. 2, Para. 1 — Executor — Terms of will.

An executor cannot legally make any reference to arbitration which will go against the terms of the will, award on such reference is invalid. AIR (V 15) 1928 Cal 275: 32 CWN 108: 107 Ind Cas 70.

——Sch. 2, Para. 1 — Reference part through court and part out of Court.

If the parties to the suit apply to the Court for an order of reference with regard to the matter in difference in the suit and on the same day make a reference to arbitration without the intervention of the Court with regard to other matters in dispute between the parties by a separate agreement the order of reference made by the Court with regard to the subject-matter of the suit cannot be questioned on the ground of illegality or invalidity. If the parties in their application for reference to arbitration with regard to matters in difference in a suit put in other matters of difference but the Court makes a reference to the arbitrators only with regard to the matters in difference in the suit without any objection of the parties, such reference is not illegal. Where the parties in addition to the petition filed in the Court actually enter into a separate agreement to refer matters in dispute outside the subject-matter of the suit to the same arbitrators, and the arbitrators act upon that agreement and make two awards, one with regard to the matter in difference in the suit under the order of reference by the Court, and another not with reference to the subject-matter of the suit the strength of the agreement of the parties, and the award with regard to the other matters although on the record has not been acted upon in

any way, the mere fact that other matters were referred to in the application for making the order of reference not in dispute does not vitiate the order as made by the Court. AIR (V 14) 1927 Cal 52: 44 CLJ 224: 98 Ind Cas 803 (DB).

——Sch. 2, Para. 1 — Partition suit.

Where aplaintiff claims a legal right to partition and the parties are in dispute both as to the articles to be divided and the allotment between them are matters in dispute which could be referred to arbitration. AIR (V 14) 1927 Pat 135: 1926 PHCC 161: 7 PLT 739: 95 Ind Cas 321 (DB).

——Sch. 2, Para. 1 — Subject-matter of reference — Construction of order of reference.

Before arbitrators get jurisdiction to decide a dispute, it must be clear that it is referred. Where the reference to the arbitration is not clear as to the matters referred, Courts should not be unreasonable or unduly technical in construing the document when it is drawn up by persons not familiar with law and legal phraseology; but at the same time the Court must be satisfied by the language used that a matter decided was in truth referred to the arbitrators for decision It does not matter whether or not the arbitrators genuinely believed that a particular matter was referred, and the final decision as to whether the particular matter was referred or whether a particular party had consented to refer it lies not with the arbitrators but with the Court. AIR (V 13) 1926 Mad 752: 50 MLJ 514: 23 MLW 681: 1926 MWN 445: 95 Ind Cas 740 (DB).

——Sch. 2, Para. 1 — Suits of civil nature.

Suits cognizable by a Civil Court to which the provisions of the C. P. Code apply may be referred to arbitration. AIR (V 13) 1926 Sind 128: 20 SLR 116: 98 Ind Cas 550 (DB).

——Sch. 2, Para. 1 — Point at issue.

Whether or not the Court can legally enquire into any question on which the parties join issue is a dispute within the meaning of para. 1 and can be referred to arbitration. AIR (V 12) 1925 Cal 812: 87 Ind Cas 633: 52 Cal 559: 42 CLJ 26: 29 CWN 886 (DB).

——Sch. 2, Para. 1 — Failure to pay a claim.

A failure to pay a claim constitutes a matter in difference between the parties to a submission. AIR (V 11) 1924 Sind 117: 80 Ind Cas 1009: 17 SLR 86.

——Sch. 2, Para. 1 — Failure to pay claim.

A mere failure to pay a claim constitutes a difference between the parties to a submission. AIR (V 11) 1924 Sind 105: 80 Ind Cas 969: 17 SLR 15.

——Sch. 2, Para. 1 — Matters in difference in suit.

The Court's jurisdiction to refer to arbitration is confined to matters in difference in the suit itself, and not extended to all matters in dispute between the parties. AIR (V 8) 1921 Mad 709: 65 Ind Cas 92: 14 MLW 666: 1921 MWN 756 (DB).

——Sch. 2, Para. 1 — Subject of reference-Withdrawal of part of claim after reference.

A portion of the claim under reference to an arbitration cannot be withdrawn without the consent of the other party. AIR (V 6) 1919 Cal 1030: 28 CLJ 275: 46 Ind Cas 477 (DB).

——Sch. 2, Para. 1 — Subject of reference — Construction to be liberal — Whole case referred — Power to award money or impose other conditions — Duty of Court in dealing with award.

Where parties apply to the Court to refer their muqaddama to the arbitration of a particular person the words used in the application should not be interpreted in a narrow sense but should be taken to mean that the parties ask for the settling of all their disputes through arbitration and the arbitrator could award damages or impose other conditions. (1912) 15 Ind Cas 321 (Oudh).

——Sch. 2, Para. 1 — Subject of reference.

The subject matter of every suit which can be instituted in Civil Court cannot be referred to arbitration. (1910) 32 All 503 : 7 ALJ 761 : 6 Ind Cas 219 (DB).

12. Validity of reference and award.

(a) General.

See also N. 1, 5 and Para. 20.

(a-1) Action of arbitrator.

(b) Death of party.

(c) Minor.

(d) Pending suit.

(e) Procedure.

(a) General.

——Sch. 2, Para 1 —Power of one partner to bind others by reference to arbitration — Attorny's powers.

It is not a part of the authority of one partner of a firm to refer a suit to which the firm is a party to arbitration. The authority of a partner instructing an attorney acting on behalf of the firm does not include an authority to refer the matter to arbitration without the consent of the other partners, still less an authority to refer the matter to the arbitration of the attorney himself. AIR (Vol 19) 1932 Cal 343 : 36 CWN 8: 138 Ind Cas 386 (DB).

——Sch. 2, Para 1 — Minor points not dealt with.

When it appears from the evidence on the record that the parties agreed, to the settlement of the disputes in a certain manner and gave up the remaining points which they apparently considered to be trivial, the incomplete character of the award cannot be considered to be fatal to its validity, when the arbitrator gives his award according to the agreement. 177 Ind Cas 89 : AIR (Vol 16) 1929 Lah 831.

——Sch. 2, Para 1 — Dispute as to use of mosque.

Where an award does not purport to deal with the question of tauliat or management of a mosque but only determines which party is entitled to the use of the mosque and decides one of them to be so entitled, the award of that character is not open to objection. 98 Ind Cas 998 : AIR (Vol 14) 1927 All 128 (DB).

——Sch. 2, Para 1 — Scope of reference.

An award not contemplated or authorized by the order of reference is invalid. It is impossible according to the Statute Law of India that one and the same arbitration should be held as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court, between the parties to the suit and between them and other persons and partly upon an order of reference and partly under an agreement. 92 Ind Cas 633 : 28 Bom. LR 217 : 3 OWN 127 : 24 ALJ 13 : 43 CLJ 14 : 27 PLR 35 : 1926 MWN 96 : 3 PLR 330 : 53 IA 1 : 53 Cal 258 : AIR (Vol 12) 1925 P.C 293 : 49 MLJ 812.

——Sch. 2, Para 1 — Award not in conformity in the order of reference.

It is incumbent upon arbitrators acting under an order made in pursuance of paras. 1 and 2 strictly to comply with its terms. The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order. An award made otherwise than in accordance with the authority by the order conferred upon them is an award which is "otherwise invalid" and which may accordingly be set aside by the Court under para. 15. 92 Ind Cas 633 : 28 Bom. LR 217 : 3 OWN 127 : 24 ALJ 13 : 43 CLJ 14 : 27 PLR 35 : 1926 MWN 96 : 3 PLR 330 : 53 IA 1 : 53 Cal 258 : AIR (Vol 12) 1925 P C293 : 49 MLJ 812.

——Sch. 2, Para 1 — Oral — Value of — Writing when necessary.

There is no question that, in law, an oral award is good and binding on the parties to the reference. If the parties desire to have the award made a decree of the Court it may be necessary for them to get the award reduced to writing to be filed in Court : but so far as the effect of the award on subsequent suit, dealing with the subject-matter of the award, is concerned, the award will bar the suit whether it be oral or whether it be in writing. 2 Bur. LJ 163 : 79 Ind Cas 742 : AIR(Vol 11) 1924 Rang 60 (DB).

——Sch. 2, Para 1 — Dispute — Meaning of.

A dispute implies an assertion of a right by one party and a repudiation thereof by another. The appellant wanted a variety of information from the respondents to enable him to judge whether the goods supplied were or were not according to the contract. Amongst other things, he demanded the production of the basis and shipment samples. The respondents declined to comply with the request. But there was at no stage an assertion by the appellant that the goods had not been supplied according to the contract and consequently there was not and could not be a repudiation by the respondents of any such possible assertion.

Held, that there was no "dispute" which could be and had been validly referred to arbitration. 64 Ind Cas 798 : 33 CLJ 545 : AIR (Vol 8) 1921 Cal 342 (DB).

——Sch. 2, Para 1 — Reference to Court — Arbitration.

When a suit is not maintainable under the law an agreement by a party to abide by the decision of Court cannot be binding. 19 CWN 1141 : 21 Ind Cas 958 : AIR (V 2) 1915 Cal 577 (DB).

——Sch. 2, Para. 1 — Validity of reference — Assistant Collector — Power of.

An award on reference made by Assistant Collector of second class in mutation proceedings., is invalid as the reference itself is ultra vires. (1910) 7 ALJ 69 : 5 Ind Cas 519.

——Sch. 2, Para. 1 — Parties — Partners — Powers of partner.

One partner cannot bind the firm by submission to arbitration unless he has formal or informal special authority in that respect. (1910) 11 CLJ 658 : 14 CWN 1106 : 6 Ind Cas 63 (DB).

(a-1) Action of arbitrator.

——Sch. 2, Para 1 — Arbitrator reading inadmissible evidence.

An arbitrator, reading a letter which was eventually rejected as evidence, cannot be said to have been prejudiced by the letter and so is not guilty of any misconduct, and as such his award cannot be set aside. 30 Bom. LR 90 : 40 Bom. 40 : 108 Ind Cas 18 : AIR (Vol 15) 1928 Bom. 55 (DB).

——Sch. 2, Para 1 — Will — Construction — Arbitrator's power.

Where a will directed that a legatee should take his share on attaining a particular age, but the other legatees and executors agreed before arbitrators that the legatee may be given his share even before he attained that age and the arbitrators found after construing the will that the interest of the legatee was absolute and not limited.

Held that the decision of the arbitrators empowering the legatee to take his share before the particular age was valid. 109 Ind Cas 821 : 6 Pat 556 : AIR (Vol 15) 1928 Pat 7 (DB).

——Sch. 2, Para 1 — An arbitrator absent at one meeting — Effect.

Absence of one of the arbitrators at one of the meetings, at which, it is shown, that nothing material was done, does not make the award invalid. 60 Ind Cas 181 : 12 LW 505 : AIR (V 7) 1920 Mad 288.

(b) Death of party.

——Sch. 2, Para. 1 — Plaint signed by one partner — Reference by another.

After filing of the suit, the managing partner of plaintiff's firm who had signed and verified the plaint died and management was assumed by another partner, M. Then a reference was made to arbitration and application was signed by M personally and by the plaintiff's pleader without mentioning that he had instruction to sign it.

Held, that the reference was not bad and that it was not necessary for the pleader to state that he had instructions to sign the petition nor for M to say that he was signing in his dual capacity. 117 Ind Cas 783 : AIR (Vol 17) 1930 Sind 40.

——Sch. 2 Para 1 — Death of one of the parties — Effect of — Agreement among parties to bind themselves and representatives.

The arbitration is not revoked by the death of one of the parties if there is an agreement among the parties to bind themselves and their representatives-in-interest by the arbitration. Where one of the parties to an arbitration dies before the conclusion of the proceedings his representative should be brought on record but where the party dies after every business is finished except the grant of award the parties and other representatives are bound even if the party dies. (1912) 15 CLJ 360: 13 Ind Cas 161 (DB).

——Sch. 2 Paras 1 and 16 — Parties — Death of one — Reference to arbitration — Death of one of the parties — if revokes the authority of arbitrator.

The death of one of the parties to an arbitration does not necessarily revoke the authority of the arbitrator. (1911) 33 All 645: 8 ALJ 678: 11 Ind Cas 935 (DB).

——Sch. 2 Para 1 — Parties — Death of one party before award is made — Effect — English law.

The death of one of the parties to a reference to arbitration does not 'ipso facto' revoke the reference; the English common Law rule however is quite the reverse of the above. The question whether a legal representative of a deceased party to a reference to arbitration is bound by the contract of reference, depends upon whether the right is purely personal to the deceased or whether it survives to his legal representatives; where such legal representative becomes a party thereto and proceeds with the investigation, the award is binding on him. (1911) 14 CLJ 188: 11 Ind Cas 481 (DB).

(c) Minor.

——Sch. 2,Para 1 — Minor party — Reference without knowledge of guardian ad litem.

When a guardian has been appointed for the minor, it is that guardian alone who can represent the minor in all proceedings in that suit. If without any reference to the guardian 'ad litem' of the minor the other parties to the suit refer their disputes to arbitration the minor's uncle professing to act as the guardian, the award cannot bind the minor. AIR (Vol 17) 1930 All 646: 1930 ALJ 923 (DB).

——Sch. 2, Para 1 — Minor — Whether bound by arbitration consented to by natural guardian.

A natural guardian can on behalf of a minor enter into an arbitration so as to be binding on minor if it is proper, reasonable and for the benefit of minor. AIR (Vol 7) 1920 Bom 32: 44 Bom 202: 22 Bom LR 266: 56 Ind Cas 399 (DB).

——Sch. 2, Paras 1 and 16 — Minor — Negligence of guardian — Award if binding on minors.

Where a minor, party to a reference, is not properly represented in the arbitration proceedings and his guardian fails grossly and fraudulently in his

duty to protect his interests, the award passed by the arbitrators is not binding on the minors. AIR (Vol 7) 1920 Mad 195: 56 Ind Cas 593 (DB).

——Sch. 2, Para 1 — Minor Reference.

A minor is bound by an agreement of arbitration entered into by his predecessor in title. AIR (Vol 6) 1919 Cal 295: 23 CWN 293: 50 Ind Cas 879 (DB).

——Sch. 2, Para 1 — Minor — Reference — Application to Court — Not signed by parties — Award — Validity of.

Sch. II, Para 1 does not require that the application in writing for an order of reference to arbitration should necessarily be signed by the parties to the suit agreeing to the reference. Where one of the parties to a suit being an infant, the agreement to refer was signed by the adult parties and by the 'guardian ad litem' of the infant and all the parties, including the guardian, appeared before and the Judge, thereupon, made an order of reference.

Held, that the order was proper and the award thereon was not vitiated. AIR (Vol 2) 1915 PC 79: 43 Cal 290: 43 IA 1: 20 CWN 137: 30 MLJ 67: 14 ALJ 97: 3 LW 145: 19 MLT 108: 23 CLJ 130: (1916) 1 MWN 67: 18 Bom LR 308: 32 Ind Cas 161.

——Sch. 2, Para 1 — Minor — Reference Guardian's assent — Repudiation by other party — Validity.

A natural guardian can refer a question that concerns the ward to arbitration and when the question does not concern the minors solely but also the guardian there is consideration and mutuality sufficient to preclude the other party to the reference from repudiating it. AIR (Vol 2) 1915 LB 110: 8 Bur LT 122: 29 Ind Cas 800.

——Sch. 2, Para 1 — Minor — Submission to arbitration by guardian — How far binding on ward.

A guardian may submit to arbitration on behalf of his ward so to bind both himself and the ward; but where he is, in his individual capacity, a party to the submission and his interest is adverse to that of the ward, he cannot submit on behalf of the ward. The whole question to be considered is whether the reference is for the benefit of the ward and the award will be binding on him if it is found to be beneficial to him. (1911) 14 CLJ 188: 11 Ind Cas 481 (DB).

——Sch. 2, Para 1 (S. 56 old Code) — Arbitration — Award — Reference — All parties — Minor party when not interested.

A suit was brought against several persons one of whom was a minor. An official of the court was appointed guardian ad litem for the minor defendant but he did not put in an appearance. The parties with the exception of the said minor applied to the court to refer the matters in dispute to arbitration. The reference was made and an award was given by the arbitrators whereby the minor was exempted from the plaintiff's claim. Objections being taken by the award.

Held that minor not having put in an appearance nor contested the suit was not a person interested in the matters which were referred to arbitration within the meaning of S. 1 Sch. II of the Code of Civil Procedure, and his not joining in the reference did not invalidate it. (1910) 7 ALJ 807 (809) (DB).

——Sch. 2, Para 1 — Parties — Joint Hindu family — Power of Manager to refer on behalf of minor members.

It is competent to the manager of a joint Hindu family to represent the minor members of his branch and agree on their behalf to a reference to arbitration regarding the partition of the family property. (1910) 7 Ind Cas 31 (Cal) (DB).

(d) Pending suit.

——Sch. 2, Para 1 — Suit on pro-note by assignee against assignor and executant — Denial of consideration by executant — Reference of suit to arbitration at the instance of plaintiff and executant alone — Award — Validity of.

Where a suit by the assignee of promissory note against the executant and assignor in which the executant pleaded absence of consideration was referred to arbitration at the instance of the executant and the plaintiff but without discharging the assignor from the array of parties:

Held, that the assignor was not a 'pro forma' defendant and was interested in meeting the defence of the executant as the plaintiff himself and hence the reference was in contravention of Sch. II, Para 1, Civil P. C. and hence the award was invalid.

Quaere— Whether it is open to some parties in a pending litigation to refer any controversy between them to arbitration, leaving the difference between one of them and some other party to be settled by Court. AIR (Vol 20) 1933 All 739: (1933) ALJ 602: 147 Ind Cas 869.

——Sch. 2, Para 1 — A suit is not pending between the dates of its dismissal for default and its restoration. AIR (Vol 13) 1926 Mad 1211: 97 Ind Cas 465 (DB).

——Sch. 2, Para 1 — Pendency of suit — Jurisdiction of Court.

The provisions of Sch. II as to an agreement to refer to arbitration are practically all permissive and it is nowhere laid down or even suggested that such agreement made between the parties to a pending suit cannot be carried out except under the orders of the Court. AIR (Vol 12) 1925 Nag 203: 83 Ind Cas 22.

——Sch. 2, Para 1 — Pendency of power — Reference to High Court under S. 17 Ajmer Courts Regulation.

Where after a reference to High Court under S. 17 of the Ajmer Courts Regulation and before the High Court gave its answers, the parties referred the matter in dispute to arbitration.

Held, that until the Ajmer Court passed its final judgment on receiving the answer from the High Court, the case must be deemed to be pending judgment and that in spite of the reference to the High Court, the agreement to refer to arbitration was valid. After the reference to arbitration the Court cannot deal with the matter in suit in any way. AIR (Vol 9) 1922 All 173 : 44 All 91 : 19 ALJ 876 : 64 Ind Cas 601 (DB).

——Sch. 2, Para 1 — Pendency of suit — Effect.

The words "any other law for the time being in force" refer to amendments of, or substitutions for, the Arbitrations Act or other piece of legislation on that subject-matter. They do not include O. 23, R. 3. Reference to arbitration in a pending suit without intervention of Court cannot be recognised. AIR (Vol 8) 1921 Cal 238: 25 CWN 127: 61 Ind Cas 919.

(e) Procedure.

——Sch. 2, Para. 1 — Agreement to refer to arbitration — Whether should be in writing.

Where the parties say that they wish to refer the matter in dispute to a certain person and abide by his decision, that person is clothed with the powers of an arbitrator. A written application to refer to arbitration is not necessary. When the Court passes an order of reference though not on a written application, the award is valid and binding and the order cannot be superseded. AIR (Vol 20) 1933 Rang 407: 12 Rang 1: 149 Ind Cas 916.

——Sch. 2, Para. 1 — Arbitration — Objection to award.

The parties to a suit stated that they would accept the statement which certain pleaders of the Court, whose names were mentioned, would make without taking oath. The pleaders were to decide all the points in dispute among the parties and were also to dispose of the question of costs. On this statement of parties being recorded, the Court referred the case to those pleaders. The pleaders filed a written statement and the Court at once proceeded to decide the case in accordance with the statement.

Held, that the whole proceeding was one of arbitration, and the award was not final, it not having been pronounced in the circumstances mentioned in Cl. (1) of para. 16. The Court should have allowed, the parties ten days time to object to the award. After considering the objections, if any, it was open to the Court to accept the award if it saw no reason to remit it and then to make a decree on foot of the award. AIR (Vol 14) 1927 All 614: 102 Ind Cas 608: 25 ALJ 787 (DB).

——Sch. 2, Para. 1 — Signature of pleader only to reference.

Absence of party's signature on the application for reference will not invalidate the award where the pleader who was conducting the case on his behalf and who had been specially authorised in the vakalatnama, to refer the suit to arbitration, had actually affixed his signature to the application and the party had appeared before the arbitrator during the proceedings. Specially, it does not lie in the mouth of the opposite party to pick holes in the award on this score. AIR (Vol 14) 1927 Lah 362: 8 Lah 693: 104 Ind Cas 202: 9 LLJ 569 (DB).

——Sch. 2, Para. 1 — Reference by father of joint Hindu family — If binding on sons.

A reference to arbitration made by the manager of a joint Hindu family consisting of himself and his sons is binding upon the sons unless the latter can show that the father's act was tainted with fraud or collusion or was otherwise done in bad faith. AIR (Vol 14) 1927 Lah 362: 8 Lah 693: 104 Ind Cas 202: 9 LLJ 569 (DB).

——Sch. 2, Para. 1 — Signature by son of party — Appearance by party — Effect.

Where a reference was not signed by one of the parties, but it was signed by his son and verified by his pleader and he himself appeared before the arbitrator,

Held, that the award was valid. AIR (Vol 11) 1924 All 457: 84 Ind Cas 640: 4 LRA (Civ) 472 (DB).

——Sch. 2, Para. 1 — Form of reference — Strict compliance with statute necessary.

The provisions of Sch. II para 1 must be strictly complied with in order that there may be a valid reference to arbitration in a suit. AIR (Vol 6) 1919 Cal 232: 49 Ind Cas 262.

——Sch. 2, Para. 1 — Parties — Application by some of the parties — Effect of.

Quaere — Whether an order of reference to arbitration made by the Court on the application of the plff. and one of the defts. is legal. AIR (Vol 5) 1918 Cal 287: 44 Ind Cas 480 (DB).

——Sch. 2, Paras 1 and 2 — Reference to Chamber of Commerce — Rules of Chamber if binding.

If a party to a contract has agreed to submit to an arbitration of the Bengal Chamber of Commerce he is bound by the rules of that Chamber in the matter of hearing and adjudicating on, such disputes. AIR (Vol 3) 1916 Cal 689: 42 Cal 1140: 19 CWN 820: 21 CLJ 584: 30 Ind Cas 681 (DB).

——Sch. 2, Para 1 — Form of Reference — Oral submission if valid.

A verbal submission to arbitration is valid, even though there is a likelihood of a question of title to immoveable property being affected. (1911) 14 CLJ 188: 11 Ind Cas 481 (DB).

——Sch. 2, Para 2.

——Sch. 2, Para 2 — Pleader as arbitrator — No authority but subsequent assent of party — Effect.

Where a pleader of a party appoints himself as arbitrator without any special authority and that party joins in the reference, neither such reference nor the pleader's conduct is objectionable. AIR (Vol 17) 1930 Sind 190: 123 Ind Cas 694 (DB).

——Sch. 2, Para. 2 — Reference by pleader — Authority.

A pleader can refer a matter to arbitration on the strength of his vakalatnama without any special authority from his client though such authority was necessary under the old Code. AIR (Vol 17) 1930 Sind 190: 123 Ind Cas 694 (DB).

——Sch. 2, Para. 2 — Scope — Question of law.

The scope of paragraph 11 is really limited to questions of law. It is true that it is not expressly stated in this paragraph that the statement of the special case must relate to questions of law: but sufficient indication in this direction is given as to the scope of this rule by the wording of the form No. 4 of the Appendix to this schedule which expressly refers to questions of law to be stated for the opinion of the Court. AIR (Vol 12) 1925 Bom 22: 48 Bom 663: 26 Bom LR 836: 84 Ind Cas 378 (DB).

——Sch. 2, Para. 2 — Revocation of appointment — Authority of pleader.

A pleader has no authority to revoke the appointment of arbitrators made by his clients, without instructions from the client, and to appoint a new arbitrator in substitution. AIR (Vol 9) 1922 Nag 39: 65 Ind Cas 879: 5 NLJ 229: 18 NLR 140.

——Sch. 2, Para 2 — Arbitrator — Commissioner — Difference between.

The Commissioner submits his reports for the approval of the Court and has no greater power than what the parties and the Court choose to give him but an arbitrator has a final authority to decide all matters in difference forming the subject of reference subject to the power of the Court, to set aside the award on certain grounds. AIR (Vol 1) 1914 Oudh 183: 25 Ind Cas 227 (DB).

——Sch. 2, Para 2 — Parties — All should join.

In order that a reference may be made under R. 2 of the Schedule II all parties must join in the application to the Court. It is not enough if the petition is signed by all. 50 PLR 1911: 17 PR 1911: 39 and 200 PWR 1911: 9 Ind Cas 195.

——Sch. 2, Para 2 and S. 54 — Old Code Ss. 525, 2 — Order refusing to file award — Decree — Appeal.

No appeal will lie from an order refusing to file an award between the parties without the intervention of a Court. 1903 AWN 234: 26 A 205 (DB).

——Sch. 2, Para 3.

1. **Court shall, by order, refer.**
2. **Effect of order of reference.**
3. **Matter in difference.**
4. **Shall fix such time as it considers reasonable.**
5. **Power of court after reference.**

1. Court shall, by order, refer.

——Sch. 2, Para. 3 — Court, if can compel party to refer to arbitration matter not agreed to be referred.

While Para 3 of Sch. II restricts the limitation on the Court's power in the case of matters refer-

red to arbitration, it does not thereby give the Court power to compel one of the parties to go to arbitration on a matter which he has not agreed shall be referred. There is no provision in the schedule which enables a Court directly or indirectly, to force a party to refer a matter in dispute. It has no power to nullify a reference lawfully made by an addition, to the matter referred, of some other matter by an amendment of the pleadings. The Court cannot, for instance, strike out any one of the issues referred because the Court has no jurisdiction over the subject-matter of the reference after an order of reference is made. Paragraph 3 (2) of Sch. II provides for that, and as the Court cannot substract from the subject-matter, so, the Court cannot add to the subject-matter, either by allowing an amendment of pleadings or otherwise. AIR (Vol 29) 1942 Sind 7: 198 Ind Cas 847 (DB).

——Sch. 2, Para 3 — Whole case referred — Court need not frame issues — Issue of jurisdiction.

Where the whole case is referred to arbitration, it is not necessary for the Court to frame issues noting the points in dispute between the parties and refer them specifically to the arbitrator.

Where a plea as to jurisdiction depends on questions of fact as well as of law, an arbitrator has full power to decide the question and a Court will not be acting illegally in referring such a question to an arbitrator. AIR (Vol 19) 1932 All 665: 54 All 297: 143 Ind Cas 191.

——Sch. 2, Para. 3 — Restitution of conjugal rights — Reference to arbitration — Validity.

The Court is not competent to refer the question of the exercise of its discretion in suits for restitution of conjugal rights to arbitration but other matters in dispute between the parties as distinct from the whole suit can be so referred and the Court can, on the whole award of the arbitrators or on the facts determined by the arbitrators, decide whether or not it should exerecise its discretion in favour of the plaintiff. AIR (Vol 17) 1930 Lah 707: 31 PLR 380: 12 LLJ 105.

——Sch. 2, Para 3 — 'Pending' — Meaning.

Suit cannot be said to be pending on the date of the agreement to refer to arbitration by reason of the possibility of an appeal being preferred within the period of limitation prescribed by law which period has not expired on the date of the agreement. There can be no order of reference to arbitration through the Court in such a case. AIR (Vol 17) 1930 Oudh 432 (DB).

——Sch. 2, Para. 3 — Revision — Illegal order of reference — Validity of award.

Where the award made by the arbitrators on reference is impeached on the ground that the reference itself is bad the High Court can revise the proceedings and, if necessary, set aside the order of reference with the result that the award will fall through. AIR (Vol 15) 1928 All 740: 110 Ind Cas 881: 26 ALJ 1009: 50 All 955 (DB).

——Sch. 2, Para 3 — Power of Court.

Although there is no specific provision in the second Schedule to the C. P. Code authorizing a Court to cancel an order made by it under para. 3 of the Schedule, yet in a proper case and for good cause the Court has inherent power to cancel that order. (Case law discussed.) AIR (Vol 12) 1925 Pat 720: 86 Ind Cas 540: 6 PLT 488.

——Sch. 2, Para 3 — Reference by parties — Suit adjourned from time to time to enable arbitrators to make the award — Effect.

The plaintiff and the only defendant interested in the subject matter of the suit agreed in writing to refer their disputes, including those in suit, to arbitration and the plaintiff presented an application that, as the matter in suit as well as other matters had been referred to arbitration the suit should be kept pending and adjourned till an award was made, and the Court accordingly granted the adjournment and kept the suit pending. Further adjournments consented to by the defendant, were applied for by the plaintiff and granted by the Court for the purpose of enabling the arbitrators to submit their award, and the Court wrote to the arbitrators, to expediate and the arbitrators, requested for further time, which was granted by the Court on the terms, that if they could not finish by the adjourned date, the suit would be posted for enquiry before the Court, that the parties should endeavour to get the arbitrators to pass the award and file the same within the time specified and that the arbitrators should be informed accordingly. After further adjournments the Court, on the application of the arbitrators got certain accounts filed in another suit between the parties in another Court and after some more similar adjournments' to all of which the defendant was a consenting party the award was filed and a decree was passed in accordance with it.

Held, there has been substantially though not in form, a reference by Court with the consent of the parties. AIR (Vol 9) 1922 Mad 429: 70 Ind Cas 410: 15 MLW 111: 31 MLT 52: 1921 MWN 423 (DB).

——Sch. 2, Para 3 — Discretion of Court — Arbitration — Application for reference made by parties.

The law gives the parties the right to have the matter submitted to arbitration at any time before the judgment is pronounced; and an application for reference made by the parties cannot be rejected by the Court. AIR (Vol 2) 1915 Cal 70: 24 Ind Cas 610 (DB).

2. Effect of order of reference.

——Sch. 2, Para. 3 (2) — Reference subsisting — Permission to plaintiff to withdraw and file fresh suit.

The Court has no jurisdiction to intervene and give the plaintiff permission to withdraw the suit and bring a fresh suit, after the suit has been referred to arbitration and so long as the reference subsists. AIR (Vol 25) 1938 All 56: (1937) ALJ 1163: 1937 AWR (HC) 1083: ILR (1938) All 146: 173 Ind Cas 895.

——Sch. 2, Para 3 (2), S. 35 — Reference — Costs incurred prior thereto — Omission of arbitrators to award such costs — Court, if can award.

Where the question relating to costs incurred in the litigation prior to a reference to arbitration was also referred to the arbitrators but the arbitrators left the question undecided and the Court did not remit the award on the ground that it had omitted to award costs :

Held, that as the Court was precluded from going into that matter by virtue of the provisions contained in Para 3 of Sch. II, it no longer had any discretion to award costs.

Held, further, that as soon as the dispute as regards costs of litigation was referred to arbitration, the Court became functus officio, so far as this matter was concerned and could not decide this question. AIR (Vol 19) 1932 All 183: (1931) ALJ 1155: 54 All 122: 136 Ind Cas 789 (DB).

——Sch. 2, Para 3 — Suit under S. 15B, Deccan Agri. Relief Act, 1879 — Reference to arbitration — Mortgage decree in terms of award — Order disallowing objections to award — Revision:

Held, that the order was not without jurisdiction and hence revision was not maintainable. AIR (Vol 19) 1932 Sind 77: 139 Ind Cas 842 (DB).

——Sch. 2, Para. 3 — Order of reference — After decree but before appeal — Award passed — Appeal withdrawn — Award if enforceable.

Where the reference to arbitration was made by the parties after the suit was disposed of by the trial Court and before the appeal was filed, Held, that the award was immune from the objection that unless proceedings before the arbitrators are stayed under para 18 of Sch 2, C. P. Code there might be a clash between the decision of the Court and of the arbitrators. The award is enforceable if the appeal is subsequently withdrawn. AIR (Vol 17) 1930 Oudh 432: 7 OWN 815 (DB).

——Sch. 2, Para 3 — Partition suit — Compromise petition defining shares and providing for arbitration — Arbitration proving abortive — Enforceability of preliminary decree.

Parties to a partition suit arrived at a compromise and jointly filed a petition of compromise in terms of which the Court passed a preliminary decree. The earlier part of the petition set out the respective shares of the parties and the latter part laid down the procedure by which the actual division was to be effected. This procedure included appointment of certain persons as arbitrators. But the petition nowhere made any mention of the application for an order of reference which the parties were to make. The arbitration did not prove successful,

Held, that there was no valid order of reference inasmuch as there was no application by the parties for such an order.

Held, further, that although, the latter part of the petition of compromise relating to procedure and appointment of arbitrators proved abortive, still the preliminary decree passed by the Court on the basis of the earlier part of it will stand. AIR (Vol 16) 1929 Cal 370: 33 CWN 1028: 118 Ind Cas 854 (DB).

——Sch. 2, Para. 3 — Provisions mandatory.

The words "shall not, save in the manner and to the extent provided in this Schedule deal with such matter in the same suit" in para. 3 (2) are imperative and convey prohibition and limit the scope of the Court's jurisdiction. AIR (Vol 13) 1926 Nag 37: 89 Ind Cas 782.

——Sch. 2, Para. 3 — Revocation of order of reference — Principles.

Obiter.—In giving leave to revoke a submission, the Court shall be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party who has a consideration for a contract had agreed to submit any disputes whether of law or fact, which might arise, to arbitration when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction or refusing jurisdiction or failing to do all that their jurisdiction requires them to do. The principle underlying the exercise of the power to revoke is that the parties take the arbitrators for better or for worse, and that their decision is final both as to law and fact; unless a substantial miscarriage of justice may take place, leave ought not to be given. It is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by. AIR (Vol 12) 1925 All 202 : 78 Ind Cas 1050 : 5 LRA Civ 319 (DB).

——Sch. 2, Para 3 — Pendency of reference.

When cases referred to arbitration appear in a special list it cannot be said necessarily because of cl. 2 that the arbitration cannot be superseded and a right and proper order made in the suit itself. By referring matters to arbitration under Sch. II parties are not to be allowed to delay the solution of their differences. AIR (Vol 12) 1925 Cal 83: 83 Ind Cas 128: 28 CWN 755.

——Sch. 2, Para 3 — Appointment of Receiver — Pending reference.

The Court is competent to appoint a Receiver in the interval between the submission of an award and the final acceptance or rejection of it and also where an arbitrator is proceeding with a reference. But in the latter case the power of the Court should not be exercised save in exceptional circumstances. AIR (Vol 12) 1925 Sind 102: 78 Ind Cas 84: 18 SLR 303.

——Sch. 2, Para 3 — Arbitration — Resiling from — Not permissible.

A party cannot resile from a reference to arbitration at his sweet will and pleasure and it cannot avail him to show that having once agreed to the reference he repents of his action. AIR (Vol 1) 1914 Oudh 327: 17 OC 386: 2 OLJ 129: 27 Ind Cas 424.

3. Matter in difference.

——Sch. 2, Para 3 — Powers of arbitrator — Receipt of payment.

An Arbitrator as such is not such an officer of the Court as is authorized to receive on behalf of the Court deposits of money made by the parties. He is appointed to arbitrate on matters in dispute, make his award and file it in Court, therefore, a payment to arbitrator does not amount to payment of money into Court. AIR (Vol 11) 1924 Rang 263: 80 Ind Cas 238: 3 Bur LJ 6 (DB).

4. Shall fix such time as it considers reasonable.

——Sch. 2, Para 3, O. 9, R. 8 — Arbitrators disagreeing — Parties agreeing to abide by decision of umpire — Court fixing day for umpire's report — Plaintiff absent on that day — Suit, if can be dismissed for default.

Where upon a difference between the arbitrators, the parties agree to abide by the decision of an umpire for whose report a day is fixed by the Court but the plaintiff remaining absent on that day and the suit cannot be dismissed for default under O. 9, R. 8, on a day when the umpire is expected to file his report. AIR (Vol 24) 1937 Pesh 49: 1937 Pesh LJ 49: 168 Ind Cas 866.

——Sch. 2, Para 3 — Contents.

If a Court wants to appoint an arbitrator under Sch. 2, it is bound to pass an order to that effect and fix a date for the return of the award and also for objections being filed. AIR (Vol 16) 1929 Mad 789 (DB).

——Sch. 2, Para 3 — Time for making the award.

The provision of Cl. 3, Sch. 2 that the Court shall fix such time as it thinks reasonable for the making of the award is mandatory. To leave the arbitrators collectively with a free hand as to time subject to no limit imposed by the Court, is exactly what the Act is taking measures to avoid.

The words of Cl. 3 "shall fix such time as it thinks reasonable for the making of the award" mean "shall fix such time for the making of the award as it thinks reasonable in that behalf." It cannot be assumed that it is no part of the intention of the statute to limit the power of the Court as to what it may do by consent of parties in this matter. AIR (Vol 10) 1923 Cal 410: 27 CWN 420: 80 Ind Cas 459.

——Sch. 2, Para 3 — Time for making award.

It is the duty of the Court to appoint a date within which to make the award. Where it does not do so, but fixes a date for the filing of the award made before but filed beyond that date can be received. AIR (Vol 5) 1918 Oudh 14 : 5 OLJ 205: 46 Ind Cas 324.

——Sch. 2, Para 3 — Time for making award — Award made within time but filed after the time fixed by a Court — Validity of.

An award if made within the time fixed is valid even though it may have been filed after the time fixed by the Court for submitting it. AIR (Vol 3) 1916 Pat 21: 37 Ind Cas 844.

——Sch. 2, Para 3 — Time not fixed for making award — If fatal.

Where the Court had fixed no time for making the award but had fixed one for filing it held that the award filed before the latter date is not invalid. (1913) 16 OC 233: 20 Ind Cas 773 (DB).

——Sch. 2, Para. 3 (1) — Fixing of time for award.

An award to be valid must be passed by the arbitrator upon submission by the Court of a matter in dispute and fixing the time for making an award and made upon an application to the Court signed by all parties interested in the subject matter and if a Court does not fix a time for making an award it commits an irregularity. (1909) 6 ALJ 333: 1 Ind Cas 146 (DB).

5. Power of Court after reference.

——Sch. 2, Para 3 — Reference — Duty of Court.

Where a matter is referred to arbitration, the Court has only to proceed according to the provisions of Sch. II, Civil P. C. or, in the alternative, to supersede the arbitration and then call the parties and act under the sections and rules embodied in the Civil P. C. AIR (Vol 24) 1937 Pesh 49: 1937 Pesh LJ 49: 168 Ind Cas 866.

——Sch. 2, Paras. 3 (2), 5, 8, 15 — Arbitration should be superseded only if strong and irresistible case is made out.

By adding Para 2 to S. 508 of the Code of 1882, (which is the same as Para 3 (2) in the Second Schedule of the present Code) the Legislature has not deprived the Court of all its powers over an arbitration proceeding under its order, except in the cases incorporated in Paras 5, 8 and 15 of the Second Schedule. The Court has jurisdiction in a proper case, to grant leave to revoke an arbitration on good cause being shown. But that jurisdiction has to be exercised with great care and caution and should never be considered a venue for making applications from time to time, in pending arbitrations, with a view to obstruct the progress of the arbitration. Unless, therefore, a strong and irresistible case is made out the Court should be reluctant to supersede an arbitration. AIR (Vol 21) 1934 Bom 388: 36 Bom LR 827: 153 Ind Cas 949.

——Sch. 2, Para 3 — Reference — Refusal of arbitrator to act — Power of Court to supersede reference suo moto.

Where an arbitrator to whom a case has been referred refuses to act, the Court has no power to supersede the arbitration 'suo moto' except on an application and after the opposite party has been given an opportunity of being heard. AIR (Vol 19) 1932 Oudh 151: 6 Luck 393: 7 OWN (CC) 1043: 129 Ind Cas 162.

——Sch. 2, Para. 3 — Power of Court after reference.

After a Court has, on the application of the parties, referred a pending suit to arbitration, its power to further deal with the case is of a very limited nature, as for example if there is no occasion to remit the award under para 14 and if a party's application to set aside the award under para 15 is dismissed, the Court can act, if at all, under para 12 only. AIR (Vol 17) 1930 Lah 26 (DB).

——Sch. 2, Para 3 — Compromise after reference — Power of Court to record.

Where after the parties to a suit had referred it to arbitration, a compromise was arrived at between them, but there was no order superseding the arbitration.

Held, the Court had no jurisdiction to record the compromise. AIR (Vol 11) 1924 Cal 722: 83 Ind Cas 606: 51 Cal 432 (DB).

——Sch. 2, Para 4.

——Sch. 2, Para 4 — Three persons appointed as arbitrators and one of them as 'sarpanch' — Decree in accordance with majority verdict — Legality of.

The parties to a suit agreed that three persons should be appointed arbitrators and one of them should be appointed the 'sarpanch' and they should decide the case. No provision was made for any difference of opinion. The arbitrators could not agree and there was a majority of 2 to 1. The Court accepting the majority verdict made a decree:

Held, that the agreement clearly meant that only in the case of a unanimous decision, there would be a valid award and not otherwise, and that the precaution that a Court ought to take, according to Para 4 of Sch. II, Civil P. C. was not taken by the Court below and hence the decree was bad. AIR (Vol 21) 1934 All 109(1): (1934) ALJ 66: 3 AWR (HC) 270: 147 Ind Cas 623(1).

——Sch. 2, Para 4 — Arbitrator, whether can be appointed umpire.

A person who is to be appointed the umpire should not be at the same time an arbitrator. AIR (Vol 19) 1932 Cal 491: 36 CWN 332: 138 Ind Cas 651.

——Sch. 2, Para 4 — Award by majority — Validity.

Where the matter in dispute in a pending suit was referred to the arbitration of two arbitrators and an umpire and the terms of the reference provided for a decision according to the opinion of the majority in the event of there being any dissent, and after the proceedings were over the dissenting arbitrator left the place after expressing his dissent from the opinion of the majority and the award was reduced to writing the next day.

Held, the award was in accord with the terms of the reference and was perfectly valid. AIR (Vol 12) 1925 Oudh 712: 88 Ind Cas 547 (DB).

——Sch. 2, Para 4 — Power to appoint umpire — Jurisdiction.

Where the question was whether the Committee of the Delhi Piece-goods Association had jurisdiction to appoint an umpire until the two arbitrators appointed by the parties had not only failed to agree as to the merits of the disputes but also had differed as to the choice of the umpire.

Held, enough had occurred to give the Committee of Delhi Piece-goods Association, under the rules accepted by the parties, jurisdiction to appoint an umpire, because the arbitrators had differed in such conclusive fashion as to put it beyond doubt that they were not going to deliver a joint award. AIR (Vol 9) 1922 All 219: 44 All 472: 20 ALJ 377: 67 Ind Cas 487 (DB).

——Sch. 2, Para 4 — Decision of majority — When binding on parties.

Where a dispute is referred to several arbitrators and the deed of reference does not provide for the prevalance of the views of the majority in the case of the decision not being unanimous, a majority award cannot be maintained. AIR (Vol 6) 1919 Pat 74: 49 Ind Cas 522 (DB).

——Sch. 2, Paras 4 and 16 — Majority award.

A majority award is not bad even in the absence of a specific provision to that effect in the reference. AIR (Vol 5) 1918 Cal 644: 21 CWN 895: 40 Ind Cas 646 (DB).

——Sch. 2, Paras 4 and 6 — Umpire — Award — No consultation with arbitrators.

On the arbitrators disagreeing the Court under the terms of submission appointed an Umpire who

gave an award without consulting the arbitrators and differing both their awards.

Held, that the award was valid and the Umpire was not bound to consult the arbitrators. AIR (Vol 2) 1915 Lah 98: 55 PR 1915: 167 PWR 1915: 50 PLR 1916: 30 Ind Cas 87 (DB).

——Sch. 2, Para 4(1)(b) — Omission to record the fact of agreement to abide by majority whether invalidates arbitration.

Where parties have agreed to be bound by the opinion of the majority of arbitrators, the omission of the court to record that fact in the order of reference does not invalidate the arbitration. AIR (Vol 1) 1914 Cal 448: 23 Ind Cas 842 (DB).

——Sch. 2, Paras. 4 and 14 — Joint arbitrators — All should act.

In the absence of a clause providing for an award made by less than all being valid each of them must act personally as if he were the sole arbitrator. For as the office is joint if one refuse or omit to act the others can make no valid award. (1912) 16 OC 94: 17 Ind Cas 320.

——Sch. 2, Para 4 — Umpire not appointed in case of difference of opinion — Effect of.

The fact that there is no provision made for the appointment of an umpire in case of difference of opinion among arbitrators does not make the submission bad on that account. (1912) 15 CLJ 360: 13 Ind Cas 161 (DB).

——Sch. 2, Para 5.

1. **Appointment of new arbitrator or umpire.**
2. **Arbitrator becoming incapable of acting.**
3. **Arbitrator refusing to act.**

   See also N. 1.
4. **Order superseding arbitration.**
5. **Revision.**

1. Appointment of new arbitrator or umpire.

——Sch. 2, Paras 5, 17 — Agreement for reference to arbitration — Persons to be arbitrators specified — Some of them refusing to act — Court, if can substitute other persons.

There is some difference between the procedure that is to be followed where the reference to arbitration is made in a pending suit and where there is a mere agreement for reference to arbitration which is sought to be filed in Court. In the latter case, the Court obviously cannot go beyond the terms of the agreement, and if it specifies the persons who are to be appointed arbitrators and makes no provision for the case where the arbitrators refuse to act, the Court cannot under Para 5 Sch. II, Civil P. C. substitute in the place of the named arbitrators certain other persons. AIR (Vol 28) 1941 Pat 155: 19 Pat 927: 7 BR 615: 193 Ind Cas 756 (DB).

——Sch. 2, Para 5 — One arbitrator refusing to act — Power of Court to appoint substitute.

A Court can make an order of reference to arbitration under Para 17, Sch. II, Civil P. C., where one of the arbitrators refuses to act and it has power under Para 17 (4) to appoint a substitute if necessary. AIR (Vol 25) 1938 All 414 : (1938) ALJ 544 : 1938 AWR (HC) 431 : 176 Ind Cas 404 (DB).

——Sch. 2, Para. 5 (2) — Arbitrators named by parties refusing to act — Appointment of third arbitrator by Court — Legality of.

When the parties to a case agree that the matter in dispute should be decided by arbitration and Counsel for the parties make a statement before the Court and sign it, there is an application made to the Court for an order of reference, and when names of two persons are given, the Court should appoint them in the first instance. But where the statement of the Counsel was silent as to what was to happen in case the second arbitrator also refused to act and there was no express provision that the Court would have no power to appoint a third arbitrator and that the suit must be decided on the original side, the power conferred upon the Court under Sch II, Para 5 (2), Civil P. C., exists and is not contrary to any agreement between the parties. By leaving the question open the parties obviously intended that the ordinary statutory power would be enforced in the case of a dead lock. Nor will there be material irregularity in the appointment of the third orbitrator. If the Court has misinterpreted the statements of the Counsel for the parties it may at the most be an erroneous view on a point of law and not necessarily a material irregularity. AIR (Vol 21) 1934 All 368 : (1934) ALJ 711 : 4 AWR (HC) 1584 : 56 All 721: 151 Ind Cas 148 (DB).

——Sch. 2, Para 5 — Where the agreement is for reference to two arbitrators with a final reference to an umpire, the Court has no power under Para. 5 of Sch. II to appoint a new sole arbitrator on one of the arbitrators refusing to act.

Further, the power of the Court to appoint an arbitrator in place of one who refuses to act arises, not on the refusal, but on the failure of one of the parties to appoint a new arbitrator after formal notice to do so. AIR (Vol 18) 1931 Bom 529 (2) : 33 Bom LR 1022 : 134 Ind Cas 733.

——Sch. 2, Para 5 — Appointment of plaintiff's nommee — No objection to proceedings — Objection to award — Maintainability.

Where the Court orders that the name of a nominee of a plaintiff be substituted in the order of reference for one of the arbitrators to whom matters in difference are referred, the defendant is entitled to see whom the plaintiff is going to appoint and to decide whether he would agree to submit to an arbitration, to the Board of which the nominee is one of the members but if the defendant adduces evidence and acts as if the nominee is legally appointed and objects to the award only when it has gone against him, he is estopped from questioning the validity of the appointment. 117 Ind Cas 344 : 1929 ALJ 868 : AIR (V 16) 1929 All 559 (DB).

——Sch. 2, Para. 5 — When justifiable — Costs of reference — Legality.

An arbitrator is a Judge chosen by the parties themselves and a Court should not thrust an arbitrator on an unwilling party except under circumstances laid down in R. 5. During the pendency of a suit, the parties agreed to refer their dispute to the arbitration of B. An order of reference was accordingly made. B, however refused to act as arbitrator. The defendant then submitted a list of persons, any one of whom he desired to be appointed as an arbitrator in place of B. Plaintiff was not willing to have the case decided by an arbitrator. He, therefore, prayed that the arbitration be superseded and the case tried before the Court. The Court thereupon appointed G to act as arbitrator in place of B on payment of Rs. 100 by the parties half and half.

Held, that it was irregular to make the summary appointment of an arbitrator. Plaintiff could not be legally order to pay the costs. 115 Ind Cas 611 : 51 All 501 : 1929 ALJ 182 : AIR (Vol 16) 1929 All 144. (DB).

——Sch. 2, Para. 5 — Powers of Court.

Under Para 5 the Court is empowered to appoint an arbitrator or umpire or to make an order superseding the arbitration only in case a party takes action under Cl. 1 of the para, and serves notice on the other party. 1929 ALJ 31 : 111 Ind Cas 559 : AIR (V 15) 1928 All 674.

——Sch. 2, Para. 5 — "Appoint means concur in appointing" and therefore to concur in the appoint-

ment of an arbitrator is good though no arbitrator is named in the notice. The rule of English law is also the same. Where the condition of the rule as to the notice to concur in the appointment has been satisfied and no concurrence has been arrived at by the parties to the reference the Court has no discretion left but (1) to appoint an arbitrator or (2) to supersede the arbitration. 86 Ind Cas 613 : 12 OLJ 174 : 2 OWN 64 : AIR (Vol 12) 1925 Oudh 361 (DB).

——Sch. 2, Para 5 — 'Written notice' — Form — Application to Court.

Where one of two arbitrators dies and one of the parties applies to the Court to appoint the surviving arbitrator as the sole arbitrator the application is "written notice" within the meaning of para 5. 86 Ind Cas 613 : 12 OLJ 174 : 2 OWN 64 : AIR (Vol 12) 1925 Oudh 361 (DB).

——Sch. 2, Para. 5 — Omission to move Court.

Omission to move the Court under paras. 5(2) of the second Schedule to the C. P. Code does not render the award a nullity. 87 Ind Cas 574 : 28 CWN 634 : AIR (Vol 11) 1924 Cal. 665. (DB).

——Sch. 2, Para. 5 (1) (b) (ii) — Appointment of fresh arbitrator without notice — Irregularity.

A Court appointing fresh arbitrator, on refusal of first arbitrator, without issuing notice to the other party acts with material irregularity. 1 UPLR (HC) 25 : 17 ALJ 643 : 50 Ind Cas 655 : AIR (Vol 6) 1919 All 219.

——Sch. 2, Para. 5 (1) (b) — Arbitrators — Refusal of one to act — Appointment of new arbitrator.

The appointment of a new arbitrator, in place of one who refused to act must be made by both the parties and not solely by the party who has been served with a written notice under the concluding portion of para 5 (1) of Sch. II of the Code. 112 PR 1918 : 139 PLR 1918 : 48 Ind Cas 395 : AIR (Vol 5) 1918 Lah 151.

——Sch. 2, Para. 5 (S. 510 old Code) — Applicability of S. 510. — Jurisdiction of Court to appoint new arbitrators without consent of parties — Subsequent acquiescence, effect of.

S. 510 of the Code Civil Procedure, 1882, applies to cases in which an arbitrator has not merely been nominated but has also consented to act in the arbitration and subsequently dies or refuses to act or becomes incapable of acting. This section presupposes the existence of a valid reference. In order to perfect the appointment of an arbitrator, acceptance of the office is necessary.

Held, (Banerji J. dubitante) that when a suit was referred to two arbitrators) and an umpire was nominated and agreed upon by the parties, but the latter refused to act, the court had no jurisdiction to appoint an umpire in his place, if the parties did not consent to such appointment, and that the reference to arbitration was invalid.

Held, further that subsequent acquiescence of the parties in the proceedings of the arbitrators would not validate the reference if it was made by the Court without jurisdiction. (1909) 1 Ind Cas 354 : 6 ALJ 351 (356, 358) (DB).

2. Arbitrator becoming incapable of acting.

——Sch. 2, Para 5 — When there is an agreement to refer a matter to named arbitrators, it cannot be said that there is any agreement to have the matter decided by some unknown arbitrator who might in future be appointed by some unspecified Court. To arrange for the appointment of a new arbitrator in the place of one who is dead, would in effect be to create for the parties a new agreement to which they had not subscribed. There is nothing in Para. 5. Sch. II. which enables the Court to reconstruct an agreement privately entered into for arbitration. (1936) 1936 MWN 407.

——Sch. 2, Para 5 — Recalling before award — Misconduct of arbitrator — Validity.

Where a suit was originally referred to arbitration and upon one of the two arbitrators reporting that his colleague was fabricating false records, the Court recalled the suit from the file of the arbitrators and proceeded with it.

Held, that a Court acting under the second schedule can only revoke an arbitration in the cases specified in paras. 5, 8 and 15, and so the Court had no authority to revoke the case. AIR (Vol 14) 1927 Mad 910: 39 MLT 195: 1927 MWN 921: 105 Ind Cas 92.

——Sch. 2, Paras 5 (1) (b) (ii) and 15 — Arbitrator becoming incapable — Order superseding arbitrator — Objection to when to be taken.

Objection under R. 5 to the supersession of an arbitrator must be taken in the first Court. They are ineffectual if taken in appeal. 27 PLR 1910: 144 PWR 1910 : 8 Ind Cas 222 (DB).

3. Arbitrator refusing to act.

See also Note 1.

——Sch. 2, Para. 5 — Arbitrator intimating his refusal to act as such — Next day he again informing that he would act as arbitrator, if asked again to do so — Subsequent award by him whether valid.

Where an arbitrator intimates to the Court that he does not wish to act as an arbitrator, if the parties do not so desire, and because of the fact that he had little leisure to do so but next day he informs the Court that he would willingly arbitrate, if so asked again, such communication by him cannot be regarded as a flat refusal on his part to act. He does not divest himself of his character as an arbitrator and an award by him subsequently, is valid. A I R (Vol 24) 1937 All 582 : (1937) A L J 651 : 1937 A W R (HC) 589 : 171 Ind Cas 398.

——Sch. 2, Para. 5 — Award after resignation — Validity.

Certain matters in a suit were referred to an abitrator who during the proceedings sent in his resignation. The Court of first instance insisted on his continuing with arbitration and eventually, he filed an award. On objections being taken the trial Court set aside the award and passed a preliminary decree. The lower appellate Court on appeal, set aside this preliminary decree and directed that a decree be passed in accordance with the terms of the award.

Held, that the proceedings of the arbitrator were null and void and that the case should be remanded under O. 41, R. 23. AIR (Vol 17) 1930 Lah 125: 31 PLR 386.

——Sch. 2, Para. 5 (1) (a) — Procedure.

Where the arbitrator refused to act and the Court acting suo motu superseded the reference to arbitration, held, that order superseding the arbitration was contrary to law and that it should be set aside. (1930) 7 O W N 1043.

——Sch. 2, Para. 5 — Arbitrator returning papers — Plaintiff's obstruction — Enquiry by Court — Order of reference — Validity.

The Court has to decide the question of fact whether a contingency such as death or refusal of arbitrator to act has occurred and whether it should give the parties a chance to appoint fresh arbitrators.

A reference to arbitrators was ordered by the Court & a date was fixed for the award. The arbitrators, however, sent in their resignation. The Judge ordered the report to be put up on the fixed date when the defendant stated that the arbitrators were willing to act but were prevented by the plaintiff from so doing. The Court ordered that the arbitrators be summoned to appear personally.

On appearance the arbitrators stated on questioning that they were prepared to act. An application by the plaintiff that as the arbitrators had returned the papers they could not be questioned, was dismissed and an order referring the case to the arbitrators was made and time was extended. A decree was passed on the award subsequently made. Plaintiff applied for revision on ground that reference was bad.

Held, that the Court was not only entitled but was bound to enquire into the truth of the allegation of the defendants as to the willingness of the arbitrators to act, by calling and questioning the arbitrators and that on the arbitrators expressing their willingness to act, the order of reference was valid, as the arbitrators cannot be said to have refused to act, and as there was no suggestion that the Court took up an improper attitude towards any of the parties or towards the arbitrators with regard to the reference. A I R (Vol 15) 1928 All 740 : 50 All 955 : 110 Ind Cas 881 : 26 A L J 1009 (DB).

——Sch. 2, Para. 5 (1) (b) (ii) — Refusal to act — Non submission of the award within time fixed.

An arbitrator failing to submit his award within the time fixed may be held to have refused or neglected to act within para. 5 (b) (ii) of Sch. II, C. P. C., so that if another arbitrator is appointed without formally discharging the former, the appointment cannot be questioned. A I R (Vol 1) 1914 Cal 448 : 23 Ind Cas 842 (DB).

——Sch. 2, Para. 5 (1) (b) (ii) — Arbitration — Agreement to refer — Arbitrators appointed without their consent and unwilling to act — Effect.

An agreement to refer matters to the arbitration of three persons nominated without their knowledge and two of whom refused to act when informed thereof is abinitio void if the agreement contained no provision to appoint an arbitrator in the place of the person not willing to act. 12 M L T 346 : (1912) M W N 957 : 24 M L J 15 : 17 Ind Cas 389 (DB).

——Sch. 2, Para. 5 (1) (b) (ii) — Refusal to accept Procedure.

Under the Old Code, S. 510 new arbitrators cannot be appointed when the arbitrators have never consented to act as such. (This difficulty has been removed by the New Code, for it would come under para. 5.) A refusel to accept by some arbitrators makes the award of the rest illegal.

Under the Old Code, S. 507 if the arbitrator refuses to accept the arbitration a new arbitrator can be appointed by the Court only if the parties so desire under S. 510. When the arbitrator refuses to act the court may at its discretion appoint a new arbitrator. Under the new Code para 5 however, in both cases, the Court can appoint only on application of either party, and after notice to other side. 9 M L T 251 : 21 M L J 263 : (1911) 1 M W N 151 : 9 Ind Cas 173 (FB).

4. Order superseding arbitration.

——Sch. 2, Para. 5 — Neglect to act — Notice — Procedure.

The Court cannot take action under para. 5 where neither party has served a notice upon the other for the removal of an arbitrator and the substitution of another. Even if the Court takes action under para. 5 it is within the discretion of the Court to refuse to appoint a fresh arbitrator and to supersede the reference. In a case where there has been a reference to arbitration but where nothing has been done for over a long time it is very desirable that the reference to arbitration should be superseded and the case be dealt with by the Court itself. A I R (Vol 12) 1925 Lah 374 : 88 Ind Cas 975 : 7 L L J 163 : 26 P L R 476.

——Sch. 2, Para. 5 (1) (b) (ii) — Withdrawal of one Procedure.

Where two arbitrators were appointed to decide a case and one of them withdraws pending the arbitration the remaining arbitrator cannot proceed with the case and file an award. The Court should in such a case either appoint another arbitrator in place of the arbitrator who withdraws or supersedes the arbitration and decide the case on the merits. A I R (Vol 7) 1920 Lah 202 : 2 Lah L J 637 : 56 Ind Cas 644.

——Sch. 2, Para. 5 — Supersession of arbitration — Order — Implied.

Where a case is referred to arbitration and the arbitrators returned the papers without submitting their award and the paties also expressed their unwillingness to arbitration the Court without expressly recording an order of supersession, fixed a date for deciding the case and passed final orders.

Held, that the procedure followed was irregular. Where in fact the reference to arbitration has become impossible and by implication the Court has superseded it, the jurisdiction of the Court to try the issue between the parties is not affected. But where the proceeding is still pending before the arbitrators and where from the circumstances it does not appear that the arbitration has in fact been superseded the court has no jurisdiction to try the case. A I R (Vol 7) 1920 Pat 731 : 5 Pat L J 672 : 1 Pat L T 416 : 57 Ind Cas 473 (DB).

——Sch. 2, Para. 5 (2) — Arbitration — Revocation — When can either party revoke agreement to refer — When can court revoke.

Neither party to an agreement made out of court to refer to arbitration can revoke it except for good and sufficient cause. But a reference to arbitration directed by court can be superseded only by an order of court on the ground of misconduct or corruption of the arbitrator, and only after the award has been received, but not during the pendency of proceeing before the arbitraor. AIR (Vol 1) 1914 All 314 : 36 All 354 : 12 A L J 529 : 23 Ind Cas 758 (DB).

——Sch. 2, Para. 5 — Revocation of Submission.

A reference to arbitration stands on the same footing as all other lawful agreements and cannot be revoked by a party to the reference except on good cause. AIR (Vol 1) 1914 Mad 280 : (1914) M W N 52 : 22 Ind Cas 548 (1).

——Sch. 2, Paras. 5 (2) and 8 — Order of supersession — Dismissal of suit.

When a Court refers a dispute to arbitration it cannot proceed with the suit until it superseded the arbitration. A suit was referred to the arbitration of two arbitrators and one umpire. When issuing notices to the arbitrators the Court informed the parties that if no award was filed within the period fixed by the Court, the parties ought to attend with their witnesses & be prepared to proceed with the case. The award was not made by the date fixed by the Court and as plaintiff failed to appear in Court with his witnesses his suit was dismissed without superseding the arbitration.

Held, that the Court cannot pass the order whether it was an order dismissing the suit in default or a decision against the plff. on the merits, on the ground of his failure to prove his case without finally superseding the arbitration. (1912) 10 A L J 23 : 16 Ind Cas 177 (DB).

——Sch. 2, Para. 5 (2) — Arbitration — Reference under compromise decree — Failure of arbitration.

Where the parties to a suit compromise it by referring to arbitration and a decree is passed thereon, and the arbitration fails, the court cannot supersede the decree and try the suit. 33 All 743 : 38 I A 181 : 15 C W N 1005 : (1911) 2 M W N 132 : 10 M L T 173 : 13 Bom L R 826 : 14 C L J 313 :

8 A L J 1164 : 14 O C 289 : 21 M L J 1151 : 12 Ind Cas 15 (PC).

——**Sch. 2, Para. 5 (1) (b) (ii) — C. P. Code of 1882, S. 510 — Decree in terms of compromise referring dispute to arbitration — Refusal of arbitrator to be nominated — Procedure — No power to supersede arbitration.**

According to the true construction of S. 510 of the C. P. Code of 1882, (Sch. II, para. 5), the Court may appoint a new arbitrator in the place of one who has refused nomination, for that is a refusal to act within the meaning of the section. 6 Mad 414 : 18 Cal 324, overruled.

Where a partition suit was compromised by the parties agreeing to refer the matter to arbitration and the Court passes a decree thereon the Court cannot supersede it and proceed with the suit, for there is no suit in existence. 33 All 743 : 38 I A 181 : 15 C W N 1005 : (1911) 2 M W N 132 : 10 M L T 173 : 13 Bom L R 826 : 14 C L J 313 : 8 A L J 1164 : 14 O C 289 : 21 M L J 1151 : 12 Ind Cas 15 (PC).

5. Revision.

——Sch. 2, Para. 5 — Court setting aside award and superseding arbitration pending suit. It does not amount to a "case decided" within the meaning of S. 115. No distinction can be drawn between supersession before award has been delivered and after the award. A I R (Vol 25) 1938 All 557 : (1938) A L J 813 : 1938 A W R (HC) 605 : I L R (1938) All 805 : 177 Ind Cas 981 (FB).

(Overrules AIR (V 16) 1929 All 743 : 1929 ALJ 918 : 51 All 1010 : 122 Ind Cas 685.)

——**Sch. 2, Para. 5 (2), S. 115 — Provisions not properly complied with — Appointment of fresh arbitrator if can be set aside in revision.**

Where the Court appoints a fresh arbitrator without properly complying with the provisions of Para. 5 (2), Sch. II, Civil P. C., the appointment is without jurisdiction or at least tainted with material irregularity and can be set aside in revision under S. 115, Civil P. C. A I R (Vol 20) 1933 Oudh 540 : 10 O W N (CC) 1207 : 9 Luck 225 : 146 Ind Cas 493 (DB).

——**Sch. 2, Para. 5 — Order continuing arbitration.**

Where the controversy between the parties is whether the arbitration should be superseded or should be continued and the sole arbitrator refusing to act and the Court settles that controversy by directing that the arbitration should continue and appointed another person to act as arbitrator, the order is one deciding a case within the meaning of S. 115. A I R (Vol 16) 1929 All 144 : 115 Ind Cas 611 : 1929 A L J 182 : 51 All 501 (DB).

——**Sch. 2, Para. 5 — Arbitration superseded — Suit to enforce agreement — Maintainability.**

Where the procedure in para. 5 was not strictly observed, but the parties acquiesced therein, and where on superseding the arbitration appointed under para. 17, the defendant filed a suit to enforce his rights which were referred to arbitration under the agreement and the suit was dismissed the High Court in revision refused to set aside the order of dismissal. A I R (Vol 13) 1926 All 55 : 89 Ind Cas 404 : 48 All 27 : 23 A L J 891 : 6 L R A Civ. 575 (DB).

——**Sch. 2, Para. 5 — Mistake in construing original reference.**

A mistake of judgment in construing the original reference cannot be rectified by the High Court on an application for revision. A I R (Vol 12) 1925 Oudh 361 : 86 Ind Cas 613 : 12 O L J 174 : 2 O W N 64 (DB).

——Sch. 2, Para. 6.

——Sch. 2, Para. 6 — Finding by arbitrator — Interference by Court.

An arbitrator is fully justified in rejecting in part the case set up, by either party and ascertaining the real facts according to his own view of the evidence. A counsel is not entitled to attack the findings of facts given by the arbitrator on the evidence led by the parties. Whether his conclusions are right or wrong is not a matter which is open for consideration by the trial Court or the appellate Court on revision. AIR (Vol 17) 1930 Lah 280: 120 Ind Cas 494 (DB).

——**Sch. 2, Para. 6 — Procedure — Applicability of Evidence Act.**

An arbitrator is not bound to follow the technical provision of the Evidence Act, and his decision cannot be challenged on ground that he relied upon document not admissible under the Act. AIR (Vol 17) 1930 Lah 280: 120 Ind Cas 494 (DB).

——Sch. 2, Para. 7.

——Sch. 2, Para 7 — Where no time is granted to file objections to award, the Court acts with material irregularity. AIR (Vol 20) 1933 All 313: (1933) ALJ 149: 145 Ind Cas 403 (DB).

——**Sch. 2, Para. 7 — Examination of witness on oath.**

There is nothing illegal in the parties to an arbitration agreeing before the Panchayatdars to have evidence taken after the administration of any reasonable form of oath to the witnesses. AIR (Vol 3) 1916 Mad 583: 17 MLT 241: 2 LW 320: 29 Ind Cas 49.

——**Sch. 2, Para. 7 (2) — Refusing to give evidence — Scope and meaning of.**

The words 'refusing to give their evidence' in Sch. II, Para 7, (2) of the C. P. C. refer to the case of a person who refuses to give evidence when placed on oath and required to answer questions put to him; it has no reference to a case where a party elects not to produce any evidence at all in his case. (1911) 8 ALJ 929: 11 Ind Cas 259.

——Sch. 2, Para. 8.

1. Extension of time.
2. Supersession.
3. Award after time fixed.

1. Extension of time.

——**Sch. 2, Para. 8 — Order declining extension of time and supersession held arbitrary and not judicial.**

Where the proceedings before the arbitrator which had been conducted for nearly four months had almost come to an end and all that was left to be done was to hear the arguments and write out the award, for which the arbitrator who had up till then obtained only two extensions, applied for only a fortnight's time for filing the award and the Court refused to extend time and superseded the arbitration:

Held, that the discretion was exercised arbitrarily and not judicially and that the order resulted in a miscarriage of justice and must be set aside. AIR (Vol 30) 1943 Oudh 117: 1942 OWN (CC) 407: 18 Luck 425: 1942 AWR (CC) 270: 240 Ind Cas 144 (DB).

——**Sch. 2, Para. 8 — Power of Court to enlarge period fixed for making award even after award is made.**

The words of Para 8 of Sch. II of the Civil P. C., confer the same power on the Court as regards enlargement of time as is conferred by S. 12, Arbitration Act, 1899.

The words, "fixed for the making of an award" are merely definitive of the period which is referred to in the paragraph. In other words, the whole

phrase "period fixed for the making of an award" must be taken to be a description of the thing which the Court is entitled to enlarge. The period fixed for the making of the award is, either the period originally specified in the order of reference within which the award was to be made and submitted or a period subsequently allowed after the expiration of that period. The fact that the award had already been made, does not affect the power of the Court one way or the other. It is, however, a factor which ought to be taken into consideration for the purpose of determining whether or not the application for enlargement of time should be granted. AIR (Vol 26) 1939 Cal 260: ILR (1938) 2 Cal 482: 42 CWN 883: 180 Ind Cas 346 (DB).

(Overrules (1911) 38 C 522 : 12 Ind Cas 13.)

——Sch. 2, Para. 8 — Arbitration pending suit — Order that trial must go on if award is not filed by certain date — Legality — Duty of Court to give time for making award or good cause.

Paragraph 8 of Sch. II, Civil P. C., contemplates that the Court must be in a position to allow further time for the making of an award for sufficient cause as and when occasion arises. The Court should not by an order made once for all deprive itself of the power to exercise its discretion by an order in anticipation that if an award is not filed on a certain date, the trial must go on.

Where a suit was referred to arbitration on the application of both parties with the direction that if the arbitrators did not file their award on a certain date the trial must go on and on the date fixed an ex parte decree was passed as the defendants were absent:

Held, that the decree was illegal. AIR (Vol 24) 1937 Mad 9: 44 MLW 608: (1936) MWN 1152: 71 MLJ 648: 166 Ind Cas 66.

——Sch. 2, Paras, 8, 9, 10 — Award made but not filed in time — Jurisdiction of Court to extend time for filing.

Where arbitrators have made the award but they have not filed it within time, the Court has jurisdiction to extend the time for filing the award. AIR (Vol 21) 1934 Bom 398: 36 Bom LR 831: 152 Ind Cas 1068.

——Sch. 2, Para. 8 — Suit after agreement to refer — Subject matter of suit in Presidency Small Cause Court (Calcutta) — Power of High Court to order stay of suit — Letters Patent (Calcutta), cl. 12.

The words "Presidency town" in S. 12 include suits instituted in the Presidency Court of Small Causes and although cl. 12, Letters Patent (Calcutta), provides that the High Court shall not have original jurisdiction in cases falling within the jurisdiction of the Presidency Small Causes Court, in which the debt or damage does not exceed one hundred rupees, nevertheless the legislature intended and deliberately provided that application for stay of a suit pending in the Presidency Small Causes Court arising out of a contract which contains an agreement to refer all disputes to arbitration, should be made to the High Court. The High Court, therefore, has jurisdiction to allow the application for stay of such a suit. AIR (Vol 17) 1930 Cal 51: 121 Ind Cas 574: 56 Cal 755: 33 CWN 888.

——Sch. 2, Para. 8 — 'Making an award', meaning — Extension of time after signing award but before filing — Validity.

The expression "making the award" includes the announcement of the award and the award cannot be deemed to have "been made" till it is announced and one way of announcing it is by filing in Court. A suit was referred to arbitration and a certain date was fixed for the filing of the award. The arbitrator asked for an extension of time as his award was not ready by that date. Court extended the period to another date. Award was filed on this date but it bore a date a day previous to the date originally fixed. It was contended that the award was ready on the date on which it was signed and, therefore, the extension of time was illegal and the award was invalid.

Held, that the award is not final till it has been promulgated either by its being filed in Court or by its being announced to the parties and hence the extension of time was proper and the award was valid. AIR (Vol 15) 1928 Lah 753: 110 Ind Cas 748.

——Sch. 2, Para. 8 — Interpretation of order — Order for issue of Takid fixing date for hearing.

Where a date was fixed for filing the award but the award was not filed on that date, and where the order passed thereupon was as follows—"The arbitrators have not submitted their award. Issue Takid at once, fixing the 10th November, for hearing" and where the officer who had passed the decree filing the award said that his intention in passing that order was to extend time for filing of the award though he had not said so in so many words.

Held, that an order like this may be taken as an order extending the time for filing the award. AIR (Vol 12) 1925 Cal 475: 78 Ind Cas 335. (DB).

——Sch. 2, Para. 8—Procedure — Extension of time for award—Operation.

It is sufficient if some notice is given to the proper officer that the party objects to the award. An extension of time must be made before the award has been delivered. But where before the award had been delivered both parties consented to the order for extension and it was taken to the proper officer but because the officer on that day had too much work or the vacation hours were too short, and the order was not signed on that day.

Held, that when as a mater of fact he came to take up this particular business, he ought to have signed the order as of the day on which it was presented for signature and it must relate back to the date on which it was presented. AIR (Vol 8) 1921 Bom 419 : 63 Ind Cas 929 : 45 Bom 1071 : 23 Bom LR 614 (DB).

——Sch. 2, Para. 8 — Irregularity — Waiver.

After arbitration and before the award the Junior Judge before whom the case was pending took leave. The senior Judge ordered that the case should be brought in his Court. The case was retransferred by the Senior Judge to the Junior Subordinate Judge on his return from leave.

Held, that the order of the Senior Judge retransferring the case to the Junior Judge was ultra vires but the parties having acquiesced in the jurisdiction of the Junior Judge, after the case was transferred to him could not subsequently object to it. When once the Court became seised of the case, it had full power to extend the time for filing the award, even though the time originally fixed had expired and the award was a valid one and Court was right in passing a decree on it. AIR (V 6) 1919 Lah 27 : 52 Ind Cas 352.

——Sch. 2, Para 8 —Discretion.

The power of extending time, vested in Court, is permissive and discretionary and the provision does not negative the right to extend time by agreement and acquiescence of parties. AIR (Vol 5) 1918 PAT 93 : 4 Pat LJ 265 : 50 Ind Cas 52 (DB).

——Sch. 2, Para 8—Reference—Revocation—Delay in making an award.

Where parties submits their difference to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause. Delay in making an award by the arbitrators caused by the voluntary absence of one of the parties is not a sufficient ground for revocation of the submission party in default. AIR (V 5) 1918 Pat 83 : 4 Pat LJ 394: 48 Ind Cas 711. (DB).

——Sch. 2, Para 8—Procedure.

An order of a Court permitting the arbitrator to enlarge time for making an award is not ultra vires and there is no objection to the Court's delegation, with the consent of parties, functions regarding enlargement of time. An arbitrator has no authority to extend time., after the fixed period for making an award had elapsed, he being functus officis, afterwards. His award must be set aside though made within the time extended by arbitrator after the fixed period, as made without jurisdiction. AIR (Vol 2) 1915 Cal 832: 19 CWN 165: 31 Ind Cas 597.

——Sch. 2, Paras 8 and 15 — Award made in time — Filing of — Order to be filed within a specified date — Award made by that date but filed two day later—Validity.

A Court allowed the arbitrators to file their award within a certain time and used the word 'file' instead of the word 'make'. The award was made in Hindi and signed before the specified date but was filed in Court 2 days later owing to the time taken in translating it into English and the parties also agreed before the arbitrator not to raise any objection. Held, that the award was made within time and was valid. AIR (Vol 2) 1915 Cal 101: 18 CWN 1325: 27 Ind Cas 233.

——Sch. 2, Para 8—Procedure.

Under S. 3 the Court itself should fix a date for the award and if the award is not completed within that time the Court should in extending the time under S. 8 fix a particular date for making the award and not leave it to the discretion of the arbitrator. Time can be extended only before the award has been made and filed. (1911) 9 Ind Cas 241 (Oudh).

2. Supersession.

——Sch. 2, Para 8 — In applying its mind to an application for extension of time for the submission of an award, the Court is entitled, and even bound, to take all the circumstances of the case into consideration and if the Court comes to the conclusion that no good would be gained by giving further time, it may supersed the arbitration. AIR (Vol 20) 1933 Pat 566 : 146 Ind Cas 1081 (DB).

——Sch. 2, Para 8 — Failure to file award — Dismissal of suit—Validity.

Where on the date fixed for filing the award, the award was not filed by the arbitrators and the Court immediately called on the suit and dismissed it held, that the order was wrong. The filing of the award is an act of the arbitrator, and it will be manifestly unjust to require the party to be present in the Court on the date on which the award is required to be filed by the arbitrator. The paragraph obviously means that the Court must wait till the date fixed by it for the filing of the award. If the award is not filed on that date the Court may then, and not in anticipation of the arbitrators not filing award, make an order superseding the arbitration and fix a date for proceeding with the suit. AIR (Vol 10) 1923 Pat 115 : 65 Ind Cas 144 : 3 PLT 346.

——Sch. 2, Para. 8 — Grounds for.

If the arbitrators do not submit their award within time the Court may supersede the arbitration and proceed with the suit. AIR (Vol 7) 1920 Cal 524: 57 Ind Cas 890. (DB).

——Sch. 2, Para 8—Failure of arbitrators to act.

Where in a case in which the arbitrators to whom a reference has been made, have returned the record without having made an award, and have declined to act, and the parties have expressed their unwillingness to have the dispute decided by the arbitrators, the Court has jurisdiction to proceed with the trial without expressly superseding the arbitration. AIR (Vol 7) 1920 Pat 731. 5 Pat LJ 672: 1 Pat LT 416 : 57 Ind Cas 473 (DB).

——Sch. 2, Para 8—Award not submitted within time—No formal order superseding arbitration — Court proceedings its suit, effect of.

When the Court without extending the time for submission of an award proceeded to deal with the suit, there was in effect an order superseding arbitration and no formal order to the effect was necescary. 17 I. C. 177 not foll, 14 MLT 388: (1913) MWN 863: 21 Ind Cas 558. (DB).

——Sch. 2, Para 8 — Where an order of supersession was passed on the date fixed but the award reached the Court that same day after passing of the order the Court would be justified in setting aside its order of supersession. (1912) 16 OC 94: 17 Ind Cas 320.

——Sch. 2, Para 8 — Mansarim's power to fix date for hearing.

A suit was referred to arbitration and May 28th was fixed for filing the award in Court. On that date no award was filed and neither party appeared. The plaintiffs' pleader applied for further extension of time and the Court then fixed June 20th. No award was filed and neither party appeared but the Sub-Judge himself did not attend the Court on the day, and the MANSURIM adjourned the case to June 24th. Subsequently this date was declared to be a holiday and the case was taken up on June 25th. When the Subordinate Judge superseded the arbitration and dismissed the suit:

HELD, that the MANSURIM had no power to fix a date for the next hearing of the suit and that the words "and in such case shall proceed with the suit" in clause (8) do not necessarily mean that the Court shall proceed at once on that same day to examine witness. 12 O.C. 109 Diss. (1910) 13 OC 341: 8 Ind Cas 876 (DB).

3. Award after time fixed.

——Sch. 2, Paras 8 and 15 — An award which is not delivered within the time fixed by the Court is a nullity. AIR (Vol 7) 1920 Lah 107: 55 Ind Cas 221.

——Sch. 2, Para. 9.

——Sch. 2, Para. 9 — Absence of arbitrator — Umpire approaching Court for direction after expiry of time for award—Direction to act under cl. (a).

In a reference to arbitration one of the arbitrators absented himself. After the expiry of the time for award the umpire approached the Court for direction. The Court directed him to proceed under cl. (a) of the paragraph.

Held, that it was a fair inference that the arbitrators had allowed the time to expire without making an award and that under the circumstances the umpire by himself was entitled to make an award. AIR (Vol 15) 1928 All 674: 1929 ALJ 31: 111 Ind Cas 559.

——Sch. 2, Para 9 — Powers of umpire.

Where an umpire is appointed, para. 9 gives him power to enter on the reference without the arbitrators. AIR (Vol 15) 1928 All 674: 1929 ALJ 31 111 Ind Cac 559.

——Sch. 2, Para. 10.

1. Award to be signed.
2. Delivery of the award.
3. Presence of arbitrators.
4. Notice of filing.
5. Depositions and documents.

1. Award to be signed.

——Sch. 2, Para 10 — Schedule 2, Para. 10, Civil P. C., which requires that when an award has been made, the persons who made it shall sign it applies only to awards made in a reference through the intervention of the Court. AIR (V 19) 1932 Pat 60: 12 PLT 733: 11 Pat 131: 135 Ind Cas 518 (DB).

——Sch. 2, Para. 10 — Absence of signature of arbitrators — Reference to arbitration not filed.

An award was brought to Court by one of several arbitrators at the instance of a party. Written submission to arbitration by the parties was not filed along with the award as required by the Original Side Rules. Further the award was signed only by one of the arbitrators and not by all.

Held, that the award could not be made a rule of the Court either under Arbitration Act or under Sch. 2, C. P. Code. AIR (V 16) 1929 Mad 31: 56 MLJ 35: 114 Ind Cas 818: 29 MLW 227.

——Sch. 2, Para. 10 — If a ministerial act.

The award embodies the decision to which the arbitrators come and the writing of the award cannot be treated to be a ministerial act. AIR (V 15) 1928 Pat 231: 107 Ind Cas 532.

——Sch. 2, Para. 10 — Absence of signature of some arbitrators.

There is a distinct statutory provision that the award must be signed by the persons who made it. The want of signatures of some of the arbitrators from the award invalidates the award. AIR (V 15) 1928 Pat 231: 107 Ind Cas 532.

——Sch. 2, Paras. 10 & 16 — Award not signed by arbitrators before filing — Decree in terms of award.

Under S. 10 as it is imperative on all the arbitrators to sign an award before it is filed in Court and as the Court has no power to allow any of them to sign thereafter, a decree passed in accordance with an award not so signed is illegal and invalid. 1 Pat LJ 306: 2 Pat LW 377: 35 Ind Cas 358 : AIR (V 3) 1916 Pat 190 (DB).

——Sch. 2, Paras. 10 and 16 — Award signed by majority — Refusal of minority to sign — Minority taking part.

Where the parties agree to abide by the decision of the majority of arbitrators, the refusal of the minority to sign the award will not invalidate the proceedings provided they were present throughout the proceedings and took part in the deliberations. AIR (V 3) 1916 Pat 156: 1 Pat LJ 90: 2 Pat LW 411: 34 Ind Cas 105 (DB).

——Sch. 2, Para. 10 — Award signed by arbitrators — Subsequent change of opinion by one of them — Legality.

Where a memorandum of award was prepared and signed by the arbitrators, but before engrossing the same on stamp paper, one of the arbitrators finds that owing to a misunderstanding of the language adopted in the memorandum, his opinion has to be changed, his refusal to sign the original memorandum engrossed on stamp paper is perfectly legal; when the memorandum was drawn up and signed there was no completed award in the strict sense, so as to exhaust the powers of the arbitrators to deal further with the matter. (1911) 14 CLJ 188: 11 Ind Cas 481 (DB).

2. Delivery of the award.

——Sch. 2, Para. 10 — Where during the pendency of a suit the parties refer the dispute to arbitration and make an agreement on conference with the arbitrators and others that the suit shall be compromised on certain grounds, such a document is not an award but an agreement to compromise to which the rules governing compromises apply. (1943) 76 CLJ 33: 45 CWN 381.

——Sch. 2, Para. 10 — Validity of oral award.

The question whether an oral award can extinguish a decretal debt depends on the terms of the reference and the terms of the award:

Held, on the facts of the case, that the award did not extinguish the debt.

Quare.— Whether there can be such a thing as an oral award. AIR (V 20) 1933 Lah 777(2): 35 PLR 211: 147 Ind Cas 858.

——Sch. 2, Para. 10 — Award sent by post — Power of Court to act.

A Court is not competent to act on an award unless it is not only signed by all the arbitrators but is also properly placed before the Court by the arbitrators and by no other persons. Where award was sent to the Court by post and none of the arbitrators took responsibility for saying as to who caused the award to be sent to Court the award was not properly placed before the Court, and as such could not be acted upon by the Court. AIR (V 16) 1929 Pat 178 : 118 Ind Cas 606.

——Sch. 2, Para 10 — Retirement of some of the arbitrators, before expiry of time fixed for filing award — Award presented by umpire.

An agreement to refer to arbitration was filed in Court and in accordance therewith two arbitrators were appointed on each side and an umpire. The Court made an order fixing a date within which the award was to be filed, but, before the expiry of the period fixed, two of arbitrators retired. Subsequent to their retirement their umpire forwarded a document to the Court which was of the nature of a compromise and which he recommended should become the subject of a decree.

Held— that no decree could be based upon such a document, inasmuch as it was not an award, nor was there any proceeding before the Court in which the compromise presented by the umpire could be filed under S. 375 C. P. C. (1904) AWN 49 (50): 1 ALJ 29 (DB).

3. Presence of arbitrators.

——Sch. 2, Para. 10 — Award by some arbitrators — Others not taking part in proceeding — Valadity.

A case was referred to the arbitration of three gentlemen. Only two of these gentlemen acted and took evidence. The third arbitrator took no part in the arbitration.

Held, that the Munsif in holding that only two of the arbitrators had full authority to act and submit an award was guilty of either error of law or error of fact. AIR (Vol 16) 1929 Cal 831.

4. Notice of filing.

——**Sch. 2, Para. 10 — Notice to defendant under Para. 10, necessity of.**

Where the arbitrator recommends that the plaintiff's claim be decreed ex parte as the defendant had failed to appear before him, before passing a decree in terms of the award, the Court should issue notice to the defendant under Sch. II, Para. 10, Civil P. C. The proper procedure on receiving the report of the arbitrator is for the Court to pass an order directing that as the defendant had defaulted in appearance, the proceeeding should be ex parte, and the arbitrator should then pronounce his award and file it in Court, after which notice could be issued under Para. 10 and the ordinary procedure relating to arbitration would have followed. The Court has no jurisdiction to deal with the matter as if there had been no arbitration, for two reasons. In the first place, the arbitration had not been superseded, and in the second place, the Court had no evidence before it on which to base even an ex parte decree. It cannot treat the report of the arbitrator as evidence. The failure to issue a notice to the defendant is clearly fatal to the valadity of the decree. AIR (V 22) 1935 All 852: (1935) ALJ 986: 1935 AWR(HC) 975: 158 Ind Cas 904.

——**Sch. 2, Para. 10 — Knowledge aliunde — Effects.**

It is incumbent on the Court to give a notice to the parties under cl. (10) and the fact that they might have received knowledge of the award having been filed in Court, aliunde does not amount to such a notice. AIR (V 17) 1930 Lah 228: 119 Ind Cas 331.

——**Sch. 2, Para. 10 — Valadity of judgment.**

Omission to give notice to the parties constitutes a grave and material irregularity in the exercise of Court's jurisdiction, and his judgment is liable to be set aside on that account. AIR (V 15) 1928 Nag 166: 107 Ind Cas 668.

——**Sch. 2, Para. 10 — Filing or award communicated to pleader — Effect.**

Where a notice of filing of an award is not given to the party but the order filing the award is communicated to his pleader & the pleader admits such communication, it is a sufficient complance with the mandatory provisions of para. 10 having regard to O. 3, R. 5. AIR (V 14) 1927 Cal 619: 45 CLJ 458: 103 Ind Cas 625 (DB).

——Sch. 2, Para. 10 — An application to file an award is not a suit. AIR (V 14) 1927 Sind 103: 19 SLR 202: 99 Ind Cas 178 (DB).

——**Sch. 2, Para. 10 — Award filed by parties or pleaders — Notice if necessary.**

When the arbitrator himself brings in the award to the Court, the Court is bound to give notice to the parties that the award has been filed, and the Court cannot possibly pass a decree in terms of the award unless such notice has been given. But if the parties or their pleaders bring in an award and ask that it should be filed, and the Court informs the pleaders or the parties that they should file objections within the prescribed times then it cannot be said that no notice was given. In such a case no material irregularity is committed which entitles the Court to set aside the whole of the proceedings. AIR (V 13) 1926 Bom 312: 28 Bom LR 511: 95 Ind Cas 547 (DB).

——**Sch. 2, Para. 10 — Effect.**

Court's omission to give notice of the filing of the award to the parties is a serious irregularity and it is a good ground for revision. AIR (V 13) 1926 Cal 1018: 94 Ind Cas 115 (DB).

——Sch. 2, **Para. 10 — Valality of award — Revision.**

The provisions of Cl. 10 are mandatory and the parties are entitled to notice even if they have knowledge of the date on which the award is filed. The omission to give such notice is a material irregularity, which etnitles the party to have the decree passed on the award set aside in revision. AIR (V 12) 1925 Lah 619: 89 Ind Cas 240.

——**Sch. 2, Para. 10 — Valadity of award decreee.**

Where no notice has been given of the filing of the award, the decree passed in accordance with the award must be set aside. AIR (V 8) 1921 Oudh 154: 62 Ind Cas 849: 24 OC 263: 8 OLJ 280.

——**Sch. 2, Para. 10 — Award decree before expiry of time for filing objections — Validity.**

Where an award is filed without notice to the defendant and a decree is passed on the award before the expiry of the time allowed by Art. 158, Limitation Act, for filing objections, the procedure is illegal and the decree must be set aside. AIR (V 8) 1921 Oudh 148: 64 Ind Cas 90: 24 OC 234: 8 OLJ 626.

——Sch. 2, Para. 10 — Notice under para 10 is not necessary where the parties are present in Court when the award if filed or where they have come to know of the award otherwise. 176 PWR 1913: 310 PLR 1913: 21 Ind Cas 298 (DB).

——Sch. 2, Para. 10 — The provisions regarding notice are mandatory. (1912) 15 OC 294: 17 Ind Cas 430.

5. Depositions and documents.

——**Sch. 2, Para. 10 — Duty of arbitrator.**

Paragraph 10 undoubtedly contemplates the possibility of the depositions of witnesses being reduced to writing by the arbitrators but does not oblige them to keep such a record. AIR (V 16) 1929 Nag 264: 119 Ind Cas 694.

——**Sch. 2, Para. 10 — Validity of award — Misconduct of arbitrator — Meaning of.**

Where an arbitrator converted his pencil notes of depositions into written depositions without having taken any steps to ensure that they were accurately transcribed, omitted to take on such transcriptions signatures of the parties, or to take other steps to ensure their accuracy, did not file those pencil notes along with his award to enable the Court to see that the record of the evidence filed by him is an accurate transcript and returned to the parties the documentary evidence filed before him.

Held, that he neglected his duties and ignored the responsibilities laid on him by law and was guilty of what may be termed as "judicial misconduct". The mere fact that an arbitrator has omitted to file along with his award the depositions of the witnesses examined by him or the documentary evidence filed before him would not justify a Court in holding that the award is on that ground invalid, but there may be a case in which the procedure adopted by the arbitrator in not filing that evidence before the Court may lead one to the conclusion that the arbitrator did not act in accordance with law, and that he was, therefore, guilty of misconduct as stated in para. 15. The word "misconduct" does not necessarily imply moral turpitude, but it includes neglect of the duties and responsibilities of the arbitrators, and of what Courts of justice expect from them before allowing finality to their awards. AIR (V 13) 1926 Oudh 307: 1 Luck 139: 13 OLJ 224: 3 OWN 279: 93 Ind Cas 446 (DB).

——**Sch. 2, Para 11.**

——**Sch. 2, Para. 11 and 20 — Paras. 11 and 20 are different and cannot be usefully compared.**

There is little relation between Paras. 11 and 20 which deal with very different topics and, therefore, cannot be usefully compared. AIR (Vol 28) 1941 Mad 129 : (1940) 2 MLJ 520 : 52 MLW 556 : (1940) MWN 1083 (DB).

——Sch. 2, Para. 11 — Where the execution of certain decrees obtained against a Hindu father was transferred to the Collector, and before the papers were sent back to Civil Court, the judgment-debtor and his son executed a mortage of the family properties:

Held, that the mortgage was entirely void and inoptrative ; it was void even with regard to the son's share in the properties inasmuch as the Collector was seized of the entire estate and was entitled to sell the entire estate in execution of the decree against the father. AIR (Vol 18) 1931 All 541 : (1931) ALJ 400 : 132 Ind Cas 568 (DB).

——Sch. 2, Para. 11. — Arbitration Act (IX of 1899), S. 10 — Arbitrators — Reference to arbitration — Difference in opinion of arbitrators on a question of law — Statement of a special case for the opinion of the Court — Appeal from the Court's order.

The parties to a suit agreed to refer their disputes relating to the properties in suit to the arbitration of two persons and a consent of Judge's order was obtained. They further agreed to refer to the same arbitrators, their disputes with regard to properties which were not the subject matter of the suit. The agreement provided that in case of a disagreement between the arbitrators, which prevented them from making an award the matter in difference was to be referred to an umpire who should make the award. The two arbitrators differed on a question of law arising in the arbitration. There was no reference to the umpire, but the arbitrators each expressed his opinion on the question and referred it for opinion to the High Court in the form of a special case under the Civil Procedure Code of 1908 Sch. II Art. II and the Indian Arbitration Act, S. 10. It was decided by the Chamber Judge. An appeal was preferred against his decision.

Held, that no appeal lay since the special case was in no sense an award. There was no award which could be adopted by the Court by the mere expression of its opinion ; but there was simply a statement of a question of law for the opinion of the Court. The case was not therefore one which will under Rule II of the second schedule of the Civil Procedure Code 1908. But it fell under S. 10 of the Indian Arbitration Act, in so far as related to the second agreement. (1910) 12 Bom. LR 852 : 35 Bom. 130 (136) : 8 Ind Cas 171 (DB).

——Sch. 2, Para. 11 — S. 506 (old Code) — Appeal decree based on an award — All the parties to the suit — Arbitration — Award — Decree from finality of illegal award — C. P. C. S. 522.

Held, that the words 'all the parties to a suit' in S. 506 of the Civil Procedure Code refer to the succeeding words of the same section "any matter in difference between them in the suit" and would not necessarily include parties who never put in appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit. (1902) AWN 19 : 24 A 229 (230).

——Sch. 2, Para 11 — (S. 506 old Code) (N. C. Sch. II Cl. 11 — Arbitration reference to Act V of 1898, Sch. II, Cl. 1 — All the parties to the suit — Partnership — Suit for winding up partnership — Ex parte parties also should consent — Consent of all parties necessary.

In a suit for winding up a partnership a reference to arbitration cannot be made by Court except on the application or with the consent of all the parties (though some of them were exparte and unrepresented. (1901) 12 MLJ 396 : 26 M 47 (48) (DB).

——Sch. 2, Para. 12.

1. Part award on matter not referred — Cl. (a).
2. Imperfect award — Cl. (b).
3. Clerical mistake — Cl. (c).
4. Arbitrator's power to review.
5. Power of court to modify award.
6. Presidency Small Cause Courts.

1. Part award on matter not referred — Cl. (a)

——Sch. 2, Para 12 — Award beyond terms of reference.

If the Court considers that the arbitrators giving award in a case have gone beyond the scope of their authority and have determined a matter not referred to arbitration, it is its duty to take action under para 12 or 14. 110 Ind Cas 401: AIR (Vol 15), 1928 Lah 915.

——Sch. 2, Para. 12 — Dissolution of partnership — Power to award interest.

In a suit dissolution of partnership and for accounts, the plaintiff claimed interest but defendant denied. The matter was referred to arbitration, one of the points referred being whether the deft. was liable to pay any money and, if so, the amount due. Held, that the arbitrator could include in his award the sums payable by the deft. as interest both on sums advanced to the firm and on those advanced to deft. for his personal use, and also for the period before and after the suit and up to the date of the award. 56 Ind Cas 941 : AIR (Vol 7) 1920 Cal 413 (DB).

2. Imperfect award — Cl. (b).

——Sch. 2, Para. 12 —Suit against joint owners for injunction — Some of them minors — Suit referred to arbitration — No sanction in respect of minors obtained — Award inseparable — If can be corrected by separating it.

Where a suit for injuction against joint owners of property, some of whom are minors, is referred to arbitration and no sanction of the Court is obtained in respect of the minors, the award is not separable and consequently cannot be corrected by separating it in respect of the minors and granting the injuction against the major only. AIR (Vol 25) 1938 Lah 582 : 40 PLR 498 : 181 Ind Cas 287.

——Sch. 2, Para 12 — Payment by instalment — Direction by arbitrator — Power of Court to interfere.

In adjuding the amount payble by one party to another, an arbitrator has full power to direct payment by instalments. The directions as to the number, amount, mode and time of payment of these instalments are therefore, matter within the discretion of the arbitrator and the essential parts of an award which a Court has no more power to modify than it has to enhance or reduce the total sum found payable by the arbitration. Even if the order fixing the instalments is erraneous, harsh or oppressive, the error is one of substance in the adjudication of the dispute, and not of form which could be amended without affecting the dceision. 124 Ind Cas 339 : AIR (Vol 17) 1930 Lah 26 (DB).

——Sch. 2, Para. 12 — Imperfection in form arising subsequently.

Para. 12 applies only if the "imperfection in form" exists in the award at the time when it is filed in Court by the arbitrator, and not if it comes into existence at a subsequent stage on the happening of an unanticipated event. 124 Ind Cas 339 : AIR (V 17) 1930 Lah 26 (DB).

——Sch. 2, Para. 12 —

Where arbitrators decided that a certain property was not endowed property but that it should not be partitioned & must continue as endowed property, the award contains an obvious error and the Court can modify and correct the award under S. 518. (1909) 2 Ind Cas 858 (All.) (DB).

3. Clerical mistake — Cl. (c).

——Sch. 2, Para. 12 — Amendment of decree on award.

Award made decree of Court — Subsequent objection to award and decree on ground that there was clerical mistake in award as to rate of interest — Proper procedure ta make amendment indicated — Court exmining arbitrator and taking other evidence and correcting error :

Held, that S. 92, Evi. Act, did not apply ; that the Court did not act illegally in exercise of its jurisdiction. AIR (Vol 29) 1942 Oudh 426: 1942 OWN (CC) 429 : 1942 ACR (CC) 269 : 201 Ind Cas 127.

——Sch. 2, Para 12 — Accidental mistake in award — Decree in terms of award.

Court has power apart from S. 152. to amend decree. AIR (Vol 19) 1932 Oudh 293: 9 OWN (CC) 803 : 140 Ind Cas 412.

——Sch. 2, Para. 12 — Mistake of arbitrator in calculation — Remedy.

An award was made upon the basis of certain figures contained in certain documents relied on by both the parties and a decree was passed according to the award without any objection from any of the parties. It was subsequently found that there was a mistake in the figures, on which the award was based and the party who was affected by the mistake applied for correction of the error.

Held, that the application was not to correct an error patent and apparent on the face of the record, but to go much deeper into the matter and to reopen the accounts and the figures at which the arbitrators had arrived and the remedy lay review or appeal. 103 Ind Cas 829 : 1927 MWN 242 : AIR (Vol 14) Mad 720 : 53 MLJ 38.

——Sch. 2, Para 12 — Correction.

The Court is bound to correct any obvious mistakes or slips in an award as in the case of decrees. The award in accordance with which the Court has to pronounce judgment is the one that embodies the real intention of the parties. (1913) MWN 338 : 13 MLT 349 : 24 MLJ 483 : 19 Ind Cas 496.

4. Arbitrator's power to review.

——Sch. 2, Para. 12 — Award Review.

An arbitrator has no power to review his own award. 99 PR 1917 : 173 PWR 1917 : 43 Ind Cas 350 : AIR (Vol 5) 1918 Lah 239 (DB).

5. Power of Court to modify award.

——Sch. 2, Para 12 — Application to amend award for error — Duty of Court — Revision.

Where the Court, after considering an application for amending an award under Para. 12, comes to the conclusion that there was no obvious error which it can correct, its decision is final even if the conclusion reached by it is not correct. But where it declines to consider the matter on the ground that it has no power in any event to amend the award, this amounts to failure to exercise judisdiction vested in it and the High Court can interfere in revision. AIR (Vol 32) 1945 PC 170 : 42 CWN 892 : (1945) Pesh LJ (PC) 170.

——Sch. 2, Para. 12 — An objection under Para. 12 of Sch. II is different from objection under Para. 15. Sch. II. AIR (Vol 20) 1933 All 648: (1933) ALJ 512: 146 Ind Cas 596.

——Sch. 2, Paras. 12, 16 — Arbitration — Power of Court to modify award — Decree on modified award, whether appealable — Second appeal, competency of.

Under Para. 12 of Sch. II, Civil P. C., a Court may modify or correct an award under certain conditions and when it does so properly it is that award and not the original one with which the decree must accord, and therefore, no appeal lies against a decree passed in terms of an award as modified by the Court under Para. 12.

No second appeal lies from an appellate order upholding the modification of an award.

The power of the Court to modify an award is limited by the Cls. (a), (b) and (c) of Para. 12 of Sch. II, Civil P. C. Where the arbitrator decided that plaintiff had by efflux of time lost his right to a plot of land but as defendant had acquired the legal title without incurring any expense, he should compensate plaintiff by paying him Rs. 125:

Held, that though the question of compensating the plaintiff had not been referred to arbitration, the Court had no power to modify the award by expunging the provision as to compensation. AIR (Vol 20) 1933 Lah 139: 34 PLR 34: 141 Ind Cas 72.

——Sch. 2, Para. 12 — After reference of pending suit.

After a Court has on the application of the parties, referred a pending suit to arbitration, its power to further deal with the case is of a very limited nature, as for example if there is no occasion to remit the award under para. 14 and if a party's application to set aside the award under para 15 is dismissed, the Court can act, if at all, under para. 12 only. 124 Ind Cas 339: AIR (Vol 17) 1930 Lah 26 (DB).

——Sch. 2, Para. 12 — Easement of necessity — Easements Act, S. 24 — Right to claim — Implied in award — Enforcement.

Where the legal effect of one of the alternative adjudication in an award is to invest the owner of an estate with the right to claim an "easement of necessity" over the road leading from the public street to the parent estate, this right must be claimed and established in appropriate legal proceedings against the owner of the servient tenement. It cannot be incorporated in the award by order of the Court purporting to act under Sch. II, Para. 12. 124 Ind Cas 339: AIR (Vol 17) 1930 Lah 26 (DB).

——Sch. 2, Para. 12 — The Court has no power to rectify or correct an award unless the award is imperfect in form or the obvious error is of such a character that it can be amended without affecting the decision of the arbitrator. It is well-settled that the Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator. 80 Ind Cas 10: AIR (Vol 12) 1925 Cal 332.

——Sch. 2, Para. 12 — Power of Court to set aside award.

The fact that the arbitrator was an officer of the Court does not affect the power or its exercise, where no misconduct is proved, except for a patent error apparent on the very face of the award as made, the award is final and the Court cannot set it aside. 78 Ind Cas 60: AIR (Vol 12) 1925 Sind 89 (DB).

——Sch. 2, Para. 12 — Types of arbitration — Jurisdiction.

The Court deals with arbitrations under three heads;—

1. Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit. In that case all proceedings from first to last are under the supervision of the Court.

2. Where parties without having recourse to litigation agree to refer their differences to arbitration, and it is desired that the agreement of reference should have the sanction of the Court. In that case all further proceedings are under the supervision of the Court.

3. Where the agreement of reference is made and the arbitration itself takes place without intervention of the Court, and the assistance of the Court is only sought in order to give effect to the award, in cases falling under heads 2 and 3 the provisions relating to cases under head 1 are to be observed, so far as applicable. In cases falling under head 1, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned, and the actual reference is the order of the Court, so that no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads 2 and 3, proceedings described as a suit and registered as such must be taken in order to bring the matter — the agreement to refer or the award, as the case may be, under the cognizance of the Court. That is or may be a litigious proceeding — cause may be shown against the application — and it would seem that the order made thereon is a decree within the meaning of that expression as defined in the C. P. Code. The jurisdiction thus created in respect of each type of arbitration must be exercised through the machinery provided and in conformity with the procedure prescribed. The Legislature never contemplated a confusion of these jurisdictions. No provision can be traced for simultaneous arbitration by private agreement and on reference by Court in respect of subject-matters within and beyond the scope of the suit and amongst persons, some parties and some strangers to a litigation. The judicial reference is an act of the Court and does not take the cause out of the Court; the Court still retains control over it, but the mode of enquiry and the manner of trial alone is changed by the reference, and the forum of the arbitrator is, in this restricted sense and subject to the control of the Court, substituted for enquiry by the Court itself. The arbitrators on such a reference are consequently limited to questions in dispute between the parties in the cause referred, and they are not competent to mix up, in their investigation and determination, other controversies wherein strangers to the suit are interested. When an award has resulted from proceedings so carried on in a manner not contemplated by the law the Court cannot be called upon to invoke the aid of the doctrine of separability. Any Court acting under the C. P. Code, has not, in India, a general authority to act on the consent of parties and thus to make an Order of Reference in a form which might apply to any dispute whatever independently of any relation to the jurisdiction of the Court. 83 Ind Cas 300: 28 CWN 424: AIR (Vol 11) 1924 Cal 567 (DB).

——**Sch. 2, Para. 12 — Merits of dispute — Jurisdiction of Court — Amendment of award.**

Under para. 12 (b) and (c) the Court has no jurisdiction to go into the merits of the dispute and come to a conclusion of its own, with the result that a very distinct alteration is made in the award. When the parties agree to have their disputes decided by their arbitrators, they agree to accept the decision of the arbitrators whether it might be right or wrong and the Court can only alter the award within the limits laid down by the Second Schedule. 45 Bom 512: 59 Ind Cas 785: AIR (Vol 8) 1921 Bom 191 (DB).

——**Sch. 2, Para. 12 — Award — Application to modify — Second reference and award — Reference to commissioner for taking accounts — Report — Procedure.**

On a reference by the Court, the arbitrators prepared their award and submitted it to the Court. Both parties filed objections and Court remitted the award to the arbitrators for rectification under para. 13. The arbitrators considered the objections and submitted their opinion regarding the alleged errors. The Court however appointed two Commissioners to examine the accounts prepared by the arbitrators to see if they involved arithmetical or clerical error. The Commissioners did so and made a report which supported the opinion of the arbitrators. When the report came up to the Court, it reserved the report on certain disputed items and asked the Commissioners to recalculate on the basis of its judgment. On the report finally made by the Commissioners the Court passed its decree. Held, that a decree must be passed in terms of the arbitrators' award, that from the very commencement the Court had followed an absolutely wrong procedure under para. 12 since it could neither be said that the Court had amended an obvious error which could be amended without affecting such decision, not could it be said that the Court had rectified a clerical mistake or an error arising from an accidental slip or omission. 22 Bom LR 1416: 59 Ind Cas 785 : AIR (Vol 8) 1921 Bom 191 (2) (DB).

——Sch. 2, Paras. 12 and 16 — Material irregularity on the part of the Court in dealing with objections to an award of arbitrators is a ground for revision though the arbitrators' being guilty of some misconduct and the Court's wrong adjudication upon the objections raised regarding that misconduct, are no grounds for revision. Modifications and corrections of an award by the Court must be confined to Para. 12 and if a Court goes beyond that and makes substantial modifications because it takes a different view from that held by the arbitrator as to what was just and fair in this or that set of circumstances, it acts without jurisdiction. 78 PR 1916: 124 PWR 1916: 40 PLR 1917: 35 Ind Cas 887: AIR (Vol 3) 1916 Lah 4.

——**Sch. 2, Paras. 12, 14 — Private reference — Award of Court.**

Paras. 12 and 14 do not apply to an award made without the intervention of the Court. In such a case the Court has no power to amend or remit the award. (1912) 5 Bur LT 55: 14 Ind Cas 978.

6. Presidency Small Cause Courts.

——**Sch. 2, Para. 12 — Application to Full Bench, if lies.**

Where a single Judge of the Presidency Small Cause Court modifies an award given by arbitrators, his decision does not amount to a decree passed on an award and, therefore, an application to the Full Bench of the Small Cause Court is competent. 24 MLW 66: 1926 MWN 772: 95 Ind Cas 442: AIR (Vol 13) 1926 Mad 878: 51 MLJ 498 (DB).

——**Sch. 2, Para. 13.**

——**Sch. 2, Para. 13 — Revision.**

An order awarding fees to the arbitrator is a 'case decided' within the meaning of S. 115 and is revisable. AIR (Vol 27) 1940 Sind 190: ILR (1940) Kar 34: 190 Ind Cas 880 (DB).

——**Sch. 2, Para. 13 — Court can award arbitrator's fees under Para. 13 and S. 35 — Such fees are a part of costs of arbitration.**

The provision relating to the arbitrator's fees made in the award itself is part of the costs of arbitration and cannot be excluded from the provisions of Para. 13 of Sch. II, Civil P. C. Even if there is no award, the Court has power to award the arbitrator's fees as part of the costs of the arbitration and as costs of the proceedings incidental to the suit under S. 35. AIR (Vol 27) 1940 Sind 190 : ILR (1940) Kar 34 : 190 Ind Cas 880 (DB).

——**Sch. 2, Para. 13 — 'Costs of arbitration', meaning of.**

In the absence of any express provision in the Second Schedule to the Civil P. C. for the remuneration of arbitrators, the English Law should be applied unless there is an express provision to the contrary and no such prohibition exists. The term "costs of the arbitration" is a wide and general term and there is no justification for limiting it to such costs as might be represented by travelling expenses and the summoning of witnesses although it does include such matters. AIR (Vol 21) 1934 Nag 199 : 17 NLJ 153 : 31 NLR 85 : 152 Ind Cas 373.

——**Sch. 2, Para. 13 — Omission of costs in award — Power of Court to make order as to costs.**

In the absence of any provision in the award in the matter of costs it is open to the Court seised of the proceedings to make an order as to costs under Para. 13. 7 OWN 97: AIR (Vol 17) 1930 Oudh 89 (DB).

——**Sch. 2, Para. 13 — Excessive costs — Power of Court to reduce.**

Where the costs charged by the arbitrators appear below the signatures of the arbitrators & are therefore not part of the award, the fact that they are excessive is no ground for challenging the award though the costs could be reduced by the Court in proper case upon an application by the perty. AIR (Vol 17) 1930 Sind 190 : 123 Ind Cas 694 (DB).

——**Sch. 2, Para. 13 — Costs — Prior to arbitration — Inclusion in award.**

The costs incurred in the processes of obtaining an order from the Court are within the discretion of the Court and not of arbitrators but an award is not bad merely because of their inclusion. 8 SLR 136: 27 Ind Cas 526: AIR (Vol 1) 1914 Sind 62.

——**Sch. 2, Para. 13 — Costs.**

The Court can award arbitration fees as costs in a suit where no award is made or where it is silent though an award has been made. (1913) 6 SLR 226: 19 Ind Cas 611 (DB).

——Sch. 2, **Para. 14.**

1. **Appeal.**
2. **Award beyond reference.**
3. **Indefinite award incapable of execution.**
4. **Limitation.**
5. **Objection — Apparent on face.**
6. **Remittal in part.**

See also N. 4.

7. **Private awards.**
8. **Revision.**
9. **Scope.**
10. **Some matters referred undetermined.**

1. Appeal.

——**Sch. 2, Para. 14 — Interpolation after signing — Modification after remittal — Appeal.**

Haying signed, but before filing in the Court, an arbitrator interpolated the award. The Court remitted it to arbitrators. Who then amended it. The Court ignored both the interpolations and passed a decree.

Held, the order fell under S. 104 (1) (c) and was appealable. A I R (Vol 13) 1926 Lah 519 : 98 Ind Cas 336 : 7 Lah 327 : 8 L L J 460 : 27 P L R 541 (DB).

——**Sch. 2, Para. 14 — Remittal, objections to — Appeal against decree on revised award.**

Where the Court remits an award and the arbitrators submit a fresh award, and the Court passes a decree in accordance with such revised award, no appeal lies against such decree on the ground that the order of remittal was wrong and that the original award ought to have been accepted and acted upon. A I R (Vol 12) 1925 Lah 267 : 6 Lah L J 500 : 26 P L R 77 : 84 Ind Cas 693.

——**Sch. 2, Para. 14 (a) — Award — Refusal to remit — Appeal.**

A Court may under para. 14 remit an award on ground of some matters being left out; but if the objection is overruled no appeal lies therefrom. A I R (Vol 1) 1914 Cal 497 : 23 Ind Cas 862 (DB).

——Sch. 2, Para. 14 (a) — Obitor — A refusal of a Court to remit an award under Sch. II, Para. 14, is unappelable. (1912) M W N 901 : 15 Ind Cas 573.

2. Award beyond reference.

——**Sch. 2, Para. 14 — Only share of minor in property referred — Arbitrator's decision that no partition should take place during minority is beyond terms of reference — Decision is void but rest of award declaring minor's share stands.**

Where a reference only refers the share of the minor in the property to the decision of the arbitrators and says nothing about its disposal or partition, then arbitrators, in deciding that during the minority of the minor there can be no partition of his property, would be deemed to have gone beyond the terms of the reference. Such decision being void it would have no effect on the award but the rest of the award will stand. A I R (Vol 26) 1939 Lah 308 : 41 P L R 201.

——**Sch. 2, Para. 14 — Discretion of Court.**

It is entirely optional with a Court to remit an award, if such award has determind any matter not referred to arbitration. A I R (Vol 18) 1931 Lah 215 : 12 L L J 314 : 131 Ind Cas 303.

——**Sch. 2, Para. 14 — Validity of award.**

In the case of a reference to arbitration without the intervention of the Court, the award, if it deals with matters beyond the scope of the reference, is not invalid and the portion of the award dealing with the matters referred to arbitration is valid and the award can be accepted to that extent, provided the portion of the award dealing with such matters can be separated from the rest of the award. (1929) 115 Ind Cas 680 : 10 P L T 53 (DB).

——**Sch. 2, Para. 14 — Filing of award in part.**

Where matters not referred to arbitration are separable, the Court should delete them and order the rest of the award to be filed. A I R (Vol 15) 1928 Sind 144 : 108 Ind Cas 791 (DB).

——**Sch. 2, Para. 14 — Duty of Court to remit.**

Misconduct must be misconduct in carrying out the terms of the reference and within the scope of it. Anything beyond that, is action without jurisdiction whether or not it may amount also to misconduct. If the arbitrators' award is beyond their jurisdiction and therefore made without jurisdiction, then obviously the decree which embodies it is also made without jurisdiction. The duty of the Court, when an award sent to it is beyond the jurisdiction of the arbitrators, is not to pass a decree in accordance therewith but to remit it back to the arbitrators under the terms of para. 14 of Sch. 2. A I R (Vol 13) 1926 Mad 201 : 49 M L J 523 : 91 Ind Cas 745 (DB).

——**Sch. 2, Para. 14 — Power of arbitrator to provide for actual division and maintenance.**

If the arbitrators have an authority to make a partition, they have an authority to determine everything incidental or consequential with reference to the mode in which the partition is to be effected and the rights of the female members of the family cannot be disregarded. A I R (Vol 11) 1924 Oudh 54 : 10 O L J 226 : 73 Ind Cas 39.

——**Sch. 2, Para. 14 — Modification of award — Remittal for correction.**

The arbitrators who were three in number were to report their decision qua the house in question to the Court and the parties were to be bound by the award qua the other property. The award filed was remitted as it was considered that the arbitrators should omit that part which related to the other property.

Held, when an award deals with a matter extraneous to the reference, which matter can be separated therefrom, the Court may modify the award or may remit it to the arbitrators for correction. A I R (Vol 10) 1923 Lah 411 : 76 Ind Cas 1007.

——Sch. 2, Para. 14 — Powers of arbitrator.

Where the reference recited "you will make a division of the moveable and immovable property having considered what is proper and having made a just settlement. That division we accept in every respect."

Held, that the reference did not exclude the power of the arbitrators to make the division subject to such conditions affecting its tenure or devolution as could have been validly agreed to even by the co-parceners themselves. A I R (Vol 10) 1923 Nag 70 : 71 Ind Cas 413.

——Sch. 2, Para. 14 (a) — Award — Interest — Whether invalidates award.

Arbitrators have jurisdiction to decide whether they should award interest and an award of interest does not invalidate the award. A I R (Vol 7) 1920 Cal 143 : 46 Cal 534 : 23 C W N 704 : 54 Ind Cas 285.

——Sch. 2, Para. 14 (a) — Award beyond scope of reference.

An award is bad if it goes beyond the scope of the reference. AIR (V 2) 1915 Cal 713 : 26 Ind Cas 73.

——Sch. 2, Paras. 14 (a) and 15 — Valid and invalid parts separable — Misconduct.

When the valid part of an award is separable from the invalid part the award should be declared valid to that extent but where misconduct is proved, the whole award is invalid. (1912) 5 Bur L T 55 : 14 Ind Cas 978.

——Sch. 2, Para. 14 (a) — Procedure of arbitrator — If can go beyond reference.

An arbitrator is not bound by the rules of practice adopted in Courts but he cannot go beyond the questions submitted to him. So where he was asked to see if the plaintiff had a right of way over a particular strip of land he cannot lay out a new path. (1912) 15 C L J 110 : 16 C W N 256 : 13 Ind Cas 118 (DB).

——Sch. 2, Para. 14 (a) — Scope of inquiry — Dispute between firms — Jurisdictions.

When arbitrators have to decide disputes between firms they must inquire who the partners are, to discover whether they have jurisdiction, whom they must serve with notices and the scope of their inquiries. The decision as to the liability of any individual as partner of a firm is a decision on a question of their own jurisdiction. The fact that the arbitrators have taken evidence which proved to cover matters outside their jurisdiction will not necessarily invalidate the award or make the proceedings improper, if the award is within jurisdiction. (1911) 9 Ind Cas 712 : 4 S L R 196.

3. Indefinite award incapable of execution.

——Sch. 2, Para. 14 — Amount payable not ascertained — Effect.

The mere fact that an amount is not actually ascertained or calculated by the arbitrators, is not a sufficient justification for holding the award uncertain, for the principle does apply that, that is sufficiently certain which can be made certain. AIR (Vol 17) 1930 Lah 22 : 119 Ind Cas 726 (DB).

——Sch. 2, Para. 14 — Error in law — Amount payable not specified — Effect of.

The error-in-law must be distinctly collected from the face of the awards, or from any document accompanying or forming part of the awards. Where the awards did not specify the amounts, which had to be paid held that is not sufficient ground for remitting the awards, if the arbitrator has given the rule for calculating the amounts to be paid. A I R (Vol 9) 1922 Cal 447 : 69 Ind Cas 995 : 49 Cal 646 (DB).

——Sch. 2, Para. 14 (b) — Award — Validity of — Award against a firm.

An award against a firm is not bad and is governed by the provisions relating to the execution of a decree against a firm. A I R (Vol 7) 1920 Cal 386 : 47 Cal 29 : 56 Ind Cas 325.

——Sch. 2, Paras. 14 (b) and 15 — Uncertain award — Setting aside of.

Where an award made out of Court is uncertain and does not specify either the amount or the land awarded or does not give directions sufficient to enable the court to ascertain or identify it, such award is liable to be set aside on account of uncertainty. An award to be capable of execution by a Court, should be certain, so that no reasonable doubt can aries upon the face of it, as to the arbitrator's meaning or as to the rights and duties of the parties thereto.

The Court has no power to remit an award made out of Court for the reconsideration of the arbitrator, though it is open to the parties to go back to him and ask him to make it a complete award, treating the arbitration as still pending. A I R (Vol 3) 1916 Oudh 160 : 3 O L J 137 : 34 Ind Cas 355 (DB).

——Sch. 2, Para. 14 (b) — Award against firm — Validity.

An award may be made against the name of a firm without ascertaining who were the parties liable. A I R (Vol 1) 1914 Cal 181 : 25 Ind Cas 955.

——Sch. 2, Para. 14 (b) Rules for calculation given — But no result — Effect of.

Where the arbitrators give rules for calculation without giving the actual result, it can be considered as sufficiently certain because the actual result may be worked out. (1912) 15 C L J 360 : 13 Ind Cas 161 (DB).

——Sch. 2, Para. 14 (b) — No decision on cardinal point.

An award should be a final decision on all matters referred to the arbitrator. Where it leaves undecided one of the cardinal points in controversy, the award is bad. (1911) 13 C L J 399 : 10 Ind Cas 450 (DB).

——Sch. 2, Paras 14 (b) and 16 — Examination of arbitrator.

When two awards are alleged, the Court may examine the arbitrator to ascertain whether certain proceedings passed by him were an award or not. (1909) 19 M L J 394 : 6 M L T 137 : 2 Ind Cas 92 (DB).

4. Limitation.

——Sch. 2, Para. 14 (c) — Award made out of time.

An award made after the allotted time, is binding if not impeached within 10 days or if the parties attend and acquiesce in the arbitration after the prescribed time. A I R (Vol 5) 1918 Pat 93 : 4 Pat L J 265 : 50 Ind Cas 52 (DB).

——Sch. 2, Para. 14 (c) — Award given after a long time — Revocation of submission — Effect of.

Where an award was not given for a very long time and the plff. gave a notice of revocation but

the arbitrators met, did their business in a most businesslike manner and gave an award.

Held, that the lapse of time did not invalidate their award. (1912) 13 Ind Cas 48 (All) (DB).

——**Sch. 2, Para. 14 (c) — Parties — Legal representatives — Written reference.**

In a suit by plff. as mutwalli for certain pots and pans, the Judge was requested by the community to arbitrate. An award was passed and a decree also. The appeal from it was treated as revision and the decree set aside as without jurisdiction because there was no written reference and it was made by persons not parties to the suit and it also included matter not in dispute between the parties.

The award having been passed in June 14, 1904 and the application for the decree beeing made only in 1909 the application was barred. The award was also bad as the plff. having died no legal representative was brought on the record and the suit had abated. (1912) 36 Bom 105 : 13 Bom L R 1017 : 12 Ind Cas 687 (DB).

5. Objection — Apparent on face.

(a) General.
(a-1) Adoption of compromise.
(b) Arithmetical error.
(c) Award by some arbitrators.
(d) Evidence.
(e) Notice.
(f) Error or law.
(g) Signature.
(h) Objection —Waiver.
(i) Miscellaneous illustrations.

(a) General..

——**Sch. 2, Para. 14 (c) — Terms of Para. 14 (c), cannot be enlarged.**

The Second Schedule of the Civil P. C., is an exhaustive Code as regards grounds for rejecting an application to file an award and no Court has jurisdiction to go beyond the provisions of this Schedude. The Court is not entitled to enlarge the terms of Para. 14 in the matters of remitting the award to the arbitrator. AIR (V 27) 1940 Oudh 405: 1940 AWR (CC) 327: 1940 OWN (CC) 670: 16 Luck 79: 189 Ind Cas 344 (DB).

——Sch. 2, Para. 14 — One of the the parties to the dispute was an unregistered firm in whose favour an award was given. The firm sought to file the award by an application under Paras. 20 and 21 of Sch. II, Civil P. C. It was objected to on the ground that the firm could not enforce its rights under the award, it being an unregistered firm:

Held, that Sch. II, was exhaustive as regards grounds for rejecting an application to file an award, and that the Court had no jurisdiction to go beyond the provisions of this Schedule. There was nothing illegal on the face of the award within Sch. II, Para. 14 (c), Civil P. C. AIR (V 25) 1938 Pat 231: 16 Pat 742: 4 BR 587: 19 PLT 549: 175 Ind Cas 468 (DB).

——**Sch. 2, Para. 14 — Arbitrator neglecting to decide an issue referred — Award of money to one party, which represented proceeds of bribes extorted from public — Award, if vitiated — Decree in terms of award, setting aside of — Ex turpi cause non oritur actio — Scope of.**

Where an arbitrator to whom the matters in dispute were referred neglected to decide an issue which was referred to him by the parties to the arbitration and he awarded a sum of money to one of the parties to the arbitration, which represented the proceeds of bribes extorted from the public:

Held, that the award could not stand and that the order directing a decree to be prepared embodying the award should be set aside.

No litigant is entitled to maintain a suit which has its origin in a disgraceful cause: ex turpi cause non oritur actio. AIR (V 21) 1934 All 493: 3 AWR (HC) 415: (1934) ALJ 1256: 149 Ind Cas 396 (DB).

——**Sch. 2, Para. 14 — Extra amount for services rendered — Validity of award.**

Though jeshta bhagam is absolute and illegal, the mere use of the word does not made an award illegal when the Court is satisfied that the extra amount is given to the eldest son for services rendered. AIR (V 17) 1930 Mad 38: 30 MLW 868 (DB).

——**Sch. 2, Para. 14 — Trying Judge as arbitrator — Review of judgment.**

Where a Judge is constituted also the sole arbitrator, the fact that both the capacities of a Judge and of an arbitrator are constituted in the same person should not deprive a party of his right of getting the matters set right which he can ordinarily do by asking Court to remit the award to the arbitrator. And so in such a case the Judge ought to admit a review of his own judgment if much of what is said in his judgment is not to be found in the operative part of it. AIR (V 16) 1929 All 747: 117 Ind Cais 610: 1929 ALJ 808: 51 All 903 (DB).

——**Sch. 2, Para. 14 — Plea of payment not considered.**

Where the defendant has put in a plea of payment which the arbitrators have not considered, it would not be a ground for setting aside the award but for remitting it for consideration under R. 14 of Schedule II. The ground on which an award can be set aside is given in Rule 15 and this is not such a ground. AIR (V 12) 1925 All 393: 86 Ind Cas 788: 6 LRA Civ. 158.

——**Sch. 2, Para. 14 — Parties alleging that others have no interest in matter referred — Validity of award.**

When all the parties to the reference present to the arbitrator that whole of the properties in dispute belonged to them and that third persons had no interest in such properties, the arbitrator is justified in treating the whole of such properties as belonging to the parties to the reference.

If, as a matter of fact, third persons had any interest in those properties, and the parties to arbitration agreed to have such properties partitioned between them by the arbitrator, it is not open to any one of them to contest the validity of the award on the ground that it deals with matters in which third parties are interested. AIR (V 12) 1925 Pat 810 : 93 Ind Cas 261 : 4 Pat 670 : 7 PLT 644 (DB).

——**Sch. 2, Para. 14 — Apparent error — What is — Plea of defect in quality but not producing goods for inspection — Effect.**

There is no error on the face of the award where the buyers having themselves complained of the inferior quality of the goods failed to produce them for inspection when called upon to do so by the arbitrators. The buyers themselves could not legitimately complain of the arbitrators coming to the conclusion that the buyers did not prove their case. Where the arbitrators stated in the award "we have considered the papers".

Held, it was not a legitimate inference from the terms of the award that the arbitrators had decided against the buyers relying upon the mere fact that the latter were unwilling to produce the goods. AIR (V 11) 1924 Cal 1051 : 82 Ind Cas 341 : 28 CWN 888 (DB).

——**Sch. 2, Paras 14 (c) and 15 — Majority award — Concurrence of arbitrators.**

An award to be valid must be the award of all the arbitrators without difference. Where there is an

uneven number of arbitrators, there is no presumption that a majority award shall be binding. AIR (V 7) 1920 Mad 130 : 38 MLJ 145 : 54 Ind Cas 912 (DB).

——**Sch. 2, Para. 14 (c) — Award — Signing of Minute of dissent by one of the arbitrators, after signing award.**

Until an awad is communicated there is nothing to prevent an arbitrator changing his mind. He cannot be said to be, functus officio until the pronouncement is actually made though he may sign the award. This does not preclude him from further considering the matter, and if he thinks fit, recording a note of dissent. AIR (V 6) 1919 Pat 74 : 49 Ind Cas 522 (DB).

——**Sch. 2, Paras 14 (c) and 15 — Restriction on alienation — Effect of.**

A term in an award which restricts the alienability of property for an indefinite period is not binding upon a person or a class of persons not expressly mentioned as being bound by it. AIR (V 5) 1918 Lah 21 : 39 PR 1918 : 37 PLR 1918 : 28 PWR 1918 : 43 Ind Cas 674 (DB).

——**Sch. 2, Para. 14 (c) — Award after suit — Fair copy.**

An award duly made and signed by the arbitrators but intended to be fair copied on a stamped paper is valid and the defect as to stamp can be cured. If a reference to named arbitrators has been made, it is no valid objection to the award that a suit was filed before that award was made. AIR (V 5) 1918 Sind 13 : 13 SLR 75 : 53 Ind Cas 337.

——**Sch. 2, Para. 14 (c) — Performance of.**

The fact that the obligations imposed under the award have been performed between the date of the award and the date of application to file it, is no ground for attaching the award though it may be a valid defence against an execution application. AIR (V 4) 1917 Mad 312 : (1916) 1 M W N 203 : 19 MLT 228 : 33 Ind Cas 67 (DB).

——**Sch. 2, Paras 14 (c) and 15 — Award — Validity — Execution outside British India.**

The Validity of an award does not ordinarily depend upon the place in which it is executed. AIR (V 4) 1917 Pat 241 : 2 Pat LW 156 : (1917) P H C C 241 : 42 Ind Cas 617 (DB).

——**Sch. 2, Para. 14 (c) — Award — Absence of party — Intentional.**

When a party's absence is intentional at the time of the delivery of the award the award is not vitiated by such absence. AIR (V 3) 1916 All 278 : 33 Ind Cas 467 (DB).

——**Sch. 2, Paras. 14 (c) and 12 — Defect in reference — Effect.**

A defect in the order of reference not affecting the arbitrator's jurisdiction or authority to make the award is not fatal to its validity. (1913) 16 OC 233: 20 Ind Cas 773 (DB).

——Sch. 2, **Para. 14 (c) — Award not properly made.**

An award not properly made and filed according to the judgment is a nullity and a decree passed on the basis thereof should be set aside. (1911) 9 Ind Cas 241 (Oudh).

——**Sch. 2, Para 14 (c) — Single award — Contracts involving common question.**

Where disputes under several contracts involving questions common to all are referred by one submission, a single award is not invalid by reason of covering the subjects of many agreements especially, where the defendants have not been prejudiced. (1911) 4 SLR 196 : 9 Ind Cas 712.

——**Sch. 2, Para 14 (c) — Inequality.**

The validity of an award must be determined by the consideration of circumstances existing at its date and not as they transpired afterwards. An award cannot be disturbed by reason of the inequality of benefit received eventually by either party. (1910) 35 Bom 153: 12 Bom LR 984: 8 Ind Cas 647 (DB).

——**Shc. 2, Para. 14 (c) — Lottery — Award.**

An award by lottery is not an arbitration award since no opinion of the arbitrator comes into play but the whole thing is made to depend upon chance. The agreement to decide the suit by lottery is void ab initio as wager and being opposed to public policy. (1909) 5 NLR 107 : 3 Ind Cas 55.

(a-1) Adoption of compromise.

——**Sch. 2, Paras 14 (c) and 15 — Award embodying agreement between parties.**

Though an award embodies an agreement arrived at between the parties, it is not less valid and binding. An award is binding on the parties after it is delivered. AIR (Vol 7) 1920 Lah 220: 56 Ind Cas 115 (DB).

——**Sch. 2, Paras 14 (c) and 15 — Compromise between parties—Acceptance of.**

The report of the arbitrators embodying a compromise arrived at between the parties subsequent to the reference is not an award. AIR (Vol 7) 1920 Lah 101: 55 Ind Cas 218.

——**Sch. 2, Paras 14 (c) and 15 — Compromise—Award on — Validity — Consent of parties — Decision.**

An award is not open to objection on the sole ground that it merely reproduces an agreement come to between the parties only, when the consent of the parties is regarded by the arbitrators as evidence that the settlement proposed is fair to all. AIR (Vol 7) 1920 Mad 195: 56 Ind Cas 593 (DB).

——**Sch. 2, Paras 14 (c) and 15 — Adoption of compromise.**

The mere approval of a compromise arrived at between the parties before an arbitrator is not an award. AIR (Vol 7) 1920 Nag 43: 54 Ind Cas 311.

——**Sch. 2, Para 14 (c) — Award not signed by one of the arbitrators—Decision in accordance with arrangement effected by the parties.**

The omission of one of several arbitrators to sign the award does not vitiate the award where the arbitration proceedings took place in the presence of all the arbitrators.

Where the arbitrators took down the depositions of the plff. and the deft. but finally approved of an arrangement put forward by the plff. and agreed to by the deft., the decision of the arbitrators, though it was in accordance with the wishes of the parties was an award. (1909) 1. Ind Cas 378 (Cal). (DB).

(b) Arithmetical error.

——**Sch. 2, Para 14 — Rate of exchange not specified in award—Validity.**

An error in law on the face of the award must be distinctly collected from the face of the award or from any paper so connected with the award as to form part of it. Where, in an arbitration, the arbitrator had awarded the amount claimbed in pounds sterling and the rate of exchange for payment was not specified.

Held that the award was not bad for uncertainty. AIR (Vol 11) 1924 Sind 117: 80 Ind Cas 1009: 17 SLR 86.

——**Sch. 2, Paras. 14 (c), 15 and 20 — Arithmetical error.**

On an application to file the award it was contended that the award was bad. as (1) the arbitrator had allocated funds or property to persons not parties

to the reference (2) the arbitrator had first allotted the residential houses to one party and payment of compensation to another and then changed his decision (3) the award purported to divide the houses in equal shares though it was clear on the face of the award that he had not done so and had awarded compensation to one party in excess of his proper share.

Held, the award was good and was not vitiated by any illegality apparent on the face of the award. The arbitrator had not travelled outside the reference and what looked like, an arithmetical error in the award did not render the award invalid. AIR (Vol 7) 1920 All 45: 42 All 277: 2 UPLR (A) 104: 18 ALJ 241: 58 Ind Cas 585. (2). (DB).

——Sch. 2, Paras 14 (c) and 15— Award —Setting aside of.

When an award is good on the face of it, the parties cannot object to and the Court will not interfere on the ground of a mere mistake. (1912) 14 OC 308: 13 Ind Cas 520. (DB).

(c) Award by some arbitrators.

——Sch. 2, Para 14(c) — Award by some arbitrators.

An award given by some of the arbitrators on evidence most of which was heard and taken by four out of six arbitrators in the absence of the remaining two, is invalid and illegal. AIR (Vol 5) 1918 All 274 16 ALJ 307: 45 Ind Cas 34 (DB). See also AIR (Vol 5) 1918 Oudh 343: 5 OLJ 471: 47 Ind Cas 960.

——Sch. 2, Paras 14 (c) and 17 — Award by some of the arbitrators.

Where two of the five arbitrators did not attend all the meetings and the award was signed by only three of them. Held, that although the agreement contained authority to make a majority award there was no valid award as there was no unanimous participation by the arbitrators in deliberating upon the and the parties had not the benefit of the presence & the effect of the arguments, experience and judgment of each arbitrator which they had a right to expect. AIR (Vol 5) 1918 Cal 865: 25 CLJ 396: 22 CWN 301: 40 Ind Cas 422. (DB).

——Sch. 2, Para 14 (c) — Refusal to act by some arbitrator.

A refusal by some arbitrators to act makes the award of the rest illegal. 9 MLT 251: 21 MLJ 263: (1911) 1 MWN 151 : 9 Ind Cas 173 (FB).

(d) Evidence.

——Sch. 2, Para 14 — Personal knowledge.

Where parties intend that arbitrators should decide from their personal knowledge and purposely abstain from producing any evidence the award cannot be impeached on the ground that the arbitrators only decided from personal knowledge without taking evidence. AIR (Vol 12) 1925 Oudh 741: 89 Ind Cas 832.

——Sch. 2, Para 14 (c) — Decision of arbitrators — Not to be questioned by Court.

A fair decision of arbitrators, who are final Judges of all matters of fact, acting within their authority, cannot be questioned by a Court on the ground of insufficiency of evidence to justify their conclusions nor can a Judge refuse to enforce their award merely because in his opinion sufficient attention was not paid to S. 110 Evidence Act. The impeachment of an award for not examining witnesses is possible only on evidence of distinct tender of witnesses to the arbitrators. AIR (Vol 4) 1917 LB 68: 37 Ind Cas 807.

——Sch. 2, Para 14 (c) — Error of law—Evidence.

A decision of an arbitrator should not be set aside under S. 115 C.P.C. on the ground of errors in the admission of evidence where such admission does not materially affect his decision. AIR (Vol 2) 1915 Mad 391: 16 MLT 156: (1914) MWN 614: 26 Ind Cas 106

——Sch. 2, Paras 14 (c) and 15 — Refusal to take evidence—Signing at different times.

A judicial act to be valid must be performed by all arbitrators and the reception of a written statement by one of the arbitrators is not a judicial act. In order to invalidate an award it must be shown that the question was specifically stated before the arbitrator and that he did not consider it. To impeach an award on the ground of improper refusal by the arbitrator to take the evidence, it must be shown that the witnesses were distinctly tendered before the arbitrators. An award not signed by all the arbitrators at the same time and place is not void. (1912) 15 CLJ 360: 13 Ind Cas 161. (DB).

——Sch. 2, Paras. 14 (c), 15 and 16 — Evidence — Closing of case — Estoppel — Decision of issues.

On a reference to arbitration of a whole case, the arbitrator need not give a finding on each, issue though he is bound to decide the whole case substantially and when the parties close their case they cannot contend afterwards that there was insufficient inquiry. 13 PWR 1911: 14 Ind Cas 371.

(e) Notice.

——Sch. 2, Para. 14 (c) — Award — Notice to one of the parties— Absence of— Enforcement of—Costs of award.

The absence of a written notice to one of the defts as provided in the reference does not necessarily invalidate an arbitration proceeding when the parties had oral notice. Where an order for costs made in an award on a private reference could be expunged and the remaining award would thereby remain unaffected the award could be enforced to that extent.—

Quaere. Whether the principle that when a suit has been referred to arbitrators, they have authority to deal with the costs of the award can be extended to private reference. AIR (Vol 5) 1918 Cal 529: 27 CLJ 104: 43 Ind Cas 770. (DB).

——Sch. 2, Para. 14 (c) — Material irregularity.

An order setting aside an award on the ground that the Court did not fix the date for award in the order of reference and that there was failure of notice to plff. of the date of the award is unsustainable. Mere opinion on a point unsupported by reasons is not a decision of that point. AIR (Vol 3) 1916 Oudh 137: 2 OLJ 495: 32 Ind Cas 345.

(f) Error of law.

——Sch. 2, Para 14 (c) — Question of succession of orasa sons—Wrong decision by arbitrators—Award if illegal.

A wrong decision of arbitrators on a question of succession of orasa sons, does not come within the meaning of Sch. II Para. 14 (c), Civil P.C. as the law on the question is not so obvious. AIR (Vol 22) 1935 Rang 16: 154 Ind Cas 557 (DB).

——Sch. 2, Para 14 — What is.

An error of law only exist when in an award there is stated some illegal proposition which is the basis of the award and which is erroneous. AIR (Vol 17) 1930 Mad 38 : 30 MLW 868 (DB).

——Sch. 2, Para 14 — An error in law on the face of the award means that there can be found in the award or a document actually incorporated, thereto, as for instance a note appended by the arbitrator, stating the reasons for his judgment, some legal proposition which is the basis of the award and which can then be said to be erroneous. AIR (Vol 12) 1925 Cal 599: 88 Ind Cas 49: 52 Cal 100 (DB).

——Sch. 2, Paras 14 and 15 — Error of law — Illegality — Bombay Cattle Trade Association's Rules 23 and 25—Vendor and purchaser— Person committing breach of contract — Damages.

Where an award imposes a liability on a party which cannot possibly be said to have been provided for by the contract between the parties on a proper construction of its terms, there is an error patent upon the face of the award which entitles the Court to set it aside. If an award misconstrues the contract and correspondence between the parties, there is an error of law patent on the face of the award.

The Court could set aside an award if there was an error of law patent on the face of it. AIR (Vol 7) 1920 Bom 256: 21 Bom LR 1037: 53 Ind Cas 799.

——Sch. 2, Para 14 (c) — Error of law — Giving life—interest to excluded heir.

An award cannot be set aside on the ground that the arbitrator has given an erroneous decision on a question of law. Para. 14(c) can be applied in setting aside an award where the arbitrator manifestly misapplies a rule of succession or applies to the parties a rule by which they are not bound. Where an arbitrator gives a life-interest in a share of property to a blind heir who is excluded from inheritance the award is not bad. AIR (Vol 5) 1918 Mad 296: 41 Mad 1022: 34 MLJ 323: 24 MLT 60: 8 LW 202: (1918) MWN 482: 45 Ind Cas 644 (DB).

——Sch. 2, Para 14 (c) — Questions of law referred — Finality.

When points of law are referred to, arbitrator's award thereon cannot be impeached as being not inaccordance with the received interpretation of law. AIR (Vol 3) 1916 Oudh 285: 19 OC 48: 33 Ind Cas 737 (2).

——Sch. 2, Para 14 (c) — Mistake—Fact or law — Power of Civil Court.

Civil Courts cannot sit as Courts of appeal to consider the correctness of an award on the merits either in respect of matters of fact or of law. They cannot do the work of the arbitrators when once the parties have decided to refer the matter to arbitration. 64 PWR 1909: 53 PLR 1909: 4 Ind Cas 553 (DB).

(g) Signature.

——Sch. 2, Para 14 — Award not bearing signature of arbitrator who was absent throughout proceeding — Award, if can be remitted under para 14(c).

Where the award does not bear signature of one of the arbitrators and where it further appears that he had taken no part in the proceedings, the Court is fully justified in remitting it to the arbitrators under Para. 14 Sch. II, Civil P.C. since there is an objection to the legality of the award apparent on the face of it. AIR (Vol 24) 1937 Pat 343: 3 BR 747: 170 Ind Cas 351.

——Sch. 2, Para 14 (c) — Signing of award —Award not signed at same time on the same day by all the arbitrators.

An award is not invalid simply because it was not signed at the same time on the same day and at the same place by all the arbitrators. The Court is bound to pass a decree in accordance with the award. AIR (Vol 7) 1920 Lah 228: 1 Lah 481: 55 Ind Cas 883. (DB).

——Sch. 2, Paras 14 (c) and 15 — Reference to three persons — Award signed by two—Application to set aside award — Lim. Act, Art. 158.

An award is invalid unless the arbitrators had been present at all the meetings including the last and heard the evidence and consulted each other as to the result. The period of limitation, under Art. 158 Lim. Act does not apply to proceedings under para. 12 or para. 14 and there is no limitation for making applications to remit award for reconsideration of the arbitrators owing to some objections to the legality of the award being apparent on the face of it. The fact that an award bore only the signature of two out of three arbitrators is an illegality apparent on its face. AIR (Vol 6) 1919 Mad 877: 24 MLT 102: 8 LW 171: (1918) MWN 477: 47 Ind Cas 597.

——Sch. 2, Paras 14 (c) and 15 — Omission of one of the arbitrators to sign.

Where an award of the arbitrators of both parties represents their decision, the failure of the arbitrator of one party to sign, does not render it invalid. AIR (Vol 5) 1918 All 426: 43 Ind Cas 154.

(h) Objection — Waiver.

——Sch. 2, Para. 14 — An objection under Para. 14 is different from objection under Para. 15, Sch. II. A I R (Vol 20) 1933 All 648 : (1933) A L J 519 : 146 Ind Cas 596.

——Sch. 2, Paras. 14 (c) and 15 — Waiver of — Objection.

Mere submission to an arbitration is not a waiver of an extrinsic objection to an award on the ground that the award is illegal because based on an illegal act or subject matter. A I R (Vol 2) 1915 Cal 745 : 19 C W N 948 : 21 C L J 273 : 28 Ind Cas 557 (DB).

——Sch. 2, Para. 14 (c) — Illegality apparent on face of award — Duty of Court.

Where the illegality is apparent on the face of the award, the Court should take judicial notice even though no objections had been filed within the period prescribed by Art. 158, Lim. Act. (1912), 16 O C 94 : 17 Ind Cas 320.

(i) Miscellaneous illustrations.

——Sch. 2, Para. 14 — Stipulation for liquidated damages in case of default is not per se illegal — Court cannot go into what is proper amount of damages.

A stipulation for liquidated damages in the award in case of default is not per se illegal. The Court has no jurisdiction to go into what is the proper amount of damages and cannot interfere with the figure embodied in the award. A I R (Vol 28) 1941 Mad 266 : (1940) M W N 879.

——Sch. 2, Para. 14 (c) — Suit on promissory note claiming interest — Reference to arbitration — Award granting interest — Objection that pro-note did not provide for interest — Award remitted for re-consideration — Legality of — Second award, if valid.

The plaintiff brought a suit on a promissory note claiming interest. The trial Court referred the case to arbitration and an award was filed awarding interest to the plaintiff. An objection was then taken to the trial Court by the defendant that the promissory note in question did not provide for the payment of interest. The trial Court considered that this amounted to an objection as to the legality of the award apparent on the face of it within the meaning of Para. 14 (c), Sch. II, Civil P. C.,

and accordingly it referred the matter for the reconsideration of the arbitrator. The arbitrator then filed an award in which he did not award any future interest, and the lower Court accepted that award and passed a decree on it.

Held, that it was doubtful whether the want of provision in the promissory note for the payment of interest was the kind of objection to legality of the award apparent on the face of it which is contemplated by Para. 14 (c), Sch. II. But in any case the interest Act will allow a Court or an arbitrator to award interest under these circumstances even though there is no provision in the promissory note for the payment of interest. The objection to the legality, therefore, was one which did not in fact exist. Under these circumstances the lower Court was not entitled to remit the award for re-consideration, and the second award was not valid. A I R (Vol 21) 1934 All 939 : 4 A W R (HC) 75 : (1934) A L J 939 : 153 Ind Cas 169.

——Sch. 2, Para. 14 — Reference for partition — Arbitration award granting extra sum to one party — Legality.

An award is not illegal within the meaning of para. 14 (c) of Sch. II of Civil Procedure Code, simply because the arbitrator to whom Hindu brothers have referred a dispute as to partition has allowed the eldest brother a certain sum of money in excess of his share in consideration of his having to care for and to educate his younger brother for many years. But the sum awarded to the eldest brother in such a case cannot be called Jeshtabhagam. A I R (Vol 12) 1925 Mad 301 : 78 Ind Cas 238 (DB).

——Sch. 2, Para. 14 — Provision for survey in arbitration — Validity of award without survey.

Where an arbitration clause provided that the Chamber should arrange for survey in accordance with its rules, and the arbitrators made their award without such survey.

Held, that it was not contemplated that the survey should be the only means of arriving at a decision and therefore the arbitrators, although they had not made a survey of the goods, had not acted without jurisdiction. A I R (Vol 11) 1924 Cal 1051 : 82 Ind Cas 341 : 28 C W N 888 (DB).

——Sch. 2, Paras. 14 (c) and 15 — Illegality — Compulsion of Court.

A Court has no power to compel an arbitrator to give a decision against his will, if the arbitrator after deciding some of the issues refuses to arbitrate further. Where a Court passed an order threatening the arbitrator with contempt proceedings and thereby forced out an award from him, the award is invalid and will be set aside on revision. A I R (Vol 8) 1921 All 361 : 18 A L J 952 : 59 Ind Cas 667 (DB).

——Sch. 2, Paras. 14 (c), 15 and 16 — Award — Decree — Validity of — Extension of time after filing of award — Error on the face of the record.

An extension of time cannot be granted after the arbitrators have made and filed their award.

A dispute was referred to arbitration and the arbitrators were directed to submit their award on or before March 15, 1912. On that date the award was not filed, but an application was made for further time and the Court adjourned the case to April 3.

On April 3, both parties were absent, their pleaders said they had no instructions and no communication had been received from the arbitrators. The Court adjourned the case till April 9 and directed, the arbitrators to return the papers with or without their award on or before that date. On April 9, it was intimated that the arbitrators had submitted their award. The Court made a decree in accordance with it.

Held, that the award was made without authority and could not be used as the basis for a valid decree. It was not material that the objection was not taken before the Court below, as the objection was apparent on the face of the record and went to the root of the matter. It was incumbent upon the Court to satisfy itself that a legal award existed whereon a valid decree, could be founded. (1912) 16 C L J 573 : 16 Ind Cas 223 (DB).

——Sch. 2, Paras. 14 (c), 15 — Contents of award—Consultation.

An award need not be a reasoned judicial decision and the arbitrators need not even give their reasons for their conclusions.

Arbitrators can get the help of others' opinions in arriving at their own opinions provided they do not thereby delegate or surrender their own judgments. 23 M L J 290 : (1912) M W N 1091 : 12 M L T 133 : 16 Ind Cas 478 (DB).

——Sch. 2, Para. 14 (c) — Payment by instalments.

An arbitrator to whom all matters in dispute in a suit for money have been referred can determine the amount to be paid and the mode of payment and can therefore direct payment by instalments. (1909) 12 O C 23 : 1 Ind Cas 328.

6. Remittal in part.

See also N. 4.

——Sch. 2, Para. 14 — Validity.

There is no provision in the C. P. Code, by which a portion of an award may be remitted. A I R (Vol 13) 1926 All 567 : 24 A L J 705 : 96 Ind Cas 531 (DB).

——Sch. 2, Paras 14 (a) and 15 — Award — Conformity to terms of submission — Excess — Void as to the portion.

An award must conform both in form and substance to the submission and it is void in so far as any portion thereof is in excess of the submission if such portion is separable from and independent of the remainder. A I R (Vol 3) 1916 Cal 806 : 22 C L J 237 : 31 Ind Cas 33 (DB).

——Sch. 2, Para. 14 (a) — Private award.

The rule that under para 14 (a) a valid portion of an award which is separable from the invalid portion ought to be accepted by the Court is not generally applicable to private awards and hence the award must be accepted in entirety or rejected in toto. AIR (Vol 2) 1915 Lah 105: 66 PR 1915 : 146 P W R 1915 : 31 Ind Cas 80 (DB).

7. Private awards.

——Sch. 2, Para. 14 — Power of Court.

Where the award is without the intervention of the Court, the Court has no power to remit the award to the umpire. A I R (Vol 14) 1927 Lah 347 : 100 Ind Cas 896.

——Sch. 2, Para. 14 — Arithmetical mistake — Power of Court to amend—A Court cannot amend arithmetical mistake in a private award or remit award with such mistake for re-consideration.

A Private award cannot be amended by the Court on the ground that the arbitrator has made an arithmetical mistake in arriving at the sums due by one party to another; and it also cannot remit such an award for re-consideration. A I R (Vol 12) 1925 Lah 86 : 78 Ind Cas 1042.

——Sch. 2, Paras. 14 (a) and (c), 15, 20 and 21 — Error of law — Private reference.

Mistake of law on a legal point referred to an arbitrator does not vitiate his award but if the point was not referred and the decision is wrong in law, the Court will not file the award. Where any of the grounds mentioned in paras 14 and 15

is proved, a Court cannot proceed to file the award if the matter was referred without the Court's intervention. Even if the invalid portion is separable, the award would not be enforceable. A I R (Vol 2) 1915 Cal 529 : 19 C W N 476 : 26 Ind Cas 697 (DB).

8. Revision.

——Sch. 2, Para. 14 — Revision on ground of incompleteness of award — Whether can be entertained by High Court.

Where no objection is taken to an award before a decree in accordance with it is passed, the Court is not bound to scrutinize the terms of the award and satisfy itself that it disposed of all the matters referred to arbitration. It is not then open to any of the parties to go up in revision to the High Court & impeach the award on the ground that it does not dispose of all matters referred to arbitration. A I R (Vol 20) 1933 Mad 697 : (1933) M W N 831 : 38 M L W 330 : 64 M L J 376 : 147 Ind Cas 476.

——Sch. 2, Para. 14 (c) and O. 9, R. 9 — Award ex-parte — Application to set aside — Revision.

Where a reference to arbitration provided that if one of the parties failed to appear, the arbitrator should proceed to hear the reference ex-parte, and one of the parties failed to appear, on the day fixed for hearing, the arbitrator could not make the award without taking any evidence but should have proceeded to hear the evidence of the other side.

An award so made without taking any evidence could not be set aside by the Court on an application under O. 9, R. 9, but should be remitted under para 14 for reconsideration, and for that purpose, the High Court could interfere. A I R (Vol 5) 1918 Cal 247 : 22 CWN 933 : 46 Ind Cas 195 (DB).

9. Scope.

——Sch. 2, Para. 14 — Fresh award — Powers of arbitrator.

When an award is sent back by the Court to the original arbitrator with direction to specify definitely the land awarded and return the award so amended, and the arbitrator instead of complying with the order goes afresh into the matter and makes a fresh award, thereby depriving the party of the award made in his favour the award cannot be accepted and the arbitrator is functus officio except as to that portion of the award which was ordered to be amended. AIR (Vol 16) 1929 Sind 164 : 116 Ind Cas 590 (DB).

——Sch. 2, Para. 14 — There is a clear distinction in the Code between remitting an award and setting aside an award. You may remit an award if it is alive and is in existence; but it is impossible to remit that which is set aside. That is at the root of the principle, recognized by the Code, that, if you remit the award, you can only remit it to the same arbitrators, and that, if you set aside the award, you must make an order superseding the arbitration. A I R (Vol 8) 1921 Pat 161 : 61 Ind Cas 390 : 2 P L T 277 : 6 P L J 287 : 1921 P H C C 170 (DB).

——Sch. 2, Para. 14 (c) — Award in excess of claim — Validity.

An award in excess of the claim cannot be sustained, and must be remitted for reconsideration. A I R (Vol 1) 1914 Cal 818 : 25 Ind Cas 951 (2).

——Sch. 2, Para. 14 (a) — Scope of enquiry.

An arbitrator appointed to decide whether a sale should be set aside is competent to set it aside if the vendor repays the purchase money. (1912) MWN 901 : 15 Ind Cas 573 (DB).

——Sch. 2, Paras. 14 and 15 — Award — Construction of — Arbitration — Reference.

Where an arbitrator divides property in a particular manner or in dividing lays down certain directions or awards certain amounts to one party, his act is well within his jurisdiction and the Court cannot interfere with the award on its merits.

Where parties agree to refer their dispute to an arbitrator they ought not to be allowed to resile from the position which they took at the time of the reference. Merely technical objections should not be allowed to disturb an award, which is fairly made and which, when the real nature of the dispute is looked into, might reasonably be considered as directed to a decision on the matters in dispute. (1912) 15 Ind Cas 321 (Oudh).

10. Some matters referred undetermined.

——Sch. 2, Para. 14 — Effects.

If an award is incomplete, the parties may affirm and may agree that the incomplete award would be binding upon them. Even if the parties had appointed a different set of arbitrators agreeing to abide by the previous award and asking them to complete the work done by previous arbitrators the previous award should be considered as affirmed by the parties and they would not be allowed to attack the award on the ground that it was incomplete. A I R (Vol 17) 1930 Cal 255 : 50 C L J 323 (DB).

——Sch. 2, Para. 14 — Undecided matters.

Where the award grants only some reliefs claimed by the parties, but is silent as to the others, it cannot be held that the undecided matters must be deemed to have been decided against plaintiff. AIR (Vol 15) 1928 Lah 874 : 29 P L R 531 : 110 Ind Cas 738.

——Sch, 2, Para. 14 — Interpolation by arbitrator after signing — Court remitting under Para. 14, Sch. 2 — Modification of award — Appeal.

After an award was signed by arbitrators but before it was filed in Court one of the arbitrators added in the award "Rest of the Plaintiff's claim should be dismissed with costs." When the award was filed the Court finding that the award was not clear as regards the costs remitted it to arbitrators. The arbitrators amended the award & parties were made to pay their own costs in the suit. The Court ignored both the interpolation by one of the arbitrators before first filing the award and the amendment after it was remitted and passed a decree with proportionate costs.

Held, the order fell under S. 104 (1) (c) and was appealable. The Court acted within its jurisdiction in remitting the award as it did under para 14, Sch. 2. When the award was so remitted the arbitrators had authority to make the alterations they did. Although an award once signed becomes final and cannot be subsequently altered, when however, the Court acts under para. 14, Sch. 2 and remits the award to the arbitrators for reconsideration on any point the arbitrators have authority to alter their original award as the result of their reconsideration and the award refiled by them is the award in the case and should be dealt with as such. AIR (Vol 13) 1926 Lah 519: 7 Lah 327: 8 LLJ 460: 27 PLR 541: 98 Ind Cas 336 (DB).

——Sch. 2, Para. 14 — An obvious slip on the part of the arbitrator no ground for setting aside or remitting an award. AIR (Vol 12) 1925 Cal 599: 88 Ind Cas 49: 52 Cal 100 (DB).

——Sch. 2, Paras 14 (b) and 21 — Private arbitration — Omission to determine some of the questions — Court not empowered to remit — Refusal.

In cases where a reference to arbitration is made by the order of the Court, the Court may remit the award for the determination of the matter left undermentioned under para 14 but in the case of an arbitration without the intervention of the Court the Court has no such power and if any of the matters referred to in Para. 14 is proved, the Court has no option but to refuse to file the award.

AIR (Vol 5) 1918 Pat 83 : 4 Pat LJ 394 : 48 Ind Cas 711 (DB).

——Sch. 2, Para 14 (a) — Withdrawal of certain questions — Effect of.

Where the parties to arbitration withdraw certain questions, they cannot be allowed to say that they are not decided. AIR (Vol 3) 1916 All 113: 38 All 380: 14 ALJ 481: 35 Ind Cas 833 (DB).

——Sch. 2, Paras. 14 (b), 15 — Conditions necessary for validity of.

The award to be valid must dispose of all the matters referred to arbitration and it should be signed by all the arbitrators at the same time and place. AIR (Vol 1) 1914 Lah 436: 92 PR 1913: 109 PLR 1914: 22 Ind Cas 811 (DB).

——Sch. 2, Paras 14 (c) and 15 — Death of party.

An arbitrator acting under authority from a Court, is a Court; and an award, made after the death of a party who lived at the time of arguments before the arbitrator is valid. (1910) 14 CWN 759: 6 Ind Cas 170 (DB).

——Sch. 2, Para 15.

1. Absence of party.
2. Agreement.
3. Apparent error.
4. Appeal.
5. Applicability.
6. Application of law.
6A. Award beyond time.
See N. 16.
7. Interpretation.
8. Jurisdiction.
9. Limitation.
10. Misconduct.
10A. Notice
11. Objection and waiver.
12. "Or otherwise invalid".
13. Personal knowledge.
14. Procedure.
15. Revision.
See also Civil P. C., S. 115
16. Setting aside.
17. Validity of reference.

1. Absence of party.

——Sch. 2, Para. 15 — Award — Objection that enquiry was held in absence of objector — Application to examine arbitrator, dismissal of — Decree in accordance with award, legality of.

The award given by an arbitrator in a suit was objected to on the ground that the arbitrator had held the enquiry in the absence of the objector. When the objector applied to the Court that the arbitrator be summoned on his behalf to enable him to substantiate his objections, the application was rejected;

Held, that as the arbitrator was the best witness to give evidence on the subject, the conduct of the Court in not summoning the arbitrator under the circumstances was not only a material irregularity but it was an illegality, and the order passed by it filing the award and passing a decree on its basis was improper. AIR (Vol 20) 1933 Lah 538: 34 PLR 397: 145 Ind Cas 329.

——Sch. 2, Para. 15 — Enquiry by arbitrator — Misconduct.

Under the reference the arbitrator was empowered to dispose of the case either with or without enquiry. He received evidence given by the plaintiff in the absence of the defendant.

Held, that the award was vitiated owing to the misconduct of the arbitrator. AIR (Vol 17) 1930 Mad 646

——Sch. 2, Para. 15 — Absence of one party — Award by arbitrator — Validity.

An arbitrator is not entitled of adopt the procedure of a special nature unless all parties affected by it agree to the adoption of such procedure. To do so is to abrogate his function as an arbitrator, and that would be a technical misconduct. One of the parties was not present at the hearing before the arbitrator. With the consent of the other parties who were present the arbitrator disposed of the suit on the evidence of a particular witness. The absent party had not authorised anybody among the parties who were present to consent to the procedure adopted by the arbitrators.

Held, that the absent party had suffered "at any rate technical injustice" and that the award should be set aside. AIR (Vol 12) 1925 Sind 287: 93 Ind Cas 840 (DB).

——Sch. 2, Para. 15 — It is improper on the part of an arbitrator to get information from one side in the absence of the other or to utilise information not accessible to others but consent of parties who are sui juris will cure the defect. AIR (Vol 10) 1923 Mad 801: 73 Ind Cas 470: 47 Mad 30: 32 MLT 32: 1933 MWN 7: 17 MLW 71: 44 MLJ 263 (DB).

——Sch. 2, Para. 15 (1) — Ex parte hearing — Arbitrators when justified in hearing case ex parte.

The arbitrators must see before they proceed ex parte that the parties had sufficient notice to enable them to appear and put their case before the arbitrator. But when a person is guilty of a final, irrevocable or conclusive refusal to have anything to do with an arbitration, the arbitrators, need not give notice but may proceed ex parte. AIR (Vol 7) 1920 Cal 386: 47 Cal 29: 56 Ind Cas 325.

——Sch. 2, Para. 15 — Where one of the parties to an arbitration deliberately absents himself from the hearing the award concluded on the hearing in his absence is not bad. AIR (Vol 5) 1918 Cal 644: 29 CWN 895 : 40 Ind Cas 646 (DB).

——Sch. 2, Para. 15 (1) (a) — Ex parte — Procedure.

Though the Evidence Act does not apply to proceedings before the arbitrators, yet the latter must not receive or act upon evidence or decide upon grounds which would render their award utterly unfair and worthless. An arbitrator can act ex parte in some cases without thereby being guilty of misconduct. There is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all matters referred. AIR (Vol 5) 1918 Sind 13: 13 SLR 75: 53 Ind Cas 337.

——Sch. 2, Para 15 (1) (a) — Absence at meeting — Validity of award.

Absence of a party due to want of notice at a preliminary meeting in which no evidence is taken and no arguments are heard, does not vitiate the award. AIR (Vol 3) 1916 All 278: 33 Ind Cas 467 (DB).

——Sch. 2, Para. 15 (1) (a) — Ex parte proceedings — Right to be heard, when lost.

By a contract between parties, a dispute was referred to arbitrators by one party and the other was repeatedly written to, but refused to do anything. The arbitrators were not bound to further give him an opportunity to be heard. AIR (Vol 1) 1914 Cal 818: 25 Ind Cas 951 (2).

——Sch. 2, Para. 15 (1) (a) — Ex parte award — Notice.

The arbitrators can make an ex parte award, if the parties do not attend the hearing after receipt of sufficient notice. Costs incurred in proceedings in court are in the discretion of Court and outside the province of the arbitrator, but an award is not bad merely because of their inclusion. AIR (V 1) 1914 Sind 62: 8 SLR 136: 27 Ind Cas 526 (1).

——Sch. 2, Para. 15 (1) (a) — Misconduct — Ex parte proceedings.

Taking evidence in the absence of a party and using private information amount to misconduct. (1911) 13 CLJ 399: 10 Ind Cas 450.

——Sch. 2, Para. 15 (1) (a) — Ex parte — procedure — Misconduct.

It is not misconduct on the part of arbitrator to take evidence in the absence of the parties, with their express or implied consent. 73 PWR 1910: 6 Ind Cas 963.

2. Agreement.

——Sch. 2, Paras. 15, 3 — Agreement between parties and arbitrator to withdraw reference — Arbitration, if to be superseded — Revival of reference, when can take place — One party resiling from previous resolve — Effect of.

A reference to arbitration initially derives its force from the agreement of parties. If the parties agree that a reference be withdrawn, and if the arbitrator also agrees, the Court should supersed the arbitration. The fact that subsequently the plaintiff and the arbitrator re-considered their previous resolve in concurrence with the defendant cannot revive the reference which has come to an end.

Nothing short of a fresh agreement to refer can invest the arbitrator with power to decide the controversy between the parties. The authority of the arbitrator, having been revoked by both the parties with his consent cannot be re-conferred upon him by only one of the parties and the Court. Any award made in such circumstances cannot be upheld as a valid award. AIR (Vol 21) 1934 All 95: (1934) ALJ 473 : 3 AWR (HC) 582 : 150 Ind Cas 222 (DB).

——Sch. 2, Para. 15 — Award by majority — Minor party — Validity of award.

There is nothing wrong in parties agreeing to abide by the award of a majority of arbitrators even where one of the parties is a minor represented by a guardian. AIR (Vol 16) 1929 Mad 144: 114 Ind Cas 367.

——Sch. 2, Para. 15 — Agreement to be bound by majority award — Two of five arbitrators not acting — Unanimous award by the rest — Validity.

Where by their joint application the parties agreed that the award of the majority of the arbitrators was to prevail after nominating five arbitrators.

Held, the intention of the parties was that all the five arbitrators were to take part in the arbitration and should there be any difference of opinion among them the opinion of the majority was to prevail and that they never meant that if at least three out of the arbitrators acted, they would be satisfied.

From the fact that the three orbitrators who actually made the award happened to hold the same opinion it cannot be assumed that even if the other two had acted, the opinion of the former three would not have been affected. It is not impossible that a discussion among all the five might have produced a different award. AIR (Vol 11) 1924 Rang 153: 77 Ind Cas 866: 2 Bur LJ 229.

——Sch. 2, Para. 15 — Reference to arbitration — How long binding.

Where the defendant contended that there could be no arbitration upon the agreement because the submission therein contained has somehow "spent itself," in the arbitrator's abortive award or because his supplementary award was lying unadjudicated upon in the Court of the District Judge when the arbitration proceedings began.

Held, the parties are under a binding agreement to refer the dispute to arbitration in accordance with terms of agreement itself and the obligation continues until it has been carried out. AIR (Vol 9) 1922 All 219: 67 Ind Cas 487: 44 All 472: 20 ALJ 377 (DB).

3. Apparent error.

——Sch. 2, Para. 15 — Arbitrators examined as witnesses — Validity of award.

Where certain proceedings were referred to three arbitrators and it appeared that the parties knew that arbitrators might be examined as witnesses and two of them were so examined subsequently each on one side.

Held, that the award and decree were not vitiated. AIR (Vol 18) 1931 Cal 53: 34 CWN 689 (DB).

——Sch. 2, Para. 15 — Error — Validity of award.

The position of arbitrators is different from that of a Court. The arbitrators are Judges of law as well as facts and their error in law does not vitiate the award. An award, therefore, should not be set aside merely upon the ground that the decree passed by the arbitrators is not one which would have ordinarily been passed by the Court in which that suit was instituted. AIR (Vol 15) 1928 Oudh 1: 107 Ind Cas 545: 3 Luck 1: 4 OWN 1085 (FB).

——Sch. 2, Para. 15 — Construction of contract, setting aside award.

Where the arbitrator considered all the evidence, documents and accounts before him and the arguments of the pleaders, and then made the award.

Held, a mere error in construing a contract between the parties which is referred to in the award simply to earmark the origin of dispute in question between the parties cannot be said to be an error in law on the face of the award. AIR (Vol 14) 1927 PC 164: 53 MLJ 18: 104 Ind Cas 476: 55 Cal 126: 54 IA 427: 29 Bom LR 1150: 46 CLJ 9: 31 CWN 1027: 39 MLT 61: 21 SLR 101.

——Sch. 2, Para. 15 — Error of law — Setting aside award.

An error in law on the face of an award, such as will justify the Court in setting it aside, must be an error in some legal proposition to which the arbitrators have tied themselves, the same being found in the award or a document actually incorporated therein, and which is the basis of the award. AIR (V 13) 1926 All 501 : 95 Ind Cas 416 : 48 All 475 : 24 ALJ 480 (DB).

——Sch. 2, Para. 15 — Error of law — Legal misconduct.

The Court will set aside an award if there is an error of law patent on the face of it. The term misconduct has in the legal sense a wider significance than personal misbehaviour. "Legal misconduct" means misconduct in the judicial sense of the word, not from a moral point of view and means some honest though erroneous breach of duty causing a miscarriage of justice. Where the arbitrators had admitted improper evidence, and were misled by it,

Held, that they had committed an error of law patent on the face of the award and that this could amount to legal misconduct.

Per Madgavkar, A. J. C. — Patent errors of law are legal misconduct on which Courts can, in their inherent power, set aside the award under S. 14 of the Arbitration Act. Whether the Courts should do so or should only remit the award is a matter on which no hard and fast rules can be laid down, depending as it does on the peculiar circumstances of each case. AIR (Vol 11) 1924 Sind 75: 83 Ind Cas 353: 17 SLR 133 (FB)

4. Appeal.

——Sch. 2, Paras. 15 and 16 — Objection to validity of reference is not within Para. 15 — Decree in terms of award made on invalid reference — Decree is appealable.

An objection to the validity of reference to arbitration does not come within the provisions of Para. 15. All the powers conferred upon the Court in relation to an award on a reference made in a suit presuppose a valid reference on which an award has been made which may be open to question. If there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding. The opening words of Para. 21 which require the Court to be satisfied that the matter has been referred to arbitration are absent in Para. 16. Therefore, an appeal lies from a decree made in terms of an award which was made on an invalid reference. AIR (V 33) 1946 PC 72 : 73 IA 52 : 1946 MWN 161 : 80 CWN 465 : (1946) MLJ 339 : 223 Ind Cas 567.

——Sch. 2, Paras. 15, 16 — Objection to award dismissed — Decree in accordance with award — Appeal, if lies — High Court, if can convert appeal into revision where interference is necessary.

Where an objection to the validity of an award, which might have been raised under Para. 15, Sch. II, Civil P. C., is not raised within the time limited, or, being raised, is rejected, and the Court proceeds to pronounce judgment and to frame a decree, no appeal will lie except on the grounds stated in Para. 16 of the same schedule i. e., if the decree passed by the Court is neither in excess of, nor not in accordance with, the award.

The aggrieved party can bring the matter up in revision if the Court had assumed jurisdiction where it had none or had acted illegally or with material irregularity in the exercise of its jurisdiction. The High Court can also convert the proceedings into an application in revision, if it is satisfied that interference is called for, provided there is no question of limitation nor any question of Court-fees, nor the respondent is being taken by surprise or is in any way being prejudiced by the action of the High Court. AIR (V 29) 1942 All 85 : ILR (1941) All 807 : (1941) ALJ 596 : 1941 AWR (HC) 302 : 199 Ind Cas 346 (DB).

——Sch. 2, Para. 15 — Only one Court, namely the Court which refers the case to arbitration, should finally decide the question whether the award is invalid not only for the reason specifically mentioned in Cl. (c), Para. 15, Sch. II, Civil P. C., but on other ground also. This being so, the decree passed by the Court below in terms of the award, after it has disposed of the objections under Para. 15, Sch. II, is final and not open to appeal; a revision would be more objectionable than an appeal in such a case. AIR (V 23) 1936 Lah 466 : 33 PLR 725 : 163 Ind Cas 380.

——Sch. 2, Paras. 15, 16 (2) — Decree in accordance with award — Appeal or revision, if maintainable.

When once a decree is passed in accordance with an award no appeal lies against it except on the grounds mentioned in Para. 16 (2) of the Second Schedule of the Civil P. C. (1936) 159 Ind Cas 1041 : 1936 OWN (CC) 16 (DB).

——Sch. 2, Para. 15 (1) — Award — Refusal to file — Appeal, if lies.

No appeal lies from an order refusing to file an award under Para. 15 of Sch. II, Civil P. C. AIR (V 22) 1935 Bom 78 : 36 Bom LR 1222 : 154 Ind Cas 332 (DB).

——Sch. 2, Paras. 15, 16 — No appeal or revision lies against a decree passed in accordance with the award made by an arbitrator. AIR (V 21) 1934 Oudh 494 : 11 OWN (CC) 1203 : 10 Luck 228 : 152 Ind Cas 90 (DB).

——Sch. 2, Para. 15 (1) (c), Para. 16 (2) — Objection as to validity of reference — Appeal, competency of.

No appeal is competent against a decree which is in accordance with an award even when the validity of the reference itself is impugned.

The intention of the Legislature is to give finality to the decision of the trial Court on all objections to the award, and to restrict the appeal to the solitary case in which the decree is at vtriance, or not in accordance with the award, and, even, then to confine its scope to that part of the decree which differs from the award. AIR (V 19) 1932 Lah 239 : 33 PLR 163 : 13 Lah 528 : 136 Ind Cas 11 (DB).

——Sch. 2, Paras. 15, 16 — Reference not consented to by all parties — Appeal from decree, competency of.

An appeal lies against a decree based on an award made in a reference to arbitration in a pending suit where all the parties interested in the suit have not joined in the submission to arbitration.

The words 'otherwise invalid', in Sch. II, Para. 15, Cl. (1), Civil P. C. must refer to the same kind of validity as is referred to in the previous clauses of Para. 15 or the kind of invalidity which is referred to in the previous sentences of Cl. (c) and does not contemplate cases of invalidity of an award on the ground that there was no valid reference.

Per Mukerji, J. — There is no reason why, if the validity of an award is challenged on the ground of irregularity or want of jurisdiction in order of reference, the award which in fact exists should be allowed to be treated as non-existent in order to escape the plain provisions of Para. 16. AIR (V 18) 1931 Cal 211: 52 CLJ 298: 35 CWN 238: 58 Cal 628: 130 Ind Cas 209 (DB).

——Sch. 2, Para. 15 — Where the reference itself is impugned for want of consent of all the parties interested, there is no valid reference to arbitration and an appeal lies against the decree passed on the terms of the award. AIR (Vol 18) 1931 Cal 109: 34 CWN 813: 130 Ind Cas 137 (DB).

——Sch. 2, Paras. 15 and 16 — Decree on award — Appeal attacking validity of award is not competent though the award may be invalid. (1931) 132 Ind Cas 180 (Lah).

——Sch. 2, Para. 15 — The order rejecting the award is not appealable. (1928) 107 Ind Cas 109 (Lah).

——Sch. 2, Para. 15 — Order overruling objection to filing award.

The effect of the introduction of the words "or being otherwise invalid" in Paragraph 15 of the Schedule of C. P. Code is that any objection to the award on the ground that it is not an award or on the ground of its invalidity should be made at the time when the award is filed. If that ob-

jection is not made then or if that objection is then made and is disallowed, it is not open to the party objecting to re-agitate the matter by way of appeal against the decree. AIR (V 11) 1924 Bom 324: 79 Ind Cas 723: 26 Bom LR 171 (DB).

——Sch. 2, Para. 15 — Award on reference to which party has not joined.

Even though a party may not have joined in the reference, no appeal lies on that ground from the decree passed in accordance with the award. AIR (V 10) 1923 All 502: 74 Ind Cas 834: 21 ALJ 326: 45 All 441: 4 LRA Civ. 543 (DB).

——Sch. 2, Para. 15 — Decree passed in accordance with award.

The words "being otherwise invalid" in para. 15, Sch. II are intended to give effect to the principle of finality in cases of arbitration and if the judgment of the Court is pronounced according to the award under paragraph 16, there is neither appeal nor revision. AIR (V 9) 1922 Sind 1 : 65 Ind Cas 50 : 15 SLR 165 (DB).

——Sch. 2, Para. 15 (2) — Arbitration — Order superseding — Decree — Appeal.

A reference to arbitration by Court was superseded and the case decided on the merits. The order of supersession was confirmed on appeal. In the meantime on an appeal from the decision, the Appellate Court held that an award having been made, the arbitration could not be superseded and that a decree must be passed in accordance with the award.

Held, that a second appeal lay against the decision of the Appellate Court and that the order superseding the arbitration having been confirmed on appeal, the Appellate Court was precluded from reopening the question. AIR (V 7) 1920 Pat 605: 2 UPLR (Pat) 57: 55 Ind Cas 1 (DB).

——Sch. 2, Para. 15 (2) — Setting aside arbitration — Decree.

An appeal lies against an order setting aside an arbitration as the proceeds amount to a "suit" on which decree should follow. The mere fact that an appellant frames his appeal as an appeal from an order, when the order complained against is really a decree in a suit, does not put him out of Court as it is only a mistake on the part of his legal advisers. The rejection of an award is not open to revision. AIR (V 3) 1916 Lah 89: 107 PWR 1916: 70 PLR 1917: 117 PR 1916: 34 Ind Cas 192 (DB).

——Sch. 2, Para. 15 (2) — Appeal — Order setting aside award.

An order of a court setting aside an award as being invalid because of the misconduct of the arbitrators is appealable. 28 A 408 : 4 ALJ 256, Not appr. AIR (V 2) 1915 All 247: 37 All 456: 13 ALJ 653: 29 Ind Cas 411 (DB).

——Sch. 2, Paras. 15 (1) and 16 — Objection to award — Which Court to decide.

Objection to an award as to its validity should be decided by the court making the reference and if no objection is made there, it cannot be made before the Appellate Court. Though leave of Court was not obtained for a reference to arbitration on behalf of a minor, he has no right of appeal when no objection on that ground was taken in the trial court. AIR (Vol 1) 1914 All 446: 36 All 69: 12 ALJ 57: 21 Ind Cas 989 (FB).

——Sch. 2, Paras. 15 (1) (a) and 16 — Withdrawal of arbitrators — Decision of majority against their view — No misconduct attributed — Decree in terms of award — Appeal.

In a suit plaintiffs and defendants agreed to refer the matter to arbitration each party appointing two arbitrators and an umpire and to abide by decision of the majority. At the last stage when nothing had to be done except to draw up the award, the two arbitrators appointed by the plaintiff withdrew, one stating no reason and the other expressly stating that he retired owing to the difference of opinion. The other three arbitrators sent in their award and a decree was passed in its terms.

Held that no appeal lay against the award and and it was validity drawn up. (1911) 7 ALJ 890 : 7 Ind Cas 99 (DB).

——Sch. 2, Paras. 15 (1) and 21 — Misconduct of — Arbitrators — Appeal.

The question of misconduct of the arbitrators cannot be considered in an appeal from the award. (1909) 12 OC 40: 1 Ind Cas 693.

5. Applicability.

——Sch. 2, Para. 15 — Objection to validity of reference to arbitration — If comes within the provisions of para. 15.

An objection to the validity of reference to arbitration does not come within the provisions of para. 15 of the second schedule to the C. P. Code. All the powers conferred upon the Court in relation to an award on a reference made in a suit pre-suppose a valid reference on which an award has been made which may be open to question. If there is no valid reference, the purported award is a nullity and can be challenged in any appropriate proceeding. AIR (Vol 33) 1946 PC 72: 73 IA 52: ILR (1946) All 193: 223 Ind Cas 567: 59 LW 309: 1946 PWN 142: 12 BR 532: 1946 ALW 271: 1946 ALJ 254: 48 Bom LR 452: 1946 OWN 220: 27 PLT 163: 1946 OA (PC) 102: 1946 AWR (PC) 102: 1946 MWN 161: 50 CWN 465: ILR (1946) Kar (PC) 68: 81 CLJ 314: (1946) 1 MLJ 339.

——Sch. 2, Para. 15 — Paragraph 15 does not apply to an award which has been made upon a reference to make which the Court had no jurisdiction. AIR (Vol 14) 1927 All 563: 25 ALJ 606: 102 Ind Cas 236: 49 All 812 (DB).

——Sch. 2, Para. 15 — Section 15 and S. 16 depend for their operation on a valid reference under S. 1 of the Schedule. AIR (Vol 12) 1925 Cal 812: 87 Ind Cas 633: 52 Cal 559: 42 CLJ 26: 29 CWN 886 (DB).

6. Application of law.

——Sch. 2, Para. 15 — Even if an arbitrator takes an erroneous view of law, the decision cannot be set aside unless he states that he has based his decision upon that erroneous view of law. Where the parties in a case entrust the decision of the dispute between them to an arbitrator, giving the fullest rights to the arbitrator, the arbitrator is entitled to decide the dispute between the parties on his own views of right and wrong, and he need not follow the ordinary accepted views of the law on the subject.

What he must not do is to lay down an erroneous proposition of law as being the true proposition of law and proceed to decide the rights of the parties on the foundation of this erroneous proposition of law. AIR (Vol 27) 1940 Oudh 405: 1940 AWR (HC) 327: 1940 OWN (HC) 670: 16 Luck 79: 189 Ind Cas 344 (DB).

——Sch. 2, Para. 15 — Arbitrator not applying rules of succession of law to which parties belong — Validity of award.

Certain family governed by the Imamia Law referred the family disputes to a sole arbitrator S whose honesty was not questioned. The award given by him

did not apply the rule of succession contained in the Imamia Law. One of the members who under the provisions of the Imamia Law was entitled to an eight annas in the property was given only a three-anna share under the award.

The arbitrator did not state in the award that he was awarding the shares according to the rules of intestate succession in the Imamia Law. He was only following his own views as to what was right and proper in the circumstances of the family. The award was attacked on the ground of a technical misconduct by the arbitrator in so far as he applied a perverse view of the law while giving the award.

Held, if S had stated in the award that he was awarding the share according to the rules of intestate succession in the Imamia Law and then proceeded to arrive at the award which he actually made, there might have been an error in law and the award could have been set aside. But here there was no error in law as S has made the award according to his own views as to what was right and proper in the circumstances. There was no technical misconduct on the part of S and the award was therefore binding on the members to whom only three-anna share was given, though he was entitled to eight-anna share. AIR (Vol 16) 1929 Oudh 1: 113 Ind Cas 785: 5 OWN 1001 (DB).

——**Sch. 2, Para. 15 — Duty of arbitrator.**

An arbitrator to whom a dispute about succession to property is referred by a Hindu joint family is not necessarily controlled in his decision by the rules of Hindu Law. He may, so long as there is no stipulation in his appointment that he should decide only according to Hindu Law, take into consideration the wishes of the parties and decide in accordance therewith. AIR (Vol 8) 1921 Lah 34: 61 Ind Cas 628: 2 Lah 114 : 3 Lah LJ 349 : 73 PLR 1921 (DB).

——**Sch. 2, Paras 15 (1) (c) and 20—Misconduct—Error of law.**

An arbitrator has powers to determine a matter relating to a joint family business and to award a share in favour of even a stranger when the finding is recorded with the full consent of the parties, who referred the case to him. The only condition is that the portion allotted to the stranger must be separate from the rest. AIR (Vol 7) 1920 All 45: 42 All 277: 18 ALJ 241 : 2 UPLR (A) 104 : 58 Ind Cas 585 (2) (DB).

——**Sch. 2, Para 15 (1) (a) — Misconduct — Perversity.**

Perversity is misconduct within para 15. When a reference provides that the matter should be decided according to Muhammadan Law, but the arbitrators did not profess to decide by that law and their decision was contrary to the rules of that law, Held that their decision was perverse. (1912) 5 Bur LT 55: 14 Ind Cas 978.

6-A. Award beyond time.

See Note 16.

7. Interpretation.

——Sch. 2, Para. 15 — The grounds of invalidity of an award contemplated in Para. 15 (c), Sch. II, C. P. C., refer to those matters which apparently go to the root of the award, and matters which merely pertain to procedure and have not been agitated before the arbitrator are not covered by it. AIR (Vol 25) 1938 Lah 604 : 40 PLR 972 : 181 Ind Cas 195 (DB).

——**Sch. II, Paras. 15, 5, 8, S. 151 — Arbitration — Allegation of misconduct whether can be dealt with before award is made — Application for extension of time to make award — Power to supersede award.**

Paragraph 3 (2) of Sch. II, Civil P. C. only means that the Code cannot deal with the subject-matter of the suit so long as the arbitration stands. It does not prevent the Court from superseding an arbitration on the ground of misconduct on the part of some of the arbitrators. Even apart from the Code, the Court has inherent jurisdiction to deal with a matter of this kind. AIR (Vol 20) 1933 Pat 566: 146 Ind Cas 1081. (DB).

——**Sch. 2, Para 15 — Arbitration Act, S. 14 — "Arbitration and award" in S. 14.**

The words "arbitration and award" and "award" in S. 14, Arbitration Act, and para 15, Sch. 2. C.P. Code, respectively allow of no distinction and the difference in pharaseology is immaterial. AIR (Vol 17) 1930 Bom 432. (DB).

8. Jurisdiction.

——**Sch. 2, Para. 15, Ss. 105, 115 — Expression "on being otherwise invalid", scope of — Objections to valadity of reference — Decision of Judge, question affecting his own jurisdiction, if makes any difference.**

There is nothing in the words "or being otherwise invalid" in Para. 15, Sch. II, Civil P. C., themselves or in their context to limit their operation to cases where an award is invalid only on the ground of something done after the reference and not before or in the reference itself. The words "or being otherwise invalid" include within their meaning questions relating to the validity of a reference. It is, therefore open to the trial Court in considering objections to an award under Para. 15, to consider and decide objections raised to the validity of the reference.

It makes no difference, if thereby a Judge may find that his own order of reference is invalid or find that he must thereby re-consider any previous order he has passed on this question. It also makes no difference if thereby the Judge must decide questions which affect his own jurisdiction because his decision on questions of jurisdiction will be subject to revision or appeal on the principle that a Court cannot be the final judge on the question of its own jurisdiction. AIR (V 26) 1939 Sind 241: ILR (1940) Kar 22: 183 Ind Cas 724 (FB).

(Overrules AIR (Vol 9) 1922 Sind 1: 15 SLR 165: 65 Ind Cas 50).

——**Sch. 2, Para. 15 — Court which made the reference — Whether can set aside award on ground that reference was bad.**

The Court itself which made the reference to arbitration is not competent to set aside the award under Sch. II, Para. 15, Civil P. C., on the ground that the reference was bad. AIR (Vol 22) 1935 All 1014: 1935 AWR (HC) 1182: 159 Ind Cas 441.

——Sch. 2, Para. 15 — The existence of an award not tainted by misconduct of the arbitrators is essential to give the court jurisdiction to enforce the award and if a Court passes a decree on an award vitiated by misconduct, there is an irregular exercise of jurisdiction within the meaning of S. 115, Civil P. C. AIR (V 18) 1931 Cal 53: 34 C WN 689: 58 Cal 269: 129 Ind Cas 428 (DB).

——**Sch. 2, Para. 15 — Arbitrators exceeding scope of reference — Award whether can be enforced to the extent of reference — Certain parties left out in reference — Effect.**

In the case of a reference to arbitration without the intervention of the Court the award if it deals with matters beyond the scope of the reference is not invalid; the portion of the award

dealing with the matter referred is valid and can be enforced provided it is separable from the rest of the award.

Held also, that the binding nature of the award on the parties is not affected by the fact that the arbitrators professed to deal with the interest of persons who were not parties to the reference. (1929) 115 Ind Cas 680: 10 Pat LT 53 (DB).

——**Sch. 2, Para. 15 — Award setting aside deed of gift on condition of donor's paying to donee compensation to the extent of benefits received by donor — Validity.**

One of two brothers executed a gift-deed of immovable property in defendant's favour, but later on both the brothers sued to set it aside alleging the gifted property to be joint family property and also fraud, undue influence and misrepresentation. The pleas were denied by defendants who further pleaded that they had paid certain loans to the donor prior to the gift. The whole matter was referred to arbitration and the arbitrators were authorized to settle all disputes between the parties. The arbitrators decided that the property transferred by the deed of gift was the sole property of the donor and that he had full power to make the transfer.

They did not decide explicitly, but decided impliedly, that there was no fraud, misrepresentation or undue influence and they further decided that the defenants had paid money to the donor and that the deed of gift had been executed as a consequence of the receipt of benefit by him from the defendants. They then set aside the deed if gift upon payment of compensation by the donor to the defendants to the extent of benefits received by him, and directed that the defendants should remain in possession of the property transferred until the plaintiffs paid them the amount of compensation.

Held, that the award is not objectionable either under the provisions of para. 12 or para. 14 and it cannot be set aside. AIR (V 15) 1928 Oudh 1: 107 Ind Cas 545 : 3 Luck 1 : 4 OWN 1085 (FB).

——**Sch. 2, Para. 15 — Reference in partition suit — Agreement of parties as to method of partition — Award in accordance, therewith — Validity.**

A reference under Para. 3, Sch. 2, a partition suit related to the "dispute in the suit" and at the time of the reference there was no dispute whatsoever as to the method of division of property. The only dispute that was before the Court and as to which a reference was made was whether the family was joint and whether the several valuable moveable properties held by the defendants first party were liable to be partitioned. When the actual method of partition came to be discussed, it was suggested that certain people who were already parties to the suit, might be brought in for the purposes of division of property and properties might be exchanged with their consent and with the consent of the parties, at whose instance the reference had been made.

Held, that an award in accordance with such an agreement between the parties did not exceed the terms of reference and was not invalid. AIR (V 13) 1926 All 567: 96 Ind Cas 531: 24 ALJ 705 (DB).

——**Sch. 2, Para. 15 — Suit by reversioner to declare invalidity of alienation by widow — Arbitrator declaring right to immediate possession — Validity.**

A reversioner sued for a declaration that the mortgage by a widow and a sale of a house were invalid beyond her lifetime and made the mortgagee-purchaser and the decree-holder parties. The matter was referred to arbitration by order of Court on consent of parties. The arbitrators went beyond the scope of reference and declared the reversioners to be entitled to obtain immediate possession of the house during the widow's lifetime upon payment of a certain sum.

Held, that this part of the award can be enforced in a separate suit as an award by arbitrators on an agreement by parties. AIR (V 13) 1926 Mad 366: 92 Ind Cas 847: 23 MLW 382: 1926 MWN 1.

——**Sch. 2, Para. 15 — Power to supervise proceedings of arbitrators.**

It is incumbent upon arbitrators acting under an order made in pursuance of paras. 1 and 2 strictly to comply with its terms. The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order.

An award made otherwise than in accordance with the authority by the order conferred upon them is an award which is "otherwise invalid" and which may accordingly be set aside by the Court under para. 15. AIR (V 12) 1925 PC 293: 49 MLJ 812: 92 Ind Cas 633: 28 Bom LR 217: 3 OWN 127: 24 ALJ 13: 43 CLJ 14: 27 PLR 35: 1926 MWN 96 : 3 Pat LR 330 : 53 IA 1 : 53 Cal 258.

——**Sch. 2, Para. 15 — Matters partly in and partly outside scope of suit — One and the same arbitration — Validity.**

It is impossible according to the Statute Law of India that one and the same arbitration should be held as to matters within the jurisdiction of the Court, and matters without the jurisdiction of the Court between the parties to the suit and between them and other persons and partly upon an order of reference and partly under an agreement. AIR (V 12) 1925 PC 293: 49 MLJ 812: 92 Ind Cas 633: 28 Bom LR 217: 3 OWN 127: 24 ALJ 13: 43 CLJ 14: 27 PLR 35: 1926 MWN 96: 3 Pat LR 330: 53 IA 1: 53 Cal 258.

——**Sch. 2, Para. 15 — Expiry of time for filing award — Power of Court to record award — Partial award — Validity.**

There is no rule of law that a partial award is invalid but that question has to be decided on the intention, of the parties, the matter being a subject of contract between them, i. e. it is valid unless there was an implied agreement that the award should be void unless an award were given in respect of all the matters referred for decision.

Where after the time for submission of the award had expired the award was made and the Court, on application recorded it under O. 23, R. 3 of the C. P. Code.

Held, it must be deemed to have exercised its power to supedsede the arbitration and to deal with the suit. When a reference is made to arbitration, the Court is not bound to act under Sch. II.

Held further, that when a party to a contract wrongly prevents a thing being done by another party that thing is deemed to be done and the party preventing, cannot plead that the thing was done. AIR (V 10) 1923 Mad 576: 45 MLJ 76 : 74 Ind Cas 609 : 18 MLW 26 : 32 MLT 369 : 1923 MWN 331: 1923 MWN 509 (DB).

——**Sch. 2, Para. 15 — Order superseding arbitration — Power of Court to consider award subsequently submitted.**

Where the reference to arbitration is cancelled,

Held, the Judge had no power to look at the award subsequently submitted and treat it as if it were the report of a Commissioner, and to base its decision thereon. AIR (V 9) 1922 Lah 194: 4 Lah LJ 48.

——**Sch. 2, Para. 15 — Consent reference — Award decree — Objection to jurisdiction.**

Where the parties submitted themselves to the decision of arbitrators and a decree was passed in terms of the award, it was not open to them to seek to reverse the award on the ground of want of jurisdiction. AIR (V 7) 1920 All 249: 59 Ind Cas 801: 42 All 661: 18 ALJ 644: 2 UPLR (All.) 240 (DB).

——Sch. 2, Paras. 15 (1) (a), 16 and 20 — An arbitrator selected by the parties comes within the general obligation it being bound to give evidence and where a charge of dishonesty or partiality is made, any relevant evidence which he can give is properly admissible. But such evidence cannot be used to scrutinise his decision on matters within his power and on which his decision is final e.g., to criticise methods adopted by him in determining valuation for purposes of partition.

Apart from examining its bearing on the charge of corruption, the Court cannot scrutinise the estimate of value appearing on the face of the award. AIR (V 1) 1914 PC 105 : 36 All 336 : 17 OC 120: 18 CWN 755: 1 OLJ 249: 12 ALJ 537: 16 Bom LR 413: (1914) MWN 472: 16 MLT 35: 27 M LJ 181: 19 CLJ 494: 23 Ind Cas 625.

——**Sch. 2, Para. 15 (2) — Appellate Court — Power to be behind the order setting aside the award.**

A Court of appeal has power to consider the validity of an order setting aside an award and to restore the award if it has been set aside on insufficient ground. 236 PLR 1912 : 15 Ind Cas 928 (NWP).

——**Sch. 2, Para. 15(a) — Delivery of award — Power to correct.**

After the delivery or publication of the award the arbitrators have no power to correct or alter the same. (1911) 14 CLJ 188 : 11 Ind Cas 481.

——**Sch. 2, Paras. 15 (1) (b) and 16 — Partition by Collector — Jurisdiction of Civil Court.**

Civil Courts cannot set aside a partition by the Revenue Authorities, in the absence of proof of fraud or wrongful loss by the parties. (1910) 5 Ind Cas 454 (Cal) (DB).

——Sch. 2, Para 15 (1) (a) — Arbitrators can consider the award after it is made, but before it is submitted to Court, on the objection of either party. A new award is valid though it differs from in its terms from the original one. 73 PWR 1910 : 6 Ind Cas 963.

9. Limitation.

——**Sch. 2, Paras. 15, 12, 14 — Application for modification or remission of award — Limitation Act (IX of 1908), Sch. I, Art. 158 — Applicability of.**

An objection under Para. 12 or Para. 14 of the Second Schedule is different from an objection under Para. 15. Art. 158, Lim. Act, applies only to objections under Para. 15 where the application is to set aside the award completely. Where a prayer is only for the modification or remission of the award, the prayer comes within Para. 12 or Para. 14 and consequently Art. 158 is not applicable. AIR (Vol 20) 1933 All 643 : (1933) ALJ 519 : 146 Ind Cas 596.

——Sch. 2, Para. 15 — It cannot be laid down that all awards which have not been decided in accordance with the terms of the Lim. Act are invalid. AIR (Vol 18) 1931 Mad 619 : 1931 MWN 451: 34 MLW 507: 133 Ind Cas 522 (2) (DB).

——**Sch. 2, Para. 15 (1) (a) — Ex parte procedure — Misconduct.**

Where an arbitrator takes evidence or hears arguments in the absence of one of the parties without giving due notice of the time and place for the meeting, he is guilty of misconduct. AIR (Vol 3) 1916 All 278 : 33 Ind Cas 467 (DB).

10. Misconduct.

(a) General.
(a-1) Absence of arbitrator.
(b) Evidence.
(c) Private enquiry.

(a) General.

——**Sch. 2, Para 15 — Incarceration of one party preventing examination of one party in presence of other parties — Award cannot be set aside.**

No doubt an arbitrator ought to examine a party in the presence of all the other parties but there is no principle of equity or justice which enjoins him to do so. It is otherwise of course with regard to the examination of other persons, whose testimony might be impugned for some reason or other. Consequently where the incarceration of a party is an obstacle known to all the parties concerned to the examination of one party in the presence of the other parties the award cannot be set aside on the ground of misconduct on the part of the arbitrator. AIR (Vol 27) 1940 Mad 905: (1940) MWN 808: (1940) 2 MLJ 356: 52 MLW 373.

——**Sch. 2, Para 15 — Arbitrators lightly discarding decision in former suit — Whether evidence of fraud against arbitrators.**

The fact that the two parties to an action objected to a third person being joined in their action, is no evidence of fraud against those parties. The fact that arbitrators lightly discarded the decisions in a previous suit and did not act on it may be wrong in law but is no evidence of fraud against the arbitrators themselves. AIR (Vol 21) 1934 Pat 106: 154 Ind Cas 396.

——**Sch. 2, Para. 15 — Failure of arbitrator to decide — Misconduct.**

Of the two questions referred to arbitrators arising out of a dispute between the partners L & K, one was whether certain moulds used for stamping marks on cotton goods belonged to the partnership or to K who claimed the same as his own. The award stated that both parties should have the right to use the moulds.

Held, that the award was bad because of the technical misconduct on behalf of the arbitrators in that they did not attempt to decide the real question at issue between the parties and that the point could not be separated from the other point. AIR (Vol 17) 1930 Sind 103 (DB).

——**Sch. 2, Para 15 — Misconduct.**

It is the duty of an arbitrator to make up his mind and decide dispute. It is his duty to see prima facie that the proceedings are conducted with reasonable diligence, and if he so far fails in those duties, that he does nothing whatever for some five years and cannot satisfactorily explain the delay, then he can be said to have failed in material respects in his ordinary duties as an arbitrator and so he is guilty of misconduct within the meaning of para 15, and, accordingly, the award may be set aside. The word "misconduct" in para 15, Sch. 2, C. P. Code, does not necessarily imply anything in the nature of fraud. But it certainly may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator, as he is occupying a quasi-judicial position. AIR (Vol 15) 1928 Bom 49: 52 Bom 116: 30 Bom LR 92: 107 Ind Cas 707 (DB).

——**Sch. 2, Para 15 — Arbitrator interested — Non disclosure by party — Fraudulent misconduct.**

Where the arbitrator is directly interested in the subject-matter of the litigation and a party does not disclose this matter in Court when the case is going to be referred to his arbitration, the party can be considered to be guilty of fraudulent misconduct within part (b) of para. 15. AIR (Vol 13) 1926 Oudh 307: 1 Luck 139: 13 OLJ 224: 3 OW N 279: 93 Ind Cas 446 (DB).

——Sch. 2, Para 15 — Umpire drawing lots — Misconduct.

A dispute was referred to four arbitrators, two being appointed by each side, and a sirpanch who was appointed by both parties. The two arbitrators appointed by the plaintiffs took one view and those appointed by the defendant another. The umpire being unable to decide between them drew lots and gave a decision accordingly.

Held, that though the reference to lot can hardly be tolerated in an ordinary Court, the action of the umpire in such a case cannot be said to amount to misconduct. AIR (Vol 12) 1925 Oudh 227: 84 Ind Cas 490: 11 OLJ 685.

——Sch. 2, Para 15 — Publication of award — Necessity.

It is only where the submission provides for the making and publishing of the award that the award is not valid unless it is published. Where, therefore, there is not such provision in the submission neither the award is invalid nor the arbitrators are guilty of misconduct if they do not publish the award. AIR (Vol 11) 1924 Nag 204: 78 Ind Cas 194.

——Sch. 2, Para 15 — Misconduct.

When one or more of the arbitrators did not act and the rest only made the award, there is misconduct on the part of the arbitrators and the award is invalid. AIR (Vol 11) 1924 Rang 153: 77 Ind Cas 866: 2 Bur LJ 229.

——Sch. 2, Para 15 — Omission in award of point no longer in the controversy — Misconduct.

The mere fact that the arbitrator is silent in his award, as to a point which was one of the points originally submitted to him, but on which in fact he finds there is no longer any controversy between the parties, does not vitiate the award. AIR (Vol 8) 1921 All 384: 43 All 108: 60 Ind Cas 626 (DB).

——Sch. 2, Para 15 — Plaintiff's adviser as arbitrator — Misconduct.

There should be the greatest good faith on the part of all the parties concerned in relation to the selection and appointment of an arbitrator. Every disclosure which might in the least affect the interests of those, who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. In an arbitration case it was found that the arbitrator had come to know the facts of the case and acted as an adviser of the plaintiff before the defendant, to whom this matter was not disclosed, entered into the agreement to refer the dispute to his arbitration.

Held, that this was misconduct within Sch. 2, para. 15, C. P. Code. (1921) 63 Ind Cas 1007 (Lah).

——Sch. 2, Para 15 (1) (a) — Refusal to summon witnesses — Arbitration and award.

The refusal of an arbitrator to summon witnesses cited by a party does not vitiate the award where there is nothing to show that the arbitrator was not acting within his powers and where in the exercise of a wise and prudent discretion, he declined to summon the witnesses. AIR (Vol 5) 1918 Cal 399: 39 Ind Cas 767 (DB).

——Sch. 2, Para 15 (1) (a) — Misconduct.

An arbitrator is guilty of misconduct if he delegates his functions which are not ministerial and his award is invalid. An arbitrator should be helped by experts in technical matters in arriving at an independent judgment. AIR (Vol 3) 1916 Cal 806: 22 CLJ 237: 31 Ind Cas 33 (DB).

——Sch. 2, Para 15 (1) (a) — Personal interest — Arbitrator.

An arbitrator having a personal interest, unknown to one of the parties, cannot act as such unless his interest is very small and apparently unknown even to himself. AIR (Vol 2) 1915 Cal 832: 19 CWN 165: 31 Ind Cas 597.

——Sch. 2, Para 15 (1) (a) — Misconduct — Irregularity.

If irregularities in the procedure of an arbitrator can be proved which would amount to no proper hearing of the matters in dispute, it is sufficient misconduct to vitiate the award, without any imputation of dishonestly or partiality to the arbitrator.

The person alleging that there had been no proper enquiry by the arbitrator must prove it. AIR (Vol 1) 1914 PC 105: 36 All 336: 17 OC 120: 18 CWN 755: 1 OLJ 249: 12 ALJ 537: 16 Bom LR 413: (1914) MWN 472: 16 MLT 35: 27 MLJ 181: 19 CLJ 494: 23 Ind Cas 625.

(On appeal from (1912) 14 OC 308: 13 Ind Cas 520.)

——Sch. 2, Para 15 (1) (a) — Misconduct — Award vitiated.

Where one of the arbitrators is guilty of the misconduct of having accepted an illegal gratification from one of the parties the award ought to be set aside in its entirety. (1913) 18 Ind Cas 92 (Oudh) (DB).

——Sch. 2, Para 15 (1) (a) — Misconduct — Effect of — Award not set aside.

Fraud or dishonesty on the part or an arbitrator is not sufficient to render his award a nullity, and does not deprive him of his jurisdiction to make the award: it merely amounts to misconduct and may afford good cause for the court to set aside the award. Where a party has not taken steps to get an award set aside within the prescribed period, he cannot object to the award on the ground of fraud or dishonesty of the arbitrator or his failure to decide all the matters in dispute. 25 B. 337 ref. An arbitrator is not bound to determine a matter not filed as a matter in difference which is merely a collateral question, though it may be necessary to dispose of it to decide the main dispute. To deprive an award of its binding effect, there must be positive evidence that both parties agreed that the former state of things shou'd be restored. (1912) 5 SLR 240: 15 Ind Cas 819 (DB).

——Sch. 2, Para 15 (1) (a) — Duty of arbitrator—Breach of contract.

Where the agent of one of the parties is made an arbitrator under a contract between the parties, he must act justly and scrupulously. An award given without applying the mind to the question really involved in the case is not binding. 34 Mad 453: 38 IA 169: 15 CWN 981: (1911) 2 MWN 111: 10 MLT 150: 13 Bom LR 813: 14 CLJ 326: 8 ALJ 1208: 21 MLJ 1110: 12 Ind Cas 44 (PC).

——Sch. 2, Para. 15 (1) (a) — Where an arbitrator examines a person as a witness, who was asked by the parties to estimate and evaluate and accepts his valuation, the arbitrator is not guilty of delegating his powers to that

person. (1910) 34 Bom 618: 12 Bom LR 34: 5 Ind Cas 621 (DB).

(a-1) Absence of arbitrator.

——Sch. 2, Para 15 — "Misconduct" in Para. 15, meaning of — Absence of arbitrator from proceeding due to justifiable cause, whether misconduct.

The word 'misconduct' as used in Para. 15 does not necessarily imply any corruption or moral turpitude on the part of the arbitrators. The word 'misconduct' is used in the sense of neglect of such duties and responsibilities as devolve on arbitrators acting judicially under the Civil P. C., and it will be unreasonable to hold that even where the absence of the arbitrator from some of the proceedings is due to some justifiable cause, it will necessarily amount to misconduct. AIR (Vol 24) 1937 Pat 343: 3 BR 747: 170 Ind Cas 351.

——Sch. 2, Para 15 — No prejudice — Effect.

The absence of an arbitrator cannot be deemed to amount to misconduct where it is clear that no business of a disputed character was gone into during the absence of the arbitrator and where the decision of the arbitrators is that of all the arbitrators. AIR (Vol 18) 1931 Cal 53: 34 CWN 689 (DB).

——Sch. 2, Para 15 (1) (a) — Effect of.

The presence of all the arbitrators, where there are more than one, at all meetings and above all at the last meeting when the final act of the arbitration is done is essential to the validity of the award. AIR (Vol 6) 1919 Pat 74: 49 Ind Cas 522 (DB).

——Sch. 2, Para 15 (1) (a) — Parties not given notice to.

Where arbitrators took evidence in the absence of parties, communicated the substance to the head arbitrator who was absent at one sitting and obtained his opinion without allowing the parties to present their respective cases before all arbitrators, the award could not be sustained. AIR (Vol 2) 1915 Oudh 110: 2 OLJ 365: 30 Ind Cas 384 (DB).

(b) Evidence.

——Sch. 2, Para 15 — Failure to hear parties, and if necessary, their witnesses — Whether amounts to misconduct.

An arbitrator, though not bound by the technical web of judicial procedure and rules of evidence, must hear the parties, and if requested, their witnesses, unless he is absolved therefrom by the terms of submission and must apply his mind to the points in the dispute and decide it according to the ordinary rules of justice, equity and good conscience. The failure to hear the parties and, if necessary, their witnesses, unless absolved therefrom by the terms of submission, amounts to misconduct on the part of the arbitrator within the meaning of Para. 15, Sch. II, Civil P. C. AIR (Vol 23) 1936 Rang 191: 162 Ind Cas 772 (DB).

——Sch. 2, Para. 15 — Question to be decided by trial Court.

An arbitrator should proceed in a proper manner in his investigation and should take the evidence in the presence of the parties. And whether his conduct amounts to such misconduct as to vitiate the award is a question which has to be decided by the Court which has considered it under Para. 15. AIR (V 22) 1935 Pat 16 : 1 BR 124 : 152 Ind Cas 838.

——Sch. 2, Para. 15 — Arbitrators giving evidence before themselves with consent of parties.

The absence of an arbitrator cannot be deemed to amount to misconduct where it is clear that no business of a disputed character was gone into during the absence of the arbitrator, and where the decision upon the matters in dispute is the decision of all the arbitrators.

An award given by arbitrators who gave evidence in the arbitration proceedings before themselves can be upheld in India if the parties had agreed that the arbitrators should also be witnesses and had allowed the arbitrators to give evidence in their presence without any objection. AIR (Vol 18) 1931 Cal 53 : 34 CWN 689 : 58 Cal 269 : 129 Ind Cas 428 (DB).

——Sch. 2, Para. 15 — An arbitrator is guilty of misconduct when he examines no witnesses, even though the nature of dispute is such that it could not be settled without evidence. AIR (V 18) 1931 Lah 65 (1).

——Sch. 2, Para. 15 — Misconduct.

Where the arbitrator, after having examined the books of the parties in their presence, discovers that one important item of a fairly big amount looks suspicious on the face of it, but. instead of calling the parties and asking them to explain the suspicious entry he calls a third person to ask his opinion, his conduct amounts to judicial misconduct. AIR (V 18) 1931 Lah 65 (1).

——Sch. 2, Para. 15 — Evidence — Refusal of opportunity to produce — Misconduct.

Refusing opportunity to a party to produce evidence is misconduct of the arbitrators. Award made in such circumstances cannot be filed. (1928) 111 Ind Cas 82 (Lah).

——Sch. 2, Para. 15 — Enquiry by arbitrator — Opportunity to meet case afforded — Misconduct.

An arbitrator ought not to hear or receive evidence from one side in the absence of the other side without, if he does, giving the side affected by such evidence the opportunity of meeting and answering it, and therefore the mere fact of questioning the parties on different dates does not amount to misconduct so long as the parties are given an opportunity of meeting the representations made by the other side. AIR (Vol 13) 1926 Mad 1158 : 24 M L W 482 : 97 Ind Cas 478 (DB).

——Sch. 2, Para. 15 — Enquiry by arbitrator — Misconduct.

The evidence must be recorded by the umpire in the presence of both parties allowing each to examine and cross-examine the witnesses. Recording evidence in the absence of one party amounts to judicial misconduct on the part of the umpire and vitiates his proceedings. AIR (Vol 12) 1925 Lah 570 : 88 Ind Cas 161 : 7 Lah L J 463 : 26 P L R 706.

——Sch. 2, Para. 15 — Refusal to allow — Misconduct.

Where a case was submitted to arbitration in the appellate stage and therefore the arbitrator refused to allow documentary evidence tendered by one party, being of opinion that his jurisdiction over the matter was the same as the Appellate Court.

Held. that his award was not vitiated by misconduct. AIR (V 11) 1924 Oudh 400 : 78 Ind Cas 378 : 11 OLJ 142.

——Sch. 2, Para. 15 (1) (a) — Decision without taking evidence.

In the absence of any agreement that an arbitrator should decide a dispute upon his own knowledge of the facts and without taking any evidence, an arbitrator's so deciding a dispute is fatal to award. AIR (Vol 6) 1919 All 98 : 42 All 185 : 18 A L J 78 : 1 U P L R (HC) 177 : 54 Ind Cas 443.

——Sch. 2, Para. 15 (a) — The making of private enquiries by the arbitrator amounts to legal misconduct and is sufficient to vitiate the award. AIR (Vol 6) 1919 Lah 208 : 9 P W R 1919 : 49 Ind Cas 303 (2).

——Sch. 2, Para. 15 (1) (a) and 4 — Misconduct — Arbitrator giving evidence.

The fact that one of three arbitrators gave evidence before the others, does not constitute misconduct on the part of the arbitrators so as to vitiate their award. AIR (Vol 5) 1918 Cal 644 : 40 Ind Cas 646: 1909-20 ID 2480.

——Sch. 2, Para. 15 (1) (a) — Omission to disclose evidence.

An arbitrator acts illegally in not disclosing to the parties the documents on which he acts. AIR (Vol 2) 1915 Cal 713 : 26 Ind Cas 73.

——Sch. 2, Para. 15 (1) (a) — The arbitrators are not bound to discuss in the presence of the parties. AIR (Vol 1) 1914 U B 53 : 2 U B R 26 : 7 Bur L T 279 : 27 Ind Cas 31 (2).

——Sch. 2, Para. 15 (1) (a) — Misconduct — Admission of evidence.

The Court cannot interfere with an arbitrator's decision on the ground that it is incorrect or partial. An award will be set aside at once on the slightest irregularity inconsistent with general principles of equity and good conscience but not for a mere technical irregularity. On a reference through Court, there was express direction by Court not to consider a certain adjustment between parties. The arbitrator admitted it at the request of one party and under protest by the other.

Held, the error prejudiced the case and amounted to misconduct. (1912) 14 Bom L R 1007 : 17 Ind Cas 696.

——Sch. 2, Paras. 15 (1) (a) — Exclusion of evidence.

It is not misconduct on the part of the arbitrators to refuse to admit evidence, which was unnecessary and which would not have in any way helped or even affected their decision. (1909) 3 S L R 164 : 4 Ind Cas 1151.

(c) Private enquiry.

——Sch. 2, Para 15 — Guardian of minor empowering arbitrator to proceed on private information — Guardian in such case does not act for benefit of minor — Award.

When the guardian of a minor gives power to an arbitrator to decide the matter not in accordance with the generally recognised rules governing arbitration proceedings but upon private information obtained behind the back of the parties, he travels far beyond the conduct of litigation which is placed in his hands. The giving of such wide power to an arbitrator can hardly ever be beneficial to the interest of a minor.

It may prove beneficial to the minor in some cases but the danger of the decision going against the minor is always present and, therefore, where a guardian arms the arbitrator with the power to decide the dispute upon private information obtained by him behind the back of the parties, he is not acting in the interest of the minor and his act cannot, therefore, bind the minor. The award in such a case based on a private information is vitiated by legal misconduct. AIR (Vol 30) 1943 All 284: (1943) ALJ 237: 1943 AWR (HC) 129: ILR (1943) All 666 : 208 Ind Cas 63.

——Sch. 2, Para 15 — Arbitrator basing decision on private enquiries and inadmissible evidence — Validity of award.

Where the arbitrators in arriving at their decision were influenced by private inquiries about the case, their conduct amounts to misconduct and the award will be invalid. AIR (Vol 22) 1935 Mad 184 : 41 MLW 51 : (1935) MWN 263 : 155 Ind Cas 381.

——Sch. 2, Para 15. — Examination of witnesses in the absence of parties—Misconduct — Validity of award.

Where the arbitrators examine the witnesses in private without hearing of the parties, their procedure is irregular and the Court will in such circumstances set the award aside without taking into consideration the nature of the statements made or the probability of their having influenced the decision. But irregularities of this kind may be cured by waiver. AIR (Vol 18) 1931 Mad 619 : 1931 MWN 451: 34 MLW 507: 133 Ind Cas 522 (2) (DB).

——Sch. 2, Para 15 — Award based thereon — Validity.

Any unusual power which is intended to be given to the arbitrators should be expressly mentioned in the agreement. An arward based upon private enquiry, by arbitrators in the absence of parties is illegal and unenforceable in the absence of a power to that effect in the agreement. 110 Ind Cas 833 : AIR (Vol 15) 1928 Lah 550.

——Sch. 2, Para 15 — Award based thereon — Validity.

The arbitrators are not entitled to conduct any inquiries behind the back of the parties concerned, and if they do so, their awards are upon to the most serious objection. (1928) 109 Ind Cas 21 : 9 PLT 571.

——Sch. 2, Para 15 — If an umpire makes enquiries behind the back of any party, he is guilty of misconduct, whether he recorded evidence at the time or not. 8 Lah 329 : 9 LLJ 218 : 101 Ind Cas 153 : 28 PLR 425 : AIR (Vol 14) 1927 Lah 425 (DB).

——Sch, 2, Para 15 — Enquiry by arbitrator — Effect.

An arbitrator must not take evidence behind the back of the parties unless the terms of the reference construed in the light of the circumstances of the case, give him authority to do so. But where the the words in the reference to the arbitrator empower him to make any decision in any way he wishes and to come to a decision by any method that he thought fit the arbitrator would be justified in making private enquiries and it would be a grave miscarriage of justice if the arbitrators award given in the circumstances is not allowed to be effective. 13 OLJ 504: 29 OC 258: 3 OWN 397: 6 OWN 1212: AIR (Vol 13) 1926 Oudh 383: 94 Ind Cas 162.

——Sch. 2, Para 15 — Arbitrator acting on confidential information — Misconduct.

No arbitrator performing his functions, which are in a sense the fuctions of a Judge, can listen to confidential information adverse to the one or the other party without committing grave misconduct. The words of the petition of the parties allowing the arbitrator full latitude in his method of coming to a decision cannot be interpreted as including unfair conduct. 86 Ind Cas 773 : 3 Pat LR (Civ.) 59 : 6 PLT 544 : AIR (Vol 12) 1925 Pat 465.

——Sch. 2, Para 15 — Findings of fact based on consultation with strangers — Validity — Consultation on point of law, etc. — Effect.

In the award, the arbitrator who had been made sole arbitrator stated that he began the arbitration, in the presence of four persons whom he named and whom, he said he associated with himself in one assembly for the purpose of strengthening his own opinion. He did not get any information from those persons or made use of it in arriving at the findings of fact.

Held, that if he asked them questions of law, or if he consulted them as to the style, syntax or grammar of his award, he was quite within his rights as an arbitrator, but if he arrived at any findings of act by consulting the people and if he allowed the persons sitting with him to affect his decision as assessors, then it must be held that there had been misconduct. 86 Ind Cas 773: 3 Pat LR Civ. 59 : 6 PLT 544 : AIR (Vol 12) 1925 Pat 465.

——**Sch. 2, Para 15 — Enquiry by arbitrator — Misconduct.**

It is impower on the part of an arbitrator to get information from one side in the absence of the other or to utilise information not accessible to others but consent of parties who are sui juris will cure the defect. 73 Ind Cas 470 : 47 Mad 30 : 1923 MWN 7 : 32 MLT 32 : AIR (Vol 10 1923 Mad 301 : 17 MLW 71 : 44 MLJ 265 (DB).

——**Sch. 2, Para 15 — Authority conferred by agreement of reference — If misconduct.**

Where the parties had expressly authorised the arbitrators to arrive at a decision, either of his own personal knowledge, or in whatsoever manner he might think proper and the Court below superseded the award on the ground of misconduct of the arbitrator because he had made "private inquiries about subject-matter in dispute behind the backs of the parties .

Held, that the Court below acted illegally and with material irreguiarity, in thus ignoring the terms of the agreement of reference to arbitration by which the parties had in fact given the arbitrator the widest possible powers and had expressly bound themselves to abide by his decision in whatsoever manner he might see fit to arrive at it and that the case feli within the revisional jurisdiction of the High Court. 64 Ind Cas 934 : 20 ALJ 125: AIR (Vol 9) 1922 All 69 (DB).

——**Sch. 2, Para 15 — Validity of award.**

Where parties to an arbitration produced no evidence and the arbitrators made an enquiry from the neighbours parties and there was nothing to show that the enquiry was not made in the presence of parties, the award, though no doubt based on hearsy and conjecture was upheld. 67 Ind Cas 866 : AIR (Vol 9) 1922 Lah 480.

——**Sch. 2, Para 15 — Result communicated in the presence of parties — Misconduct.**

Where an arbitrator communicated his information gained privately to the other arbitrators in the presence of the parties and they had opportunity of checking the information or of contradicting it, and the defendant acutally admitted the information to be correct.

Held, that the arbitrator was not guilty of misconduct. 65 Ind Cas 676 : 14 MLW 394 : 1921 MWN 509 : AIR (Vol 8) 1921 Mad 271 : 41 MLJ 276.

——**Sch. 2, Para. 15 (a) — Private enquiries without evidence in presence of parties.**

An arbitrator must come to his decision on evidence taken in the presence of both the parties or after giving both parties an opportunity of being present at the enquiry. 9 PWR 1919 : 49 Ind Cas 303 (2) : AIR (Vol 6) 1919 Lah 208 (DB).

10-A. Notice.

——**Sch. 2, Para. 15 — Failure to give notice — Legal misconduct.**

It is a legal misconduct on the part of the umpire to decide a case without giving notice to the parties or hearing their comments on the evidence. 100 Ind Cas 896 : AIR (Vol 14) 1927 Lah 347.

——**Sch. 2. Para 15 — Absence of notice by arbitrator — Reference implying no further evidence to be produced — Validity of award.**

The conduct of the proceedings depends upon the order of reference, and if in an order of reference there is an implied agreement that further evidence is not to be put forward by the parties an that the parties have sufficiently and completely stated their case, the award cannot be invalid because the arbitrators did not give notice that they were prepared to receive evidence. Where, when making the reference, the parties set out that had already represented before the arbitrators what each of them had to say, and then directed the arbitrators to make the award, stating that they had given them full power to do so.

Held, that the award cannot be said as invalid on the ground of want of notice by arbitrators that they were prepared to take evidence. 106 Ind Cas 331 : AIR (Vol 14) 1927 Mad 1010 (DB).

——**Sch. 2, Para 15 — Failure to give notice — Misconduct.**

If the parties are not given notice of any meeting at which they should appear and represent their case to the arbitrators, in the ordinary case that would clearly amount to misconduct on the part of the arbitrators without any imputation on their honesty and the award is liable to be set aside. 25 Bom LR 392: 85 Ind Cas 424 : AIR (Vol 11) 1924 Bom. 149.

——**Sch. 2, Para 15 — Failure of umpire to give notice of hearing — Validity of award decree.**

The arbitrators to who in dispute was referred having differed, appointed an umpire under the express terms of the contract. The umpire informed both the parties of his appointment, but fixed no date of hearing. No further steps were taken by any of the parties concerned and the umpire made his award whereupon the applicants objected on the ground that they had desired to lead evidence before him, but had no opportunity to do so.

Held, that the duties of an umpire are indentical with those of an arbitrator. And therefore the parties are entitled to a hearing before an umpire no less than before the arbitrator and it is incumbent on the umpire on appointment, to fix a day of hearing and apprise the parties of it. And in the absence of an opportunity of hearing of the parties before the umpire, the decision filing the award must be set aside. 83 Ind Cas 543 : 17 SLR 172 : AIR (Vol 11) 1924 Sind 27 (DB).

——Sch. 2, Para. 15 — An arbitrator need not give any further notice when the defendant knew that the arbitrator was proceeding in spite of repeated notices of withdrawal. 33 Ind Cas 467: AIR (Vol 3) 1916 All 278 (DB).

——Sch. 2, Para 15 (1) (a) — Omission by the arbitrators to give notice of their own meeting, to a party, who has, prior to such meeting, notified to the arbitrator his withdrawal from the submission, does not invalidate the award. 7 Bur LT 279 : 27 Ind Cas 31 (2) : 2 UBR 26 : AIR (Vol 1) 1914 UB 53.

11. Objection and waiver.

——**Sch. 2, Para. 15 — Objection to award not taken before Court passing decree — Suit to set aside decree, if maintainable.**

The words "or otherwise invalid" occurring in Para. 15. Sch. II. Civil P. C., are comprehensive enough to include all kinds of objections.

Where the objection that the arbitrator exceeded his powers in drawing an award is not taken before the Court passing the decree upon it under Para. 15, a separate suit will not lie to set aside the decree on that ground. AIR (Vol 26) 1939 Lah 69: 41 PLR 380: 183 Ind Cas 79.

——**Sch. 2, Paras. 15, 14 — Award made after examining parties only — Examination of witnesses not asked for — Award, if vitiated.**

Where an award was made by an arbitrator on examination of the parties only and the parties did not at the time protest against the procedure and demand examination of witnesses but subsequently complained of this defect and sought to get the award set aside on ground of arbitrator's misconduct:

Held, the failure of the arbitrator to ask the parties whether they desired to produce any witnesses for examination was just such a slip in his procedure, which did not go to the substance of his decision, but as they did not at the time

protest against this procedure and demand that witnesses should be examined they could not subsequently be heard to complain of his defect in the procedure adopted and urge it as a ground for setting aside the award. AIR (Vol 22) 1935 Rang 308: 158 Ind Cas 832 (DB).

——Sch. 2, Para. 15 — Charges of misconduct, when entertained in Court.

Under Sch. II, the only time for entertaining charges of misconduct against an arbitrator is when the award has been filed in Court. AIR (Vol 21) 1934 Cal 255: 58 CLJ 234: 149 Ind Cas 865.

——Sch. 2, Para. 15 — Examination of witnesses in the absence of parties — Misconduct — Validity of award.

Where the arbitrators examine the witnesses in private without the hearing of the parties, their procedure is irregular & the Court will in such circumstances set the award aside without taking into consideration the nature of the statements made or the probability of their having influenced the decision. But irregularities of this kind may be cured by waiver.

A mere signature to an award does not necessarily remove all objections to any irregularity. But when a man signs a document with a knowledge that he might have objected to it on the score of some irregularity his act is 'prima facie' evidence that he waives the objection. It lies on him to displace this general presumption by adducing special circumstances and in order to do this, it is essential, that he should give to the Court a perfectly open, true and can did account of what took place. What amounts to waiver must be decided on the circumstances of each case. AIR (Vol 18) 1931 Mad 619: 1931 MWN 451: 34 MLW 507: 133 Ind Cas 522 (2) (DB).

——Sch. 2, Para. 15 — Irregularity not affecting jurisdiction.

An objection to irregularity or improper conduct of an arbitrator may be waived by parties either expressly or by their conduct provided the party waiving it has full knowledge of the defect. The principle of waiver is not confined merely to irregularities in the examination of witnesses during the absence of one of the parties; it applies to every irregularity which does not affect the jurisdiction of the arbitrators. 123 Ind Cas 234: AIR (Vol 17) 1930 Sind 79.

——Sch. 2, Para. 15 — Award filed without objection — Objection to decree on the ground of wrong decision by arbitrator.

Where no objection is taken to an award under Sch. 2, and a decree is passed in accordance with its terms, the decree is binding on the parties thereto and cannot be subsequently treated as nullity because the arbitrators had wrongly decided a mixed question of fact and law which had arisen before them. 1929 ALJ 540: AIR (Vol 16) 1929 All 521 : 117 Ind Cas 361 (DB).

——Sch. 2, Para. 15 — Signature of party to award — Estoppel.

The mere signature by a party to an award does not necessarily in all cases estop him from afterwards disputing the correctness of the award. 117 Ind Cas 574: 7 Rang 136: AIR (Vol 16) 1929 Rang 166.

——Sch. 2, Para. 15 — Private enquiry — Absence of party — Waiver — Effect.

There is no misconduct of arbitration in having made private enquiries or examined evidence in the absence of a party to the arbitration proceedings where that party by his own conduct waives the objection he has to such a procedure. AIR (Vol 16) 1929 Sind 200. : 119 Ind Cas 529 (DB).

——Sch. 2, Para. 15 — Party not prejudiced by action of arbitrator — Right to object.

It is only the party prejudiced by the exercise of excessive authority by the arbitrator who is entitled to object to the award by reason of it; the party in whose favour the erroneous action of the arbitrator operates cannot be heard to impeach the validity of the award on this ground; AIR (Vol 14) 1927 Sind 206. : 102 Ind Cas 277 (DB).

——Sch. 2, Para. 15 — Objection as to the validity of a reference to arbitration is not an objection within the meaning of para. 15 and has no finality attached to it. AIR (Vol 13) 1926 All 238 : 48 All 239 : 24 ALJ 235 : 91 Ind Cas 930 (DB).

——Sch. 2, Para. 15 — Events prior to reference — Right to plead.

Paragraph 15 contemplates the entertaining by the first Court of all possible grounds which can be urged against the validity of the award including the ground that what purports to be an award is, by reason of certain events which happened prior to the reference, not an award at all. 48 All 226: 23 ALJ 997: 90 Ind Cas 904: AIR (Vol 13) 1926 All 202 (DB).

——Sch. 2, Para. 15 — Onus of proof.

Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the matter without giving notice of the hearing, undertakes the burden of satisfying the Court that this is what really happened. 46 All 686: 22 ALJ 676: 82 Ind Cas 16: 5 LRA Civ 465: AIR (Vol 11) 1924 All 788 (DB).

——Sch. 2, Para. 15 — Plea of misconduct — When can be raised.

Under the second schedule the only time for entertaining the charge of misconduct against an arbitrator is when the award has been filed. 80 Ind Cas 459: 27 CWN 420: AIR (Vol 10) 1923 Cal 410.

——Sch. 2, Para. 15 — It is improper on the part of an arbitrator to get information from one side in the absence of the other or to utilise information not accessible to others but consent of parties who are sui juris will cure the defect. A minor's guardian cannot waive the minor's right to object to the irregular procedure. AIR (V 10) 1923 Mad 301: 73 Ind Cas 470: 47 Mad 30: 32 MLT 32: 1923 MWN 7: 17 MLW 71: 44 MLJ 263 (DB).

——Sch. 2, Para. 15 (1) (a) and (b) — Waiver of objections — Agreement not to object to — Effect of.

Agreement not to object to an award does not preclude parties from objecting on the ground of fraud or bad faith of arbitrators.

Where the agreement of arbitration authorised the arbitrators to partition the property in dispute in unequal shares, the giving, of a mere life-interest in a small piece of land to one entitled to a "share" is a violation of the agreement and the award is liable to be set aside. If the arbitrators imported their personal knowledge without giving an opportunity of testing such knowledge it is misconduct on their part. 107 PWR 1916: 117 PR 1916: 70 PLR 1917: 34 Ind Cas 192: AIR (Vol 3) 1916 Lah 89 (DB).

——Sch. 2, Para. 15 (1) — Objection to award.

A clause in a compromise petition providing that any of the parties thereto may object to the award on any account is contrary to the procedure in Sch. II, especially para. 15 thereof in respect of arbitration proceedings, in a pending suit. 1 Pat LJ 306: 2 Pat LW 377: 35 Ind Cas 358: AIR (Vol 3) 1916 Pat 190 (DB).

——Sch. 2, Para. 15 (1) — Objection — "Waiver".

Where a party to arbitration objected to the appointment of an umpire but did not press the ob-

jection forcibly and submitted to the proceedings without demur.

Held, that the party cannot object to the appointment of the umpire or the regularity of the proceedings. 9 PR 1913: 248 PLR 1913: 16 Ind Cas 996 (DB).

12. "Or otherwise invalid"

——Sch. 2, Paras 15, 16 (2)—"Or being otherwise invalid", if wide enough to cover all kinds of objections to award.

Paragraphs 15 and 16 of the Second Schedule to the Civil P.C. when read together clearly show that the intention of the Legislature was that all objections to the validity of an award should be brought in and decided by the Court making the reference and that when objections have been brought but disallowed by the Court, a decree shall follow in terms of the award and it will not be appealable.

Paragraph 15 (1) (c) shows that all objections against the validity of an award can be brought in the Court making the reference the word "or being otherwise invalid" being wide enough to cover all kinds of objections to an award. (1936) 159 Ind Cas 1041 : 1936 OWN (CC) 16 (DB).

——Sch. 2, Para 15 (1) (c) — "Or being otherwise invalid" in Para 15 (1) (c) — Meaning of.

The Legislature by inserting the words "or being otherwise invalid" in Para. 15 (1) (c) intended and provided that every ground upon which the validity of the award in law could be challenged should fall within the ambit of Para. 15 (1), Sch. II and could be relied on as a ground for setting aside the award. AIR (Vol 22) 1935 Rang 94: 12 Rang 675: 156 Ind Cas 414.

——Sch. 2, Para. 15 Cl. (c) — 'Otherwise invalid' in Para 15 Cl. (c) —Whether ejusdem generis with grounds previously mentioned.

In Cl. (c) of Para 15, Sch II, Civil P.C., the last ground should not be taken ejusdem generis with the grounds mentioned before. It need not be some ground akin to corruption or misconduct of the arbitrator. AIR (Vol 21) 1934 All 95: (1934) ALJ 473: 3 AWR (HC) 582 : 150 Ind Cas 222 (DB).

——Sch 2 Para 15 (1) (e)—"Or otherwise invalid"—Meaning.

The words "or otherwise invalid" in cl. (e) of Para. 15 (1) refer to the invalidity of the kind mentioned in the preceding sentences of the said clause. AIR (V 18) 1931 Cal 211 : 52 CLJ 298 (DB).

——Sch. 2, Para 15—"Or being otherwise invalid" —Meaning.

Para 15 of Sch. 2 assumes a valid reference to arbitration and only contemplates cases where the propriety of an award on the basis of such a reference is in question. The words "or being otherwise invalid" in sub-S. (1) cl. (c) refer to the invalidity of the kind referred to in the preceding sentences of the said clause as for instance the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court. AIR (Vol 18) 1931 Cal 109: 34 CWN 813. (DB).

——Sch. 2, Para 15 — 'Or being otherwise invalid.

The words "or being otherwise invalid" do not and cannot cover an award where the reference itself is bad. On principle, the words "or being otherwise invalid' should not be taken as including the question whether there was a valid reference to the arbitration. 39 All 489 and AIR 1923 All 502 Not Foll,; AIR (Vol 15) 1928 All 740: 50 All 955: 110 Ind Cas 881: 26 ALJ 1009 (DB).

——Sch 2, Para 15 — Reference pending suit — Arbitrator treating person not party to suit as party to arbitration—Award if 'otherwise invalid.'

Where an arbitrator in a reference pending a suit treats a person who is not a party to the suit as a party to the arbitration and decides disputes between parties to the suit or any of them and such person, however just and equitable the award may be 'it is otherwise invalid' within the meaning of para. 15 sub-Cl. (c) AIR (Vol 14) 1927 Sind 193: 101 Ind Cas 802. (DB).

——Sch 2, Para 15 — Otherwise invalid—Meaning of.

An award made otherwise than in accordance with the authority by the order conferred upon them is an award which is "otherwise invalid" and which may accordingly be set aside by the Court under para. 15. AIR (Vol 12) 1925 PC 293: 49 MLJ 812: 92 Ind Cas 633: 28 Bom LR 217: 3 OWN 127: 24 ALJ 13: 43 CLJ 14: 27 PLR 35: 1926 MWN 96: 3 Pat LR 330: 53 IA 1: 53 Cal 258.

——Sch. 2, Para 15 — Plea of minority found against —Reference without fresh statement—Validity.

The words "otherwise invalid" must not be construed as ejusdem generis with what has gone before it. Some limitation must be placed upon the words so construed. They cannot mean that a decision merely adopting an idle or wanton objection, however absurd and irrelevant, would be a decision of "invalidity from any cause whatever". The decision must be a real decision of some ground no matter what, which if it existed would invalidate an award.

Merely a decision that the Court ought not to have referred is not a matter affecting the validity of the award once the dispute has been referred, the parties having previously agreed to the reference. In a suit the defendant as a minor filed a statement through his guardian. On an issue raised defendant was held to be a major. Then upon the agreement of the parties the issues settled in the case were referred to arbitration.

Held, that the award could not be set aside on the ground that defendant in the proceedings prior to the reference should have filed another written statement after he was found to be a major. AIR (Vol 8) 1921 All 16: 60 Ind Cas 857: 43 All 305: 19 ALJ 33 (DB).

—Sch. 2, Para 15 — "The words otherwise invalid" in para 15 are not ejusdem generis with the other cases mentioned therein but are meant to include all case of invalidity on grounds other than those mentioned. An award cannot be said to be ipso facto invalid because it is not shown to be advantageous or beneficial to the minor. AIR (Vol 6) 1919 Mad 1029: 34 MLJ 71: 23 MLT 89: 45 Ind Cas 763. (DB).

13. Personal knowledge.

——Sch. 2, Para. 15 — Award on evidence — Validity.

An award was based entirely or almost entirely on evidence. The panchayatdars were, however, selected because of their personal knowledge which they used only in understanding and appreciating evidence.

Held, that the award was not bad. AIR (V 16) 1929 Mad 144 : 114 Ind Cas 367.

——Sch. 2, Para 15 — Selection due to personal knowledge—Duty of arbitrator.

Where a particular arbitrator has been selected only because of his personal knowledge in the matter in dispute, it would not be a misconduct on his part to use his personal knowledge in coming to a certain decision although in such cases it is desirable that he should tell parties what his personal knowledge is and give an opportunity to them to adduce evidence sufficient to vary his views. AIR (Vol 13) 1926 Bom 527: 28 Bom LR 986: 97 Ind Cas 673 (DB).

——Sch. 2, Para 15 — Award based thereon—Validity.

Though personal knowledge does not of itself disqualify an arbitrator from acting as such and may even be a good reason for his being selected, but unless the parties consent to such a course no arbitrator has a right to decide the matter on his personal knowledge and the award based on such knowledge is vitiated. AIR (Vol 13) 1926 Mad 752: 50 MLJ 514: 95 Ind Cas 740 : 23 MLW 681 : 1926 MWN 445 (DB).

——Sch. 2, Para. 15 — Award based thereon — When justifiable.

Whether the arbitrators can import their own personal knowledge into the consideration of the case before them will depend upon the terms of submission to arbitration. If the submission simply asks the arbitrators to decide a case that will not give them a right to import their own personal knowledge into the consideration of the case. But where the submission to arbitration gives them an option either to take evidence or to decide the case upon their own personal knowledge they would be entitled to import into the consideration of the case their own personal knowledge.

Where the reference to arbitration does not say that the arbitrators were to decide the matter in controversy upon their own personal knowledge; but on the other hand the reference to arbitration simply asks them to decide the dispute between the plaintiff and the defendants.

Held, that they cannot import into the consideration of the case anything derived from their own personal knowledge. AIR (Vol 12) 1925 Mad 1086: 49 MLJ 115: 88 Ind Cas 660: 1925 MWN 503.

——Sch. 2, Para 15 (1) (a) — Personal knowledge—Award of an arbitrator.

If the decision of the matter depends on expert knowledge only the award by an expert arbitrator made on his own expert knowledge is valid. But the arbitrator is not justified in making an award on his own personal knowledge especially when the parties intend to tender evidence. Such an award may be rightly refused to be filed. AIR (Vol 7) 1920 Nag 129: 57 Ind Cas 604.

——Sch. 2, Para. 15 (1) (a) — Personal knowledge — Arbitrators deciding on personal knowledge of trade usages.

Arbitrators with expert knowledge of the particular trade in relation to which a question is pending before them can use their personal knowledge of the useages of that trade, and when their reference allows, impose by their award on the purchaser the obligation of accepting for reduced price goods not according with the sample. AIR (Vol 3) 1916 Bom 4: 41 Bom 518: 18 Bom LR 532: 37 Ind Cas 271 (DB).

14. Procedure.

——Sch. 2, Paras 15 (1), 3 (2), O. 23, R. 3—One of parties applying to set aside award—Other party not objecting—Award, if can be set aside and cognizance of suit taken by Court—Action of Court, it can come under O. 23, R. 3 — Applicability of O. 23, R. 3

After a matter is referred to arbitration, the Court, has no jurisdiction left to deal with the matter except in accordance with the provisions of Sch. II. The grounds on which an award can be set aside are set forth in Para. 15 (1) of Sch. II. The words of Para 15 (1) are imperative and take away the jurisdiction of the Court to set aside an award on any ground other than those specified in the said clause. Therefore an order of the Judge setting aside the the award without coming to a finding whether or not any of the grounds specified in this clause existed but merely on the ground that one of the parties applied to have the award set aside and the other did not object to it and taking cognizance of the suit offends both against Paras. 15 (1) and 3 (2) of Sch. II, Civil P.C.

Order 23, R. 3 contemplates an agreement or compromise entered into by the parties out of Court which the parties ask the Court to give effect to and does not apply to a case in which a party prays for an award being set aside and the other party does not object to that prayer. To hold otherwise would be tantamount to holding that parties can by consent confer upon a Court jurisdiction which it does not possess. AIR (V 24) 1937 Oudh 507 : 1937 CWN (CC) 1002: 13 Luck 609: 171 Ind Cas 172 (DB).

——Sch. 2, Para. 15 — O. 20, R. 5 — Order on objections to arbitration award — Finding with reasons on each separate issue — Necessity of.

An order on the objections to an arbitration award should comply with the provisions of O. 20, R. 5, Civil P.C. and the Court should state its finding or decision with the reason therefor upon each separate issue. AIR (Vol 22) 1935 All 519: (1935) ALJ 309: 1935 AWR (HC) 244: 154 Ind Cas 310.

——Sch. 2, Para. 15 — Plaintiffs asked to rearrange record and sort out exhibits—Award if vitiated.

Irregular procedure opposed to the principle of natural justice, amounts to legal misconduct on the part of an arbitrator.

Where there has been an opportunity afforded to one side to get an advantage with the arbitrator over the other, either by lack of notice, or by the absence of the other side, and there is even a remote possibility that the advantage so obtained may have unconsciously influenced the mind of the arbitrator, the proceedings vitiated by a breach of the principles of natural justice, and whether this is so or not must depend on question of fact.

The arbitrator sent for one of the parties (plaintiff) and asked him to re-arrange the record of the case in proper order and to sort out certain exhibits:

Held, that the plaintiff was used to perform only a ministerial act and an award by him was not vitiated on that account. AIR (Vol 22) 1935 Bom 127: 37 Bom LR 69: 59 Bom 268: 155 Ind Cas 669. (DB).

——Sch. 2, Para 15 Non-compliance — Effect.

When the parties have agreed to abide by the decision of a tribunal of their own selection, unless there has been something radically wrong and vicious in the proceeding it must not be set aside. An award should not be set aside on the ground of failure to

observe the highly technical web of procedure and rules of evidence which surrounds judicial procedure. AIR (Vol 12) 1925 Rang 383: 91 Ind Cas 659: 3 Rang. 387. (DB).

——Sch. 2, Para 15 — Form of application.

To say that no application could be said to have been made within the meaning of Art. 158 until either a notice of motion had been given or a rule nisi had been obtained, is taking too technical a view of what is required by Sch. 2, R. 15 AIR (Vol 8) 1921 Bom 419: 63 Ind Cas 929: 45 Bom 1071: 23 Bom LR 614. (DB).

——Sch. 2, Para. 15 (1) (a) — Irregularities in procedure—Waiver.

Irregularities in the procedure of an arbitrator may be waived by the parties provided they knew of them. AIR (Vol 6) 1919 Mad 22: 10 LW 57: 51 Ind Cas 53

——Sch. 2, Para 15 (1) (a) When a sum is awarded by the arbitrator, the Court to which the application is made to file the award and pass a decree on it can not disallow the sum. If it comes to the conclusion that the party is not legally entitled to the same, it ought to remit the case to the arbitrator. AIR (Vol 5) 1918 Cal 399: 39 Ind Cas 767 (DB).

——Sch. 2, Para 15 (2) — Award not filed in time—Effect.

If the award is not submitted to the Court on the day fixed the reference is ineffectual. After that the only course to follow is to fix a date for hearing the suit, to enable the parties to appear and adduce evidence in support of their respective cases. This course was not followed in a suit and the suit was dismissed for default. The order of dismissal was set aside by the High Court and the suit remanded for proper decision. (1910) 12 CLJ 624 : 8 Ind Cas 1107 (DB). But see contra 44 PWR 1916 : 34 Ind Cas 177 : AIR (V 3) 1916 Lah 80.

——Sch. 2, Para 15 — An arbitrator should make and retain for subsequent use, notes of proceedings before him. AIR (V 1) 1914 PC 105 : 36 All 336 : 17 OC 120 : 18 CWN 755 : 1 OLJ 249 : 12 ALJ 537 : 16 Bom LR 413: (1914) MWN 472: 16 MLT 35: 27 MLJ 181: 19 CLJ 494: 23 Ind Cas 625.

(On appeal from (1912) 14 OC 308 : 13 Ind Cas 520.)

——Sch 2, Para 15 (1) (a) Inquiry.

An arbitrator can conduct business in any way he thinks best and is not fettered by any rules of practice or procedure obtaining in Courts. (1912) 14 OC 308: 13 Ind Cas 520 (DB).

——Sch. 2, Para 15 (a) — Delivery of award — to correct.

After the delivery or publication of the award the arbitrators have no power to correct or alter the same. An irregularity in the course of the reference on the part of the arbitrator will not vitiate the award where the parties knowing of such irregularities, have chosen to waive their objections on that score. An award must be a final decision of all matters requiring determination, otherwise the award may be completely vitiated except where the arbitrator is empowered to make several awards. In the case of an award pertaining to taking of and examining accounts, the accounts should be taken as a whole and not piecemeal and the rights of the parties determined with reference to the whole. (1911) 14 CLJ 188 11 Ind Cas 481 (DB).

15. Revision.

See also Civil P. C. S. 115.

——Sch. 2, Para. 15 — A person who was a party to arbitration even if successful in appeal challenging the reference as being without jurisdiction, is generally deprived of costs. But in revision such a person should not be given any relief. AIR (V 29) 1942 Cal 230: ILR (1941) 2 Cal 366: 199 Ind Cas 740 (DB).

——Sch. 2, Para. 15 — No revision lies against an order passed by lower Court under Para. 15 and superseding the arbitration. AIR (V 26) 1939 Oudh 238: 1939 OWN (CC) 716: 1939 AWR (CC) 101: 183 Ind Cas 378.

——Sch. 2, Para. 15 — Decision passing decree in accordance with award — Revision, if lies.

Per Full Bench, Iqbal Ahmad J., contra :—An objection to the validity, of the reference to arbitration on the ground that the reference was illegal because of the absence of leave does come within the purview of Para. 15, Sch. II, Civil P. C., and so if the objection is decided adversely and a decree is passed in terms of the award, the decree is final and no appeal lies therefrom. This, however, does not mean that the order of reference to arbitration cannot be challenged by way of revision on that ground.

The decision of the Court that made the reference to arbitration overruling the objection and passing of decree in accordance with the award, cannot be challenged by an appeal or by an application in revision, for at most that amounts to an error of law. But the order made by the Court, where it has acted illegally or with material irregularity in the exercise of its jurisdiction, can be challenged by way of revision, though not by way of appeal, whether the illegality or irregularity was committed before the reference to arbitration or after the receipt of the award..

Per Iqbal Ahmad, J.— 'The words 'otherwise being invalid' in Cl. (c), Para. 15, Sch. II, Civil P. C., refer only to the invalidity of the award based on any ground unconnected with the proceedings of the Court, as distinct from some invalidity attaching to the procedure of the Court. AIR (V 24) 1937 All 65 : (1936) ALJ 1333 : 1936 AWR (HC) 1223: ILR (1937) All 317: 167 Ind Cas 99 (FB).

——Sch. 2, Para. 15 — Arbitrators giving evidence before themselves with consent of parties — Interference in revision.

The absence of an arbitrator cannot be deemed to around to misconduct where it is clear that no business of a disputed character was gone into during the absence of the arbitrator, and where the decision upon the matters in dispute is the decision of all the arbitrators.

An award given by arbitrators who gave evidence in the arbitration proceedings before themselves can be upheld in India if the parties had agreed that the arbitrators should also be witnesses and had allowed the arbitrators to give evidence in their presence without any objection.

Per Graham, J.— At any rate, the High Court will not interfere with the award in such a case in revision if no grave injustice has been done. AIR (V 18) 1931 Cal 53: 34 CWN 689: 58 Cal 269: 129 Ind Cas 428 (DB).

——Sch. 2, Para. 15 — Refusal to set aside award,

A revision lies from an order refusing to set aside an award. AIR (V 16) 1929 Lah 369: 111 Ind Cas 145.

——Sch. 2, Para. 15 — Decree in accordance with award.

The policy of the Legislature is that judgments in accordance with the award should be final and unless it is quite clear that the Judge has exercised the jurisdiction wrongly, there should be no

interference in revision. AIR (V 15) 1928 Mad 48: 105 Ind Cas 105 (DB).

——Sch. 2, Para. 15 — Refusal of one arbitrator to sign — Effect — Error of law by arbitrator — Effect.

The High Court in the exercise of its revisional jurisdiction, cannot set aside the decree passed in accordance with an award on the ground that one of three punchas refused to sign the award. The question whether or not the award was valid is one especially reserved for the decision of Court passing such decree, and even if it has erred on a question of law in coming to a decision on that point, that in itself is not a ground for the exercise of revisional jurisdiction by the High Court. AIR (V 14) 1927 All 573: 100 Ind Cas 76.

——Sch. 2, Para. 15 — Question of validity of reference.

Objection as to the validity of a reference to arbitration is not an objection within the meaning of para. 15 and has no finality attached to it. Any order passed on such objection is open to revision, 39 All. 489, not Foll. AIR (V 13) 1926 All 238 : 48 All 239 : 24 ALJ 235 : 91 Ind Cas 930 (DB).

——Sch. 2, Para 15 — Absence of notice of filing award — Revision.

Court's omission to give notice of the filing of the award to the parties is a serious irregularity and it is a good ground for revision. AIR (V 13) 1926 Cal 1018 : 94 Ind Cas 115 (DB).

——Sch. 2, Para. 15 — Order setting aside award and proceeding with case — If revisable.

Arbitration proceedings entered upon by the parties in the course of a trial of a suit are proceedings in that suit and do not constitute a separate case within S. 115 and, therefore, an order of lower Court setting aside award and directing the suit to proceed before it is not open to revision. AIR (V 13) 1926 Lah 191 : 26 PLR 253 : 91 Ind Cas 10.

——Sch. 2, Para. 15 — Order superseding award.

No revision lies against an order superseding an award made in a pending case and directing the suit to proceed on the merits. AIR (V 12) 1925 All 566 : 89 Ind Cas 173 : 23 ALJ 656 : 6 LRA Civ. 459 : 47 All 916 (DB).

——Sch. 2, Para. 15 — Order superseding award on misinterpretation of terms of reference — Appeal — Revision.

When the question was whether the parties by their agreement of reference to arbitration had agreed that the arbitrator might supplement his knowledge by listening to ex parte statements behind the back of the parties and the lower Court decided that the terms of the agreement did not empower the arbitrator to act as he did, in appeal it was opened that the Court-below had misinterpreted the terms of agreement of reference.

Held, that the legislature has not seen fit to allow an appeal from an order of this nature, even on the grounds specified in S. 100 of the Civil Procedure Code, the appellate Court ought not to interfere in revision. AIR (V 9) 1922 All 64 : 65 Ind Cas 779 : 20 ALJ 117 (DB).

——Sch. 2, Para. 15 — Setting aside award on the ground that reference ought not to have been made.

Where an award was set aside on the ground that the reference to arbitration ought not to have been made,

Held, that revision lay.

Piggott, J. — The order could be challenged in a petition of appeal under S. 105, and hence revision was doubtful. AIR (V 8) 1921 All 16 : 60 Ind Cas 857 : 43 All 305 : 19 ALJ 33 (DB).

16. Setting aside.

——Sch. 2, Para 15 — Award after order superseding arbitration and later order cancelling reference cancelled —Suit not proceeded with—Award, if void ab initio—It has to be set aside by application under Para 15.

Where the award has been made after the issue of the order of the Court superseding the aribtration but the Court did not proceed with the suit because it cancelled its order cancelling the reference, the award is not void ab initio but has to be set aside under Sch. II Para 15, Civil P.C. The words "or being otherwise invalid." even if construed on the ejusdem generis principle must apply to a case like this.

Where, therefore, no application to set aside the award has been made, an order of the Court to pass a decree in terms of the award cannot be set aside. AIR (V 28) 1941 Mad 921 : (1941) 2 MLJ 395 : 1941 MWN 780: 54 MLW 604: 200 Ind Cas 55.

——Sch. 2, Paras 15 (c), 8 — Award — Submission of, beyond date fixed—Parties submitting to arbitration and conducting case after due date—Consent of parties if can be inferred—

An arbitrator is a domestic tribunal and the parties who refer their dispute to him for decision can by mutual consent, which can be inferred from their conduct, acquiesce in the proceedings of the arbitrator who may submit his award beyond the date fixed by the Court for returning the same. Such a consent would be inferred from the fact that the parties conducted the case and took a willing part in the proceedings before the arbitrator though the date fixed for the filing of the award had expired. AIR (Vol 23) 1936 Lah 466: 33 PLR 725: 163 Ind Cas 380.

——Sch, 2, Para 15 — It is enough if award is made in time.

Paragraph 15 of Sch. II, only means that an award might be set aside if it was not made in time. There is nothing in the paragraph to indicate that there is any necessity for the award being submitted or delivered or filed in time in order to maintain its validity. AIR (Vol 22) 1935 Cal 359: 38 CWN 784: 156 Ind Cas 165.

——Sch. 2, Para 15 — Award going beyond the terms of reference—Whether enforceable.

An award of the arbitrators, so far as it travels beyond the reference and not warranted by the terms of reference cannot be enforced. AIR (Vol 21) 1934 All 117: 151 Ind Cas 338 (DB).

——Sch. 2, Para. 15 — Suit.

Where the agent without authority referred to the arbitration and the principal became aware of it long after the proceedings were over, the principal can institute a suit challenging the validity of the award and need not apply under Para. 15 of Sch. II (1933) 1933 MWN 1475.

——Sch. 2, Para 15 — Where an award not made through the Court contains mistakes, the Court will not set it aside or interfere to rectify it. AIR (Vol 18) 1931 Mad 619: 1931 MWN 451: 34 MLW 507: 133 Ind Cas 522 (2) (DB).

——Sch. 2, Para 15 Compromise of mortgage suit—Decree on Commissioners' report— Mistake in allotment by Commissioners—Suit to set aside decree—Maintainability.

A suit on a mortgage of a share of a tauzi land was compromised by a petition presented to Court under

which the mortgagee was to get 25 bighas of the tauzi land mortgaged. The Comissioners appointed under the compromise petition to make pattibandi by a mistake induced by opposite party gave to the mortgagees only 10 bighas instead of 25 and reported to the Court accordingly. The Court passed the decree incorporating the report of the Commissioners. Mortgagees applied unsuccessfully for amendment of the decree and so instituted a suit for declaration that the decree incorporating the report of the Commissioners was contrary to terms of compromise and so liable to be set aside and prayed for fresh pattibandi. It was contended that the suit was not maintainable and the allotment could not be distrubed.

Held, that the suit was maintainable and as the decree as passed did not represent agreement of the parties and the decree could be modified without disturbing the allotment already made. AIR (Vol 17) 1930 Pat 155 : 117 Ind Cas 315 : 8 Pat 726 : 10 PLT 164 (DB).

——**Sch. 2, Para 15 — Reference not in writing.**

An award cannot be set aside merely because the reference to arbitration is not made in writing. AIR (Vol 12) 1925 Oudh 269: 80 Ind Cas 7: 11 OLJ 570: 28 OC 74.

——**Sch. 2, Para 15 — Application dismissed for default— Effect.**

Where defendants were not present to prosecute their application to set aside their award the decree passed against them is not an ex parte decree but their application is only dismissed for default. AIR (V 11) 1924 Pat 603 : 83 Ind Cas 26 : 1924 PHCC 170: 3 Pat 839: 6 PLT 212 (DB).

——**Sch. 2, Para 15 — An Order superseding arbitration.**

It is obligatory on the Court, in setting aside the award, to make an Order superseding the arbitration AIR (Vol 8) 1921 Pat 161: 61 Ind Cas 390: 2 PLT 277 : 6 PLJ 287 : 1921 PHCC 170 (DB).

——**Sch. 2, Para 15 (1) (c) — Award after time— Provision for extension.**

The mere fact that the award is not given within the specified time is not sufficient for refusing to file the agreement in Court especially where there is a provision in the agreement, allowing an extension of time. AIR (Vol 6) 1919 Lah 231: 155 PR 1919: 55 PWR 1919: 51 Ind Cas 636. (DB).

——**Sch. 2, Paras 15 (1) (b) —Minor—Arbitration— No representation of minor.**

The principles of O. 32, R. 11 apply to references to arbitration made out of Court on behalf of a minor . A minor can sue to set aside an award made at the instance of a guardian who was grossly negligent and acted fraudulently in conducting the proceedings. The award is invalid if the minor who is a party is not properly represented and a Court can set it aside. The court can refuse to file the award on objection being taken by the minor. AIR (Vol 6) 1919 Mad 1029 : 34 MLJ 71 : 23 MLT 89 : 45 Ind Cas 763 (DB).

——**Sch. 2, Paras. 15 and 8 — Award made out of time — Validity — Court competent to set aside.**

An award made out of time is not necessarily void. it is only voidable and becomes binding if not sought to be set aside within ten days after it is filed. It is the Court which can extend time under para 8, and though its power under it is discretionary, extension of time by agreement of parties, is not negatived thereby.

Parties, who acquiese in the making of the award by arbitrators having power to make one even out of time, can not impeach it on the ground that it was made out of time. The determination by Court as to the validity of an award made out of time, though erroneous, will not be interfered with by civil Court under S. 115. AIR (Vol 5) 1918 Pat 93: 4 Pat LJ 265: 50 Ind Cas 52 (DB).

——**Sch. 2, Para 15 (2) — Suit to set aside award— Review.**

An award which was impeached subsequently owing to the defendant's having given false evidence supporting fraudulent accounts given before arbitrator, which fact was based on a document of which plff. had possession before award, was held not liable to be set aside by a subsequent suit but open to review only.

Quaere:— Whether an award could be set aside by separate suit. Obiter:—A suit to set it aside will lie for fraud if a party falsely personates in arbitration proceedings or has no notice of proceedings. AIR (Vol 2) 1915 Lah 153: 98 PR 1915: 179 PWR 1915: 31 Ind Cas 196. (DB).

——**Sch. 2, Para 15 — Remainder, if good can be maintained**

Where a separate and separable portion of an award is bad, the remainder if good, will be maintained. AIR (V 1) 1914 PC 105 : 36 All 336 : 17 OC 120 : 18 CWN 755 : 1 OLJ 249 : 12 ALJ 537 : 16 Bom LR 413: (1914) MWN 472: 16 MLT 35: 27 MLJ 181: 19 CLJ 494: 23 Ind Cas 625.

(On appeal from (1913) 14 OC 308 : 13 Ind Cas 520.)

——Sch. 2, Para. 15 (1) (a) — An arbitrator should make and retain for subsequent use, notes of proceedings before him; but even in their absence an award should not be set aside at the instance of one of the parties who must be held to have known the general course of procedure and who did not make any protest until after making of the award with the terms of which he was not satisfied. AIR (V 1) 1914 PC 105 : 36 All 336 : 17 OC 120: 18 CWN 755: 1 OLJ 249: 12 ALJ 537: 16 Bom LR 413: (1914) MWN 472: 16 MLT 35: 27 MLJ 181: 19 CLJ 494: 23 Ind Cas 625.

(On appeal from (1913) 14 OC 308 : 13 Ind Cas 520.)

——Sch. 2, Para. 15 (1) (a) — Neither party to a submission can revoke it except for good cause shown. AIR (V 1) 1914 UB 53 : 2 UBR 26 : 7 Bur LT 279 : 27 Ind Cas 31.

——**Sch. 2, Para 15 (1) (a) — Admission of evidence —Mistake.**

The honest though mistaken admission or evidence in violation of a rule of evidence would not be a ground for setting aside an award. 38 Bom 60: 15 Bom LR 392: 19 Ind Cas 934 (DB).

——Sch. 2, Paras. 15 (1), 12 and 14 — An application to set aside an award falls within para 15 and does not include proceedings under paras 12 and 14. (1913) MWN 338: 13 MLT 349: 24 MLJ 483: 19 Ind Cas 496.

——Sch. 2, Para 15 (1) (a) The Court cannot interfere with an arbitrator's decision on the ground that it is incorrect or partial. An award will be set aside at once on the slightest irregularity inconsistent with general principles of equity and good conscience but not for a mere technical irregularity. (1912) 14 Bom LR 1007: 17 Ind Cas 696

——Sch. 2, Para 15 (1) (c) — Award after supersession.

Award after supersession by Court, can be set aside under Para. 15 (1) (c). 9 MLT 251 : 21 MLJ 263 : (1911) 1 MWN 151 : 9 Ind Cas 173 (FB).

——Sch. 2, Para. 15 — Arbitration — Award — Grounds for setting aside — Error of law.

An award,which was open to no reproach but which affected the interests of a minor, was set aside at the minor's instance on the grounds that he (the minor) derived an inequality of benefit under it and that the arbitrators had, in making the award, taken an erroneous view of the law. On appeal:—

Held, that neither ground was sufficient to invalidate the award: since the validity of the award must be determined in the light of the circumstances as they existed at its date, and not as they transpired some years after it had been passed by the arbitrators. (1910) 12 Bom LR 984. (987) (DB).

17. Validity of reference.

——Sch. 2, Para 15—Reference of dispute pending appeal — Subject-matter of reference — Award, validity of.

Where a suit for possession of land on the basis of sale is decreed by the trial Court and an appeal is filed by the defendant and the dispute between the parties is refered to arbitration through the Apellate Court, it is the entire dispute that is referred to arbitration and not only the subject-matter in appeal and hence an award directing the refund of consideration to the plaintiff and return of land to the defendant cannot be impugned. AIR (V 31) 1944 PC 83 : (1944) ALJ 384: (1944) 2 MLJ 227: 1944 AWR (CC) 47: 57 MLW 518: 11 BR 119: ILR (1945) Kar PC 1: 215 Ind Cas 316.

——Sch. 2, Para. 15 — All parties interested not joining — Reference, if bad.

Where a person interested does not join in the agreement to refer the order of reference is bad. AIR (Vol 22) 1935 All 1014: 1935 AWR (HC) 1182: 159 Ind Cas 441.

——Sch. 2, Para 15 — Arbitration without consent of all interested parties—Decree in terms of award —Appeal, competency of.

Where the reference itself is impugned for want of consent of all the parties interested, there is no valid reference to arbitration and an appeal lies against the decree passed on the terms of the award.

Paragraph 15 of Sch II obviously assumes a valid reference to arbitration and only contemplates cases where the properiety of an award on the basis of such a reference is in question. AIR (Vol 18) 1931 Cal 109: 34 CWN 813: 130 Ind Cas 137 (DB).

——Sch. 2, Para 15 — Pleader arbitrator— Inference of prejudice— Circumstances.

Where both the arbitrators are pleaders, the mere fact that one of them has appeared for the other in various cases without charging fees does not show that the latter was under the former's obligation and would therefore not take a fair view of the matter under arbitration. AIR (Vol 17) 1930 Snid 190: 123 Ind Cas 694 (DB).

——Sch. 2, Para 15 — Filing suit after reference— Effect.

The filing of a suit regarding the same subject-matter does not ipso facto render the arbitrators functi officio and their award void. AIR (Vol 11) 1924 Sind 105: 80 Ind Cas 969: 17 SLR 15.

——Sch. 2, Para 15 (1) (a) A pleader is not incompetent to be an arbitrator simply because on some occassions he was engaged by one of the parties as his pleader AIR (Vol 5) 1918 Cal 399: 39 Ind Cas 767. (DB).

——Sch. 2, Para 15 (a) An irregularity in the course of the reference on the part of the arbitrator, will not vitiate the award where the parties knowing of such irregularities, have chosen to waive their objections on that score. (1911) 14 CLJ 188: 11 Ind Cas 481.

——Sch. 2, Para. 15 (2) — Award not filed in time.

If the award is not submitted to the Court on the day fixed the reference is ineffectual. (1910) 12 CLJ 624 : 8 Ind Cas 1107 (DB).

(But see contra AIR (V 3) 1916 Lah 80 : 44 PWR 1916 : 34 Ind Cas 177.)

——Sch 2, Para 15 (1) (b) — Application to file an award— Fraud Undue influence — One of the parties a minor— Duty of Court.

Where one of the parties to a reference is a minor and an application is made to the Court by another party to file the award, the Court before filing the award, should decide definitely whether the reference was for the benefit of the minor so as to be binding on him. (1910) 7 Ind Cas 31 (Cal) (DB).

——Sch. 2, Para. 16.

See also Civil P. C., Ss. 96 and 104.

1. Appeal.
2. Applicability and scope.
3. Court as arbitrator.
   See also N. 1.
4. Decree according to award.
   See N. 1.
5. Duties and powers of Court.
6. Effect of award.
7. Expiry of period for objection.
8. Functions of arbitrator.
9. Modified award.
   See N. 1.
10. Objections to award.
11. Procedure.
12. Revision.
13. Second appeal.
    See also, N. 12.
14. "Suit".

1. Appeal.

(a) General.
(a-1) Appeal not maintainable.
(b) Court as arbitrator.
(c) Decree according to award.
(d) Invalid award.
(e) Modified award.

(a) General.

——Sch. 2, Para. 16 — Decree not suggested to be in excess of or not in accordance with award — Appeal.

Where the reference is pending at the commencement of the Arbitration Act the case will be governed by the old law and not by the Arbitration Act, and if it is not suggested that the decree is either in excess of or not in accordance with the award, no appeal would lie under the provisions contained in Sch. II, of the Civil P. C. AIR (Vol 30) 1943 Pat 318: 10 BR 299: 210 Ind Cas 565 (DB).

——Sch. 2, Para. 16 — Where there is no separate order passed filing the award, the appeal from the decision of the Court passing a decree upon the award should be treated as an appeal which is in substance an appeal from an implied order filing the award. AIR (Vol 28) 1941 Cal 202: ILR (1940) 2 Cal 551: 44 CWN 1034: 194 Ind Cas 610.

——Sch. 2, Para. 16 — Schedule II, Para. 16 (2), Civil P. C., contemplates an appeal from a decree. AIR (Vol 28) 1941 Oudh 598: 1941 OWN (CC) 1077: 1941 AWR (CC) 329: 17 Luck 17: 196 Ind Cas 496 (DB).

——Sch. 2, Para. 16 — Decree in accordance with Court's modification of award — Appeal, if lies against it.

Although under para. 16, Sch. II, Civil P. C., no appeal can lie from a decree in accordance with an award, yet when the trial Court has not pronounced judgment according to the award, but in accordance with its modification of the award, from such a decree an appeal will lie. AIR (Vol 22) 1935 Pat 109: 1 BR 232: 153 Ind Cas 764 (DB).

——Sch. 2, Paras. 16 (1) (2), 15 — Decree passed on award — When can be challenged.

The only grounds on which a decree passed on an award can be challenged are on the grounds of the decree being in excess of or not in accordance with the award, that is to say, what is open to challenge is not the award but the decree. AIR (Vol 22) 1935 Pat 16: 1 BR 124: 152 Ind Cas 838.

——Sch. 2, Para. 16 — Valid submission to arbitration — Award made — Appealability.

Para. 16 of Sch. II, contemplates an award made in a case where there has been a valid submission to arbitration and an appeal does not lie when there is such a valid submission.

Per Mukerji, J. — Where there is no valid submission an appeal will lie. (1930) 52 CLJ 298 : AIR (Vol 18) 1931 Cal 211 (DB).

——Sch. 2, Para. 16 — Appeal from decree.

Para. 16 contemplates an award made in a case where there has been a valid submission to arbitration. Where the reference itself is impugned for want of consent of the parties interested an appeal will lie against the decree passed on the basis of the invalid award. 34 CWN 813: AIR (Vol 18) 1931 Cal 109 (DB).

——Sch. 2, Para. 16 — Appeal lies where a decree is passed without allowing the parties 10 days' time to file their objections to the award. AIR (Vol 17) 1930 Rang 307 (DB).

——Sch. 2, Para. 16 — Decision on local inspection.

Where a judgment-debtor caused removal of his property from the decree-holder's land through a bailiff, and where the bill submitted by the bailiff being deemed excessive, the Munsiff before whom the case was, was asked to decide the matter personally by a visit to the spot and where it was contended that the Munsiff's decision on the matter could not be challenged in appeal he having been appointed an arbitrator.

Held that the Munsiff was not and could not be so appointed and as such his decision could be challenged in appeal, and that he was merely asked to inspect the locality, the parties agreeing to accept his decision. 118 Ind Cas 816: 6 OWN 391: AIR (Vol 16) 1929 Oudh 287.

——Sch. 2, Para. 16 — The rule prohibiting an appeal against a decree based on and in accordance with an award does not apply to a case where the objection is to the inherent jurisdiction of the Court to entertain the suit. 112 Ind Cas 262: 10 LLJ 242: AIR (Vol 15) 1928 Lah 730.

——Sch. 2, Para. 16 — Reference without consent — Reference without consent of one party — No appeal lies.

Ashworth, J. — No appeal lies from an award made on reference, to which one of the parties had not consented.

Mukerji, J. — I do not see how a party, who never agreed to refer his dispute to arbitration, can be estopped from appealing on the ground that he was no party to the reference. 102 Ind Cas 236: 49 All 812: 25 ALJ 606: AIR (Vol 14) 1927 All 563 (DB).

——Sch. 2, Para. 16 — Where a Court remits a part of the award for reconsideration and upon failure of the arbitrators passes a decree partly on the award as originally made and partly on his own findings, an appeal lies. 96 Ind Cas 531: 24 ALJ 705: AIR (Vol 13) 1926 All 567 (DB).

——Sch. 2, Para. 16 — Where a Court has passed a decree in terms of an award after having heard arguments only but without having given sufficient opportunity to the objector to produce evidence to substantiate his objection, an appeal to set aside the decree is competent. AIR (V 12) 1925 Rang 238 : 88 Ind Cas 339 : 4 Bur LJ 39 (DB).

——Sch. 2, Para. 16 (2) — Appeal — Private award — Filing.

An appeal lies from an order directing a private award to be filed even though the Court has passed a judgment and decree upon the award not in excess of the award. AIR (V 3) 1916 All 113 : 38 All 380 : 14 ALJ 481 : 35 Ind Cas 833 (DB).

——Sch. 2, Para. 16 (2) — Appeal — Award — Old and New Code.

Where a reference to arbitration was made under S. 506 (Code, of 1882) and an award made and decree passed thereon after New Code came into force; the latter Act must decide the question of appeal. A decree passed in terms of an award under the Old Code would be appealable if the award is void ab initio. A Court passing a decree under Para. 16 in terms of an invalid award, must be presumed to have decided that it was valid since the Court has jurisdiction to decide whether or not it has jurisdiction and that decision is final. (1913) 6 SLR 163 : 19 Ind Cas 348 (DB).

——Sch. 2, Para. 16 (2) — Appeal — Award — Setting aside — Objection to.

The appellant can traverse the order of the Court setting aside an award of the arbitrators for misconduct in appeal from the final decree. 97 P R 1912 : 106 PWR 1912 : 133 PLR 1912 : 15 Ind Cas 62 (DB).

(a-1) Appeal not maintainable.

——Sch. 2, Para. 16 — Decree in accordance with award — Award in excess of powers conferred on arbitrators — Appeal, if lies.

There is ample provision in Paras. 14 and 15 of Sch. II, Civil P. C., to enable the Court, to which the award is submitted, to refuse to give effect to the award if in its opinion it is either void or invalid or illegal. If, however, the award is accepted, it means that in the opinion of the Court, it is neither void nor invalid and the Legislature does not appear to have intended that the opinion of the Court should be challenged in appeal. Paragraph 16 merely gives effect to the principle of finality of awards and the intention of the Legislature evidently is that an award should be subjected to the scrutiny of one Court only, namely, the Court through which reference is made to arbitrator and not that Court and an Appellate Court. No appeal, therefore, lies from the decree when it is in accordance with the award, even if the award itself is in excess of the powers conferred upon the arbitrators. AIR (V 26) 1939 Pat 526 : 18 Pat 193 : 6 B R 88 : 185 Ind Cas 52 (DB).

——Sch. 2, Para. 16 (1) (2) — Same Pleader for all defendants — Pleader signing agreement to refer — Award, validity — Appeal, if lies.

Where one and the same Pleader is acting for all the defendants and he has the power to enter into a compromise and in signing the agreement to refer, he has not stated that he was signing only on behalf

of some of the defendants and none of the defendants has taken any exception to the arbitration proceedings, all the defendants must be held to have been parties to the agreement and there is no ground on which the validity of the agreement to refer or the award can be challenged and hence there is no right of appeal from the decree on the award even if it be assumed that an appeal lies in the case of a decree passed after an invalid reference. AIR (V 22) 1935 Pat 16 : 1 BR 124 : 152 Ind Cas 838.

——Sch. 2, Para. 16 — Objection that party has not signed — Appeal, competency of — Revision, whether lies.

The question of the invalidity of a reference to arbitration from whatever cause including the failure of party to sign, cannot form the subject-matter of an appeal.

A revision also does not lie in such cases. AIR (V 20) 1933 Lah 426 : 14 Lah 165 : 34 PLR 393 : 143 Ind Cas 585 (DB).

——Sch. 2, Para. 16 (2) — Appeal by person not party to reference, competency of.

Under Para. 16 (2), Sch. II, Civil P. C., no appeal lies form a decree which is in accordance with an award made by an arbitrator and the mere fact that the validity of the award is impeached by the appellant on the ground that he was not a party to the reference does not take the case out of the ambit of this rule. AIR (V 18) 1931 Lah 126 : 32 PLR 44 : 12 Lah 408 : 131 Ind Cas 348 (DB).

——Sch. 2, Para. 16 — Held, that no appeal lies from a decree purporting to follow an award except on the ground that it is not based on an award or in other words there is no award. (1931) 12 Lah LJ 89 : 132 Ind Cas 180.

——Sch. 2, Para. 16 — An award must be in conformity with Clause 1 of Para. 16 in order that a decree passed on it might be unappealable. AIR (V 14) 1927 All 120 : 98 Ind Cas 993 : 49 All 178 : 24 ALJ 1036.

——Sch. 2, Para. 16 — Objections by new parties — Submission to arbitration proceedings — Effect.

Where at a time when the objections to the award are under consideration, certain persons apply to be made parties to the suit and file detailed objections against the award in the same manner as if they had been parties to the suit and to the arbitration proceedings at an earlier stage of the litigation, they must be deemed to have submitted themselves to the arbitration proceedings and placed themselves in the same position in which they would have been had they been parties to the suit from its commencement. They cannot subsequently be permitted to turn round and repudiate their previous conduct and urge that they are not bound by the result of the decision of the Court on the objections raised by them and, no appeal lies against the decree at their instance. AIR (V 14) 1927 Lah 362 : 104 Ind Cas 202 : 8 Lah 693 : 9 LLJ 569 (DB).

——Sch. 2, Para. 16 — No appeal lies from an award on grounds other than those specified in para. 16 (2). AIR (V 13) 1926 Pat 164 : 91 Ind Cas 799 : 7 PLT 264 : 1925 PHCC 324 (DB).

——Sch. 2, Para. 16 — An order adjudicating upon objections to an award under the arbitration Act is nowhere described as an order filing or refusing to file an award and is not appealable under any law. AIR 1921 All 273, Dissented from. AIR (V 9) 1922 Lah 369 : 69 Ind Cas 583 : 3 Lah 296 (DB).

——Sch. 2, Paras. 16 (2), 20, 21 — Appeal — Award by arbitrator — Right of appeal.

Where the paries to a suit got frequent adjourn ments stating that the dispute had been referred to an arbitrator, no appeal lies against the decree passed by the Court in terms of the award unless it is in excess of or not in accordance with the award, in asmuch as the orders passed by the Court on the various applications for adjournments amounted in substance to a reference of the dispute between the parties, by the court to arbitration. AIR (V 4) 1917 All 71 : 39 All 401 : 15 ALJ 452 : 39 Ind Cas 730 (DB).

——Sch. 2, Para. 16 (2) — Appeal — Objections to the validity overruled.

Though a court referring matter to arbitration can set aside an invalid award, yet when it overrules the objections to its validity and passes a decree in terms of such award, no appeal lies from such a decree except when the decree is in excess of or not in accordance with the award. AIR (V 3) 1916 Pat 190 : 1 Pat LJ 306 : 2 Pat LW 377 : 35 Ind Cas 358 (DB).

——Sch. 2, Para. 16 (2) — Appeal — Order recording award.

No appeal lies against the order of a Court recording an award. AIR (V 3) 1916 Pat 156 : 1 Pat LJ 90 : 2 Pat LW 411 : 34 Ind Cas 105 (DB).

——Sch. 2, Para. 16 (2) — Objections to award — Ex parte deft. — Invalid award.

A person is not a party interested within Para. 16, if he did not concur in the reference to arbitration and if he remained ex parte at the hearing he is not entitled to appeal against the decree. A person's remaining ex parte deprives him of any equitable right to have it set aside.

Per Phillips, J:— No appeal lies against a decree even embodying an invalid award except according to Para. 16 (2).

Per Tyabji, J :— An appeal lies against a decree on an award purporting to bind a person who was not a party to the submission or when the award is made without any agreement to refer at all. AIR (V 3) 1916 Mad 691 : 18 MLT 374 : 2 LW 960 : (1915) MWN 847 : 31 Ind Cas 206 (DB).

——Sch. 2, Paras. 16, 12, 17, 18, 19 and 20 — Reference by Court — Application under Para. 20 — Defective award — Joint application for reference by Court — Award.

Where in proceedings under Para. 20 the defective award was set aside by a joint application of the parties and the matter was referred to now arbitrators who delivered their award in time and the Court passed a decree on the award, held, that the award was made on an order of reference by the Court on an agreement by the parties to refer to arbitration; Paras. 17 to 19 applied to the case and no appeal lay from the decree. AIR (V 1) 1914 Lah 145 : 28 PR 1914 : 14 PLR 1914 : 20 PWR 1914 : 21 Ind Cas 925 (DB).

——Sch. 2, Para. 16 (2) — Decree dismissing suit— Appeal.

Where the Court on an objection to the award that the Court had no jurisdiction to try the suit, dismissed the suit, an appeal lies, but where the Court separates the award where it is separable and passed a decree in accordance with the valid part of the award, no appeal lies especially where the party affected did not object to such separation. 52 PR 1913 : 16 PWR 1913 : 14 PLR 1912 Sup: 17 Ind Cas 684 (DB).

(b). Court as arbitrator.

——Sch. 2, Para. 16 — Judge constituted arbitrator — Finality of decree.

Parties to a suit agreed that the trial Judge should decide the case after hearing certain docu-

mentary evidence and making an inspection of the locality and further agreed to accept his decision.

Held, that there can be no appeal from the decision of the Court in this case because the Judge was constituted an arbitrator and his decision was virtually an award. AIR (V 16) 1929 All 577: 117 Ind Cas 107: 1929 ALJ 1024: 51 All 886 (DB).

——Sch. 2, Para. 16 — Where parties agreed to shut out oral evidence and to substitute for it the inspection that the Judge might make of the locality, appeal from the decision of the Court is competent, because the Judge was not constituted an arbitrator. AIR (V 16) 1929 All 116: 113 Ind Cas 762.

(c). Decree according to award.

——Sch. 2, Para. 16 — In suit under Oudh Rent Act (XXII of 1886), against X, Y was made pro forma defendant — **Claim by Y from X in his written statement — No prayer that Y should be added as plaintiff nor Y offering to pay court-fee on his claim — Issue on plea of Y not framed — Suit referred to arbitration — Arbitrator finding certain sum due to Y from X but saying it lay in discretion of Court to pass such decree — Application by Y asking time to pay court-fee — Application refused and decree passed in terms of award — Appeal by Y — Decree held was in conformity with award and appeal was barred.**

In a suit filed by plaintiff under S. 108(15), Oudh Rent Act, against X, Y was made a pro forma defendant. Y, in his written statement claimed a certain sum from X but he made no prayer to be transferred as plaintiff nor offered to pay court-fee on his claim. No issue was framed on the plea raised by Y. The case was referred to arbitration and the arbitrators decided the questions to which the issues related but they also remarked that a certain sum of money was due to Y from X, and that it lay with the Court to pass a decree in favour of Y if within its discretion it thought fit to do so. On the date when the award was to be confirmed Y applied for time in order to enable him to pay the Court fee on his claim, but the Court refused to grant time and passed a decree in plaintiff's favour in terms of the award. No decree was passed in favour of Y. In appeal by Y it was contended that the decree was not in conformity with the arbitration award as it did not incorporate a decree in favour of Y though the award found that a sum of money was due to him:

Held, that since Y was not plaintiff in the suit and no issue was framed concerning his claim, the reference of the case to arbitration must be deemed to have been a reference of the plaintiff's claim, and in the case as framed no decree could have been passed in favour of Y. Moreover, the award left it to the discretion of the Court to allow Y to become the plaintiff and pay the Court-fee or not. Hence the decree was in conformity with the award and the appeal was barred by Sch. II Para 16 Civil P. C. AIR (Vol 33) 1946 Oudh 86: 1945 OWN (CC) 353.

——Sch. 2, Para 16 — Paragraph 16 (2) of Sch. II Civil P. C. does not provide that the decree which is to follow upon the judgment must be the decree of a Civil Court. AIR (V 28) 1941 All 101 : (1941) ALJ 63: 1941 OWN (CC) 393: 1941 RD 185: 1941 AWR (CC) 25: ILR (1941) All 198: 193 Ind Cas 17 (FB)

——Sch. 2, Paras. 16 (2), 15 (1) (c) — Decree based on judgment in accordance with award — Appeal, when lies.

Under Para 16 (2) Sch II, Civil P.C. no appeal lies from a decree based upon judgment pronounced in accordance with an award except upon one or other of the two grounds therein prescribed. AIR (Vol 22)1935 Rang 94: 12 Rang 675: 156 Ind Cas 414 . (DB).

——Sch. 2, Para 16 — Revision and appeal.

Reference to arbitration — Consent of parties — Decree passed in accordance with award —Award becomes final — Decree is not open to either appeal or revision. AIR (Vol 19) 1932 Oudh 156: 7 Luck 642: 9 OWN (CC) 191: 137 Ind Cas 151 (DB).

——Sch 2, Para 16 — Appeal from decree.

No appeal lies against the decree which is in accord with the terms of the award and particularly when the trial Court entertained and decided all the objections preferred against the validity of the award. AIR (Vol 16) 1929 Nag 264: 26 NLR 168: 119 Ind Cas 694.

——Sch 2, Para 16 (2) — Appeal — Want of consent of parties interested.

An appeal lies against a decree made in accordance with an award where the reference itself is impugned for want of consent of the parties interested. AIR (Vol 6) 1919 Cal 232: 49 Ind Cas 262 (Cal).

——Sch. 2, Para. 16 (2) — Appeal —Arbitrator appointed without agreement of parties — Decree — Revision.

No appeal or revision will lie against the decree based on an award on the ground that the arbitrator was not properly appointed. AIR (V 2) 1915 Mad 484 : (1914) MWN 865 : 25 Ind Cas 583.

——Sch. 2, Para. 16 (2) — Apppeal — Award — Objection.

A decree based on an award is not open to appeal on the ground that there was no valid award in law or that the arbitration was guilty of misconduct. (1913) 18 CLJ 35 : 18 CWN 626 : 17 Ind Cas 7 (DB).
Also (1913) 19 Ind Cas 405 (Cal) (DB).

——Sch. 2, Para. 16 (2) — Award — Decree on — Appeal.

No appeal lies from a decree based on an award though the award could have been set aside by reason of its having been made beyond the time allowed. (1912) 39 Cal 822 : 18 Ind Cas 69 (DB).

——Sch. 2, Para 16 — Refusal of arbitrator to sign award — Legality of award — Decree passed on such award — Appeal.

Held that no appeal lies from the decree of a Court passed in accordance with the award in a case where five arbitrators were nominated and of the arbitrators appointed by one party refused to sign it, but no misconduct was alleged against the umpire and the other two arbitrators who did sign it. (1910) 7 ALJ 890 (892, 893) : 7 Ind Cas 99 (DB).

——Sch. 2, Para. 16 (2) — Appeal — Award.

No appeal lies from a decree, in accordance with an award. (1910) 5 Ind Cas 621 (All) (DB).
(Also (1912) 9 ALJ 258 : 14 Ind Cas 455).

——Sch. 2, Para 16 (2) — Appeal — Award — Consent.

Interference of Court of appeal with a decree passed in accordance with award, is ultra vires ab initio, even with the consent of the parties. 73 PWR 1910 : 6 Ind Cas 963.

——Sch. 2, Paras. 16 (2) and 20 — Appeal — Decree on award subsequent to presentation of application under S. 525.

A decree passed in accordance with an award made subsequent to the presentation of an application under S. 525, Old Code is appealable. 89 P R 1909 : 136 PWR 1909 : 3 Ind Cas 597 (DB).

(d) Invalid award.

——Sch. 2, Para. 16 — Invalid submission.

No appeal lies from a decree in accordance with the award even on the ground that the submission was invalid owing to want of concurrence of all the parties. 28 PR 1916, held obiter; 25 CWN 832, not Foll. AIR (V 16) 1929 Lah 476 : 116 Ind Cas 559 : 10 Lah 871 : 31 PLR 165 (DB).

——Sch. 2, Para. 16 — Chosen arbitrators — Wide powers — Additional arbitrators — Help if can be enlisted.

Two chosen arbitrators enlisted the services of two additional arbitrators, though under the terms of reference they had no power to do this. But the award was made and signed only by the two arbitrators originally referred to. These gentlemen were given very wide powers,

Held, even if they called in two other persons to assist them, their award could not be attacked on the ground that it was no award at all, and the case was subject to the ordinary rule, which is that a decree in consequence of an award, to which para. 16, Sch. 2 applies, is not appealable. AIR (V 16) 1929 Rang 225 : 7 Rang 269 : 119 Ind Cas 212 (DB).

——Sch. 2, Para. 16 — Procedure.

No appeal lies from a decree passed in accordance with any invalid award under para. 16 (2), Sch. 2. The remedy lies by taking proceedings to have the invalid award set aside by the Court which made the reference under para. 15 (c). AIR (V 14) 1927 Lah 362 : 104 Ind Cas 202 : 8 Lah 693 : 9 L L J 569 (DB).

——Sch 2, Para. 16 — Reference by pleader — No special authority — Award is invalid and decree thereon is appealable as ordinary decree — Principle explained.

A restrictive provision like the one in paragraph 16 (2) of the Second Schedule of C. P. Code must be strictly construed. The Legislature must be taken to have contemplated that the decree in respect of which paragraph 16 (2) provides that there should be no appeal must be one which has been passed after a substantial compliance with the preceding provisions of the schedule. Where the validity of reference is attacked, the Court in order to determine whether an appeal lay against the decree in such a case must decide whether the reference was valid or invalid, and that if it were valid the decree will be a decree under the second schedule and no appeal will lie therefrom if it is passed in terms of the award. If the reference is not valid the decree will not be a decree under the second schedule and will be open to appeal like any other decree not coming under the schedule. Therefore in order to decide whether in such cases an appeal lies or not it is necessary for the Courts to decide the question of the validity of the reference. Where it was found that reference to arbitration was made by a pleader who had no special authority in that behalf.

Held, that the arbitrators had no jurisdiction to take cognisance of the matter in dispute between the parties and their award though made upon a reference through the intervention of the Court, was null and void on the ground that it was made upon a reference to which all the parties interested did not agree as required by paragraph 1 of the second schedule and therefore an appeal lay from such decree as one from a decree not coming under the schedule. AIR (V 11) 1924 Nag 338 : 79 Ind Cas 48.

——Sch. 2, Para. 16 — Illegal part inseparable from legal part — Whole award is bad.

Where the award does not state either the facts found by the arbitrators or the grounds for their decision and it is, consequently, impossible to hold that the award proceeded solely on those grounds which entitled the arbitrators to exercise their jurisdiction under the arbitration clause, and not on any of the grounds which did not afford a basis for the exercise of that jurisdiction,

Held, that if the bad is not separable from the good, the whole is bad and the award is null and void. AIR (V 9) 1922 Cal 399 : 69 Ind Cas 342 : 34 CLJ 253 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Filing, not done in Court.

An award, though not filed in Court or though no deed of conveyance had been executed to give effect to its terms, is valid so as to vest title in parties. AIR (V 3) 1916 Oudh 281 : 18 OC 282 : 32 Ind Cas 465 (DB).

——Sch. 2, Para. 16 (2) — Appeal — Invalid award — Revision — When lies — No proper appointment of arbitrators.

No appeal lies against a decree based on an award except when it is not based on a valid award, but a Court will revise judgments or orders, not appealable, passed on award on the ground of material irregularity committed by the Court passing order or judgment using such revisional jurisdiction sparingly. Obiter. — If there is no legal appointment of arbitrators the award is nullity and appeal lies against the decree. AIR (V 2) 1915 Lah 253 : 28 PR 1916 : 11 PWR 1916 : 31 Ind Cas 700 (DB).

——Sch. 2, Para. 16 (2) — Appeal — Void award.

An award which does not comply with the provisions of Sch. II is void, the subsequent embodiment of the decision of the arbitrators on certain papers which already bore the signature of one of them and were signed subsequently by the others, vitiates the award, as also the absence of one of the arbitrators from a part of hearing. (1911) 14 CLJ 143 : 11 Ind Cas 898 (DB).

(e) Modified award.

——Sch. 2, Para. 16 (1) (2) — Limitation Act (IX of 1908), S. 5 — Award relating to extraneous matters — Decree on modified award —Appeal from decree, competency of — Conversion of appeal to one from order modifying award — Extension of time.

Apart from the provision contained in sub-Para. (1) of Para. 16 of Sch. II of the Civil P. C., there is no other provision under which judgment may be pronounced on a modified award. A judgment on a modified award must, therefore, be taken as pronounced under Sub-Para. (1), and Sub-Para. (2) bars the maintainability of an appeal against that judgment.

Where an appeal is preferred against the decree based on a modified award instead of against the order modifying the award under a bona fide belief that such appeal lies, it is a good ground to allow the appeal to be converted into one from the order modifying the award or to allow extension of time under S. 5, Lim. Act.

Plaintiffs sued for partition of two items of immovable property and certain specified movables. The defendant resisted the claim for partition alleging that all joint properties had not been brought into the hotchpot; and as a motive for the suit, which he alleged had been 'falsely' instituted, he asserted that the property in suit had been previously partitioned and that some paddy and the funds of a money-lending business which had been left unpartitioned had been misappropriated by the plaintiffs. He never asked for a partition of all joint properties or even of the said paddy or the proceeds thereof or of the said money-lending busi-

ness and the issues framed did not suggest any such course. The award of the arbitrators to whom the matter was referred dealt with the paddy and money-lending business:

Held, (i) that the award must be regarded as having dealt with matters outside the scope of the suit and not the subject-matter of the reference, and the trial Court was justified in modifying the award to that extent;

(ii) that the decree passed in terms of the modified award was not appealable even though the grounds of appeal were directed against the order modifying the award;

(iii) that the order modifying the award was, however, appealable under S. 104 (1) (c), Civil P. C., and the appeal from the decree could be converted into one from the order modifying the award. AIR (V 19) 1932 Cal 713 : 36 CWN 1069 : 138 Ind Cas 848.

——**Sch. 2, Para. 16 (2) — Appeal — Two awards one modifying the other.**

A decree setting forth two awards by the same arbitrator, one modifying the other should be set aside. AIR (V 6) 1919 Cal 1030 : 28 CLJ 275 : 46 Ind Cas 477 (DB).

——**Sch. 2, Para. 16 (2) — Appeal — Modified award.**

An appeal lies from a decree passed in accordance with a modified award. (1909) 12 O C 23 : 1 Ind Cas 328.

2. Applicability and scope.

——**Sch. 2, Para 16 — Suit under Oudh Rent Act (1886)—Applicability of Civil Procedure Code, Sch. II**

By virtue of S. 135 read with S. 116, Oudh Rent Act, Civil P.C. Sch. II applies to decree based on award on reference to arbitration in a suit under Oudh Rent Act and no appeal lies from such a decree AIR (Vol 33) 1946 Oudh 86: 1945 OWN (CC) 353: 1945 RD 540: 1945 AWR (CC) 124 and 243.

——**Sch. 2, Para. 16 (1) — Scope of.**

The words 'No application has been made to set aside an award' cover the case of an application for setting aside on the ground that there was no valid award and refers to a contingency other than the remission of an award. (1913) 18 CLJ 35: 18 CWN 626 : 17 Ind Cas 7 (DB).

——**Sch. 2, Para 16 (1) — Compromise— Arbitration proceedings— C.P. Code, O. 32, R. 3.**

Parties to a proceeding under S. 525, CPC 1882 may enter into a compromise by altering amending or adding to the award. Ss 373 and 375 C.P.C. 1882 apply to these proceedings as well. (1910) 38 PWR 1910: 5 Ind Cas 994.

——**Sch. 2, Para 16 (1) — Award — Meaning of.**

The word "award" in S. 522 CPC 1882 means the award as given by the arbitrators and not as modified by the Court under S. 518 CPC 1882 (1909) 12 OC 23: 1 Ind Cas 328.

3. Court as arbitrator.

See also Note 1.

——**Sch. 2, Para. 16 — Consent — Parties agreeing to abide by decision of Court — Such decision acts as an award.**

Where parties to a suit agree in a particular matter to abide by a decision of the Court and bind themselves finally by that such a decision is final and is binding on the parties and no appeal lies against it. The decision in such cases is in the nature of an arbitrator's award. It is not at all necessary that an application to abide by the decision of the Court should be in writing (1929) 113 Ind Cas 365: 11 NLJ 247.

——**Sch. 2, Para 16 (1) — Court appointed arbitrator—Award—Remedy of aggrieved party.**

Where the Court itself is appointed arbitrator no separate award need be passed inviting objections before passing a decree. Such an award is itself a decree and the remedy of the aggrieved party is by way of appeal and not by applications to the Court itself. AIR (Vol 2) 1915 Mad 1074: 26 Ind Cas 355 (Mad).

4. Decree according to award.

See N. 1

5. Duties and powers of Court.

——Sch. 2, Para. 16 — It is not the duty of the Court suo motu to fix a date for evidence in support of the objections to an award filed in Court. It is for the parties to move the Court if they want to produce evidence. AIR (Vol 13) 1926 Lah 584: 96 Ind Cas 108.

——Sch. 2, Para. 16 — An award having been made and an application to set aside on the ground of misconduct or any other illegality having been refused the Judge has no option but to pronounce a decree in accordance with it. AIR (Vol 11) 1924 All 788: 82 Ind Cas 16: 46 All 686: 22 ALJ 676: 5 LRA Civ 465.

——**Sch. 2, Para. 16 — Order on objections.**

The court hearing objections against an award is not a court of appeal sitting in judgment over the award. AIR (Vol 11) 1924 Oudh 400: 78 Ind Cas 378. 11 OLJ 142.

——**Sch. 2, Para 16 (2) — Decree — Costs — Fee not fixed before decree — Power of Court.**

Where an award provides for the payment by the plaintiff of the costs including the arbitrators fee, but the court omits to fix the fee before the decree is prepared, it is open to the court to fix the fee after the preparation of the decree. AIR (Vol 6) 1919 All 185: 17 ALJ 1053: 52 Ind Cas 653 (DB).

——**Sch. 2, Para. 16 (1) Objections — Evidence in support of — Court's duty.**

When a party to a suit objects to the award of arbitrators to whom the suit was referred, he should be given an opportunity to support his objections by appropriate evidence; and it is a material irregularity not to afford such opportunity. AIR (Vol 4) 1917 Oudh 240: 3 OLJ 583: 37 Ind Cas 400.

——**Sch. 2, Para. 16 (1) — Separation of valid part of award.**

Court can separate the valid part from the invalid part of an award. 16 PWR 1913: 52 PR 1913: 14 PLR 1912 (Sup): 17 Ind Cas 684 (DB).

6. Effect of award.

——**Sch. 2, Para. 16 — Duty of Court to give opportunity to substantiate objections — Finality of award — Award not final as to all statements made in it.**

Where a reference to arbitration is made during a suit and an award is filed, the party objecting to the award must be given an opportunity to adduce evidence to substantiate his objections, even though the award states that it was made after hearing both parties and considering all the evidence placed. An arbitrator's award is final only as regards the award itself. It is not final with regard to any statement made in it as to the conduct of the proceedings.

Obiter. — Paragraph 16 of Sch. II, Civil P. C., must be read in its plain meaning and means that a judgment cannot be pronounced in terms of an award within 10 days after the award had been received. AIR (Vol 21) 1934 Mad 619: 40 MLW 364: 67 MLJ 377: 152 Ind Cas 157.

——Sch. 2, Para. 16 (1) (c), S. 115 — Arbitration — Agreement to abide by decision of majority— Umpire not agreeing with either arbitrator—Decree on umpire's award—Validity.

Where the parties agree to be bound by the unanimous opinion of the arbitrators or by the opinion of the majority in case of difference, the Court has no power to force upon the parties the award of the umpire alone.

The parties agreed to refer their disputes to arbitration and appointed two arbitrators and an umpire. The agreement provided that the award should be given effect to with reference to the opinion of the majority. The defendants' arbitrator was of opinion that the suit should be dismissed. The plaintiffs' arbitrator awarded Rs. 18. The umpire gave an award for Rs. 205. The Court below passed a decree in accordance with the award of the umpire. The defendant applied to the High Court for revision :

Heid, (i) that the award was futile as there was no award of the majority;

(ii) but the decree passed on the basis of the award was, however, final under Para. 16 (1) (c), Civil P. C , and could not be challenged in revision. AIR (Vol 19) 1932 All 76: (1931) ALJ 906: 134 Ind Cas 30.

——Sch. 2, Para. 16 — Agreement not to object.

A clause in the Muchalika precluding the parties from bringing actions against the arbitrators are impeaching their award, unless for fraud, does not debar a party to the deed from moving to set aside the award for illegality on the face of it, though no fraud or collusion appeared. AIR (Vol 9) 1922 Mad 179: 71 Ind Cas 266: 45 Mad 466: 15 MLW 160: 1921 MWN 793.

——Sch. 2, Para. 16 (1) — Effect of award — Decree not passed — Effect — Breach of covenant — Damages.

The award of the arbitrators is as binding on the parties as the decree of court but it cannot be executed unless it is made a decree of court. If one of the parties to the award takes an objection and covenants to indemnify another, there is a cause of action to the latter for damages on breach of the covenant. AIR (Vol 7) 1920 Mad 615: 38 MLJ 470: 57 Ind Cas 982 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Extension of time after award.

A valid award on a voluntary reference is final and conclusive on all the parties and the Court cannot interfere with any portion of it e.g., extending the period of time in the award. AIR (Vol 5) 1918 Cal 554: 40 Ind Cas 609 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Defence to a civil suit.

An award can be put forward as a defence in a Civil suit regarding a matter in respect of which the award was made. AIR (Vol 5) 1918 Lah 239: 99 PR 1917: 173 PWR 1917: 43 Ind Cas 350 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Agreement — Tender in pursuance of — When defective.

An award is an agreement settled for parties by arbitrators and is subject to all the incidents of a private contract. When money is payable under it on a specified date, tender of the amount to the party entitled absolves the person making it from payment of interest. AIR (Vol 5) 1918 Mad 1314: (1917) MWN 308: 5 LW 718: 38 Ind Cas 295 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Decree passed on — Whether majority can alter the conditions.

Per Abdur Rahim J. (Napier J. Contra) A decree passed on an award is on the same footing as a contract and the mode of management of temple properties laid down therein can be altered by the majority of the members owning the properties. AIR (Vol 5) 1918 Mad 733: (1917) MWN 595: 41 Ind Cas 738 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Merger of claims in — Binding on parties.

A valid award operates to merge and extinguish all claims embraced in the submission and the award furnishes the only basis for determining the rights of the parties. Such an award is operative and binding on parties to reference even though neither party sought to enforce it by suit or application. 156 PWR 1913: 275 PLR 1913: 20 Ind Cas 185 (DB). also (1911) 5 SLR 240: 15 Ind Cas 819; also 13 SLR 75: 53 Ind Cas 337: AIR (Vol 5) 1918 Sind 13 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Matters not covered by arbitration.

The principle of finality which attaches to a decree passed in accordance with an award given on arbitration does not affect matters which are outside the arbitration proceedings. AIR (Vol 4) 1917 Mad 672: 39 Mad 853: 30 MLJ 465: 32 Ind Cas 881 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Res judicata — Subsequent suit for possession.

An award given by arbitrators in a mutation proceeding is no bar to a subsequent suit for possession in a Civil Court. AIR (Vol 3) 1916 All 358: 14 ALJ 85: 32 Ind Cas 761.

——Sch. 2, Para. 16 (7) — Effect of award — Bar to action on original demand.

All claims embraced in the submission, are put an end to by a valid award and the award furnishes the only basis for determining the rights of the parties and constitutes a bar to any action on the original demand. AIR (Vol 3) 1916 Low Bur 74: 8 LBR 157: 33 Ind Cas 554.

——Sch. 2, Para. 16 (1) — Minor — Sanction — Time for objections — Passing of decree before expiry.

A judgment ordering a decree in terms of an award on receipt of the award and before the expiry of the time allowed for making an application to set aside the award is illegal, notwithstanding that before the expiry of such time an application may have been made to set aside the award or that the parties may have stated that they had no objections to urge.

A decree passed on an award will not be binding on a minor who is a party, unless the Court considered and found that its terms were beneficial to the minor and the Court is not absolved from this duty by reason of its having considered it prior to the reference. AIR (Vol 3) 1916 Sind 79: 9 SLR 183: 34 Ind Cas 845 (DB).

——Sch. 2, Para. 16 (2) — Appeal — Judgment and decree — Finality of award — Revision.

A judgment and decree passed on an award under Para. 16 are neither appealable nor open to revision;

to secure finality for a judgment and decree passed on an award the conditions are that no application has been made within 10 days for setting aside an award, or such an application has been refused. AIR (Vol 1) 1914 Mad 675: 38 Mad 256: 14 MLT 314: 25 MLJ 507: (1914) MWN 142: 21 Ind Cas 308 (DB). Also AIR (Vol 3) 1916 Mad 963: 29 Ind Cas 512 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Oral award.

An oral award is as good as a written award. But until an award has been made a rule of court so as to give it the force of a decree, it cannot operate to transfer property. AIR (Vol 1) 1914 Oudh 149: 17 OC 108: 24 Ind Cas 542.

——Sch. 2, Para. 16 (1) — Effect of award — Equivalent to judgment — No decree — Grounds for impeaching.

An award is equivalent to judgment and whether it was passed into a decree or not, it is binding on the parties. A party to an award may urge and show that an award is not binding upon him for want of jurisdiction in the arbitrator. (1909) 33 Bom 401: 11 Bom LR 406: 2 Ind Cas 431 (DB).

Also (1909) 11 Bom LR 20: 5 MLT 226: 1 Ind Cas 105 (DB).

——Sch. 2, Para. 16 (1) — Effect of award — Persons not parties — Whether can claim benefit of.

Persons not parties to an award cannot enforce any of its provisions in their favour. (1909) 5 MLT 199: 4 Ind Cas 1114 (DB).

7. Expiry of period for objection.

——Sch. 2, Para. 16 (2) — Award — Objections rejected as time-barred — Decree in accordance with award — Revision — Failure to exercise jurisdiction — Limitation Act (IX of 1908), S. 12 (2), Sch. 1, Art. 158 — Period for obtaining copy of award, deduction of, in computing period for filing objections.

During the pendency of a suit, the parties agreed to refer the matter to arbitration. The arbitrators made the award which was filed in Court in the presence of the Pleaders of both parties and parties were warned to file objections, if any. More than ten days after the filing of the award, the plaintiff filed an objection. After some delay in hearing due to various causes, the Court refused to consider the objections on the ground that they were time-barred and a decree was passed in accordance with the award. The plaintiff applied in revision on the ground that the Court should not have held that the objections were time-barred, that on the same day that the objections were filed, he applied for a copy of the award and nine days elapsed before he got it and that if allowance were made for these nine days his objections would be in time:

Held, that no appeal was competent on the order but an application for revision lay against it.

Held, also, that where the Court refused to consider objections to an award though filed in time, it was a refusal to exercise a jurisdiction vested in him and that an application for revision against it should be allowed.

Held, further that the period requisite for obtaining the copy of an award should be allowed in computing the period for filing objections to an award. AIR (Vol 20) 1933 Rang 38: 142 Ind Cas 835.

——Sch. 2, Para. 16, Cl. (1) — Award — Acceptance by both parties — Power of Court to pass decree before expiry of ten days.

Clause (1) of Para. 16 of Sch. II of the Civil P. C., does not prevent the Court from passing a decree in terms of an award, before the expiry of ten days from the filing of the award, if the parties accept the award and agree that a decree might be passed in terms of the award. AIR (Vol 18) 1931 Nag 112: 27 NLR 240: 134 Ind Cas 282.

——Sch. 2, Para. 16 — Reference on partition dispute.

Where in a dispute of certain partners referred to arbitrators, two partners compromise their claims inter se and other partners accept the compromise, the arbitrators can go into the question whether such compromise took place, and if they find the compromise valid, they have power to give a decree in terms of that compromise and the award so given will be binding on all the partners. AIR (Vol 15) 1928 Lah 915: 110 Ind Cas 401.

——Sch. 2, Para 16 — Ten days' rule.

Ten days are allowed for filing objections and therefore a Court has no jurisdiction to pass a decree in accordance with the award before the expiry of the period. A decree passed in contravention of the rule is liable to be set aside in revision. AIR (Vol 12) 1925 Rang 103: 76 Ind Cas 307.

——Sch. 2, Para. 16 — Time under sub-R. (2) not allowed to make objections.

Where the Court has not followed the procedure laid down by the Code and does not allow a party the time which the law allows him, to make objections, but proceeds to pass at once a decree in accordance with the award, then it cannot be said that there is any defect in the award itself, and under sub-para. (2) of para. 16, no appeal would lie, but the High Court may exercise its discretion under S. 115. 29 All 584, Diss. from. AIR (Vol 8) 1921 Bom 32: 45 Bom 832: 59 Ind Cas 811 (DB).

——Sch. 2, Para. 16 (1) — Time for objections — Court, if can extend time.

A Court has no power to extend the time for filing objections to an award. AIR (Vol 4) 1917 Nag 211: 13 NLR 172: 42 Ind Cas 266.

——Sch. 2, Para 16 (1) — Time for objections — Filing of award before time.

The submission of an award will be deemed to be made only on the date fixed by the Court for filing it and the time for filing objections should be counted from that date. AIR (Vol 3) 1916 Lah 321: 14 PWR 1916: 34 Ind Cas 250.

——Sch. 2, Para. 16 (1) — Time for objections — Award accepted by both parties.

It is not necessary to allow ten days for objections where parties have accepted an award. AIR (Vol 1) 1914 Lah 313: 27 PWR 1914: 69 PLR 1914: 23 Ind Cas 591.

See also 176 PWR 1913: 310 PLR 1913: 21 Ind Cas 298 (DB).

——Sch. 2, Para 16 (1) — Limitation — Award — Application for correction of.

No specific provision is made in the Limitation Act for applications to correct an award. (1913) MWN 338: 13 MLT 349: 24 MLJ 483: 19 Ind Cas 496.

8. Functions of arbitrator.

——Sch. 2, Para 16 — Arbitrator — Function of — He cannot decree or dismiss suit.

The function of an arbitrator is to come to a decision on the issues which have been referred to him and when his award is received the Court decides the suit and it is not for the arbitrator to dismiss or decree the suit. Paragraph 16, Sch. II, Civil P. C., indicates that it is the function of the Court to pronounce judgment and not the function of the arbitrator. AIR (Vol 22) 1935

All 372: (1935) ALJ 396: 1935 AWR (CC) 190: 159 Ind Cas 35.

——Sch. 2, Para 16 (1) — Enquiry arbitrator — How and what to be examined.

An arbitrator can be examined with reference to any matter of law or other things with a view to know if he has used his discretion rightly. (1911) 14 OC 308: 13 Ind Cas 520 (DB).

——Sch. 2, Para 16 (1) — Objections — Decision on question of jurisdiction.

The decision of the arbitrators on a question of their own jurisdiction is not final and can be raised in the objections to the filing of the award, This does not however imply the counter proposition that arbitrations must not consider or decide how far their Jurisdiction extends. (1910) 4 SLR 196: 9 Ind Cas 712.

9. Modified award.

See N. 1.

10. Objections to award.

——Sch. 2, Para 16 (1) — Objectors — Dismissal for default — Decree in accordance with award — Restoration — Application for.

Where a suit was referred to the arbitration and the arbitrators made an award, against which the plff. filed certain objections, and the objections being subsequently dismissed for default, and the Court having passed a decree in accordance with the award, the plff. applied for restoration of his petition of objections.

Held, that the passing of the decree is no ground for refusing to entertain the application for restoration on its merits. AIR (Vol 7) 1920 All 215: 18 ALJ 756: 57 Ind Cas 200 (DB).

——Sch. 2, Para 16 (1) — Objections to award — Exparte award.

Party against whom an arbitrator has proceeded exparte has every right to an opportunity to file objections to the award. His objections cannot be summarily rejected on the ground that the arbitrator has proceeded exparte. 229 PWR 1912: 1 PLR 1913: 15 Ind Cas 57 (DB).

11. Procedure.

——Sch. 2, Para. 16 — Procedure.

Where immediately after the report is field without any further trial the Court passes a final decree in terms of that report, procedure is wholly irregular whether the report is considered as an award or as a commissioner's report. AIR (Vol 16) 1929 Mad 789 (DB).

——Sch. 2, Para 16 (1) — Construction — of award — Execution.

The fact that a particular expression in the award is capable of many interpretations does not show that it is indefinite and it should be interpreted in the execution proceedings of the decree following the award. AIR (Vol 3) 1916 Oudh 226: 3 OLJ 258: 35 Ind Cas 761 (DB).

12. Revision.

——Sch. 2, Paras. 16, 14 (c), O. 9, R. 13, S. 115 — Revision — When maintainable.

Interference with a decree passed by an arbitrator by way of revision is just as objectionable as it would have been to allow interference by way of an appeal, but that has reference really to interference on the merits, and it cannot be regarded as having any bearing on a case where the Court which had to deal with the arbitration proceedings has passed orders which it had no jurisdiction to pass. Although the intention of Para. 16 of Sch. II of the Civil P. C.. is to give finality to decrees passed in accordance with the decision of arbitrators yet it cannot be said that in no possible case can a revision be entertained against such decrees. If, for instance, it could be shown that the lower Court acted altogether without jurisdiction in passing a decree in terms of the award, it can be permissible for a Court to entertain a revision under S. 115, Civil P. C. AIR (Vol 27) 1940 Oudh 405: 1940 OWN (CC) 670: 1940 AWR (C C) 327: 16 Luck 79: 189 Ind Cas 344 (DB).

——Sch. 2. Para 16 — Court proceeding to pronounce judgment according to award — Revision.

Where the matter in dispute in a suit is referred to arbitration and the Court rejecting certain objections to an award proceeds under the provisions of Para. 16, Sch. II, Civil P. C., to pronounce judgment according to the award, the order is of an interlocutory nature and a petition for revision does not lie against it. AIR (Vol 20) 1933 Lah 692: 34 PLR 3: 14 Lah 715: 143 Ind Cas 309 (DB).

——Sch. 2, Paras. 16, 15 (c), S. 115 — Objections disallowed — Decree in accordance with award — Interference in revision — Legality of.

The intention of Para. 16, Sch. II, Civil P. C., is clearly to give finality to a decree passed in accordance with the decision of the arbitrator. Interference by a High Court with the decision of the lower Court in the exercise of revisional jurisdiction under S. 115, Civil P. C.. is a matter of discretion, and where it is found that after a matter has been referred to arbitration, through Court, the Court has passed a decree in accordance with the terms of the award, the party aggrieved cannot go behind the reference to arbitration on a mere technical plea and the High Court's power of interference in revision should not be exercised. AIR (Vol 20) 1933 Oudh 327: 10 OWN (C C) 669: 150 Ind Cas 291.

——Sch. 2, Para 16 — No second appeal.

No second appeal lies from an order recording an award as compromise, but the appeal may be treated as revision. AIR (Vol 17) 1930 Lah 860.

——Sch. 2, Para. 16 — Objection.

Any objection or point against an award must be taken in the lower Court; a point which could have been taken but was not taken in the lower Court cannot, for the first time, be allowed to be taken in revision. AIR (Vol 16) 1929 Cal 831.

——Sch. 2, Para 16 — Though no appeal lies against the decree passed on an award except in so far as it may be in excess of or not in accordance with the award yet a revision is competent where the Court which passed the decree misused the jurisdiction conferred upon it. (1929) 118 Ind Cas 906 (Lah).

——Sch. 2, Para. 16 — Order filing award.

An order filing an award not appealable under para. 16, Sch. 2 cannot be set aside in revision. AIR (Vol 14) 1927 Pat 135: 95 Ind Cas 321: 1926 PHCC 161: 7 PLT 739 (DB).

——Sch. 2, Para 16 — No revision lies against a decree which has been passed in accordance with an award under para. 16 of the second schedule, after hearing and determining in accordance with law the objections raised against the validity of the award. AIR (Vol 12) 1925 All 541: 86 Ind Cas 942: 6 LRA Civ 156.

——Sch. 2, Para 16 — It cannot be laid down as a general rule that in no case in which an award has been filed and decree passed in accordance therewith can the High Court interfere under S. 115, C. P. Code. Revision is permissible in cases in which the arbitrators or the Court may have exceeded their jurisdiction or acted with material irregularity in the conduct of the proceedings. AIR (Vol 12) 1925 Cal 475: 78 Ind Cas 335 (DB).

——Sch. 2, Para 16 — Where the Court disposes of objections to an award without allowing opportu-

nity to party to substantiate them. a revision will lie. AIR (Vol 8) 1921 Lah 249: 64 Ind Cas 394: 3 LLJ 487: 20 PLR 1922.

——Sch. 2, Para 16 (1) — Revision — Remand.

Where Court receives an award, and without allowing time to parties to make objections, passes immediately decree in its terms, no appeal can lie from the decree so made; but the High Court can under S. 115 C. P. C., set aside the decree and send the case back to the first court to enable the parties to file their objections to the award. 29 All 584 not Foll. (1920) 22 Bom LR 1454: 59 Ind Cas 811 (DB).

See Contra AIR (Vol 6) 1919 Mad 150: 37 MLJ 100 : 52 Ind Cas 569 (DB).

——Sch. 2. Para 16 (2) — Award — Revision — Omission of sanction under O. 32, R. 7 — Agreement to refer signed by agent, validity of — Other remedy open — Revision.

Where a decree is in accordance with an award there is no appeal therefrom. The omission of sanction under O. 32, R. 7, is no ground for revision. Where the guardian of the minor signs the agreement to refer, through an authorised agent. it is valid reference. Even if the award is not binding on the minors they have a right to set it aside on attaining majority and where such a remedy exists, the Chief Court will not interfere in revision. AIR (Vol 3) 1916 Lah 201: 99 PR 1915: 207 PWR 1915: 32 Ind Cas 250 (DB).

——Sch. 2, Para 16 (2) — Revision.

A decree based upon an award is not appealable but if the Lower Court acted without jurisdictio or failed to exercise a jurisdiction or acted with material irregularity in dealing with the award, the High Court can revise such an order. AIR (Vol 3) 1916 Mad 969: 31 Ind Cas 458 (DB).

——Sch. 2, Para 16 (1) — Effect of award.

A decree in accordance with the award is not appealable unless it exceeds or is not in accordance with the award. The High Court will not interfere in revision with the court's order granting or refusing time to object to an award if the court has taken due care and attention. AIR (Vol 3) 1916 Pat 403: 35 Ind Cas 914 (DB).

Also AIR (Vol 5) 1918 Nag 191: 46 Ind Cas 785.

Also AIR (Vol 1) 1914 Oudh 327: 17 OC 386: 2 OLJ 129: 27 Ind Cas 424.

——Sch. 2. Cl. 16 (2) — Objections to award.

Under cl. 15 (1) all questions affecting the validity of an award are to be decided by the court in which the award is being filed. No appeal lies and a revision application seems to have been also prohibited. AIR (Vol 3) 1916 Sind 79: 9 SLR 183: 34 Ind Cas 845 (DB).

——Sch. 2, Para 16 (1) — Objections — Order refusing to investigate objections as time barred — Revision.

An order refusing objections to an award without adequate inquiry, apparently under the impression that these were not raised within time, is liable to be set aside, in revision. AIR (Vol 2) 1915 Lah 352: 96 PLR 1915: 30 PWR 1915: 28 Ind Cas 427.

——Sch. 2 Para 16 (1) Time for objections — Decree in terms of award before expiry of 10 days.

A decree in terms of the award before 10 day from the date of the submission of the award is invalid and should be set aside. It is doubtful whether there is an appeal from such decree but undoubtedly there will be revision. An appeal against such decree can be treated as a revision. (1912) MWN 1232: 12 MLT 608: 17 Ind Cas 431 (DB).

Also (1911) 1 MWN 141: 9 MLT 301: 21 MLJ 444: 9 Ind Cas 197.

13. Second appeal.

See also N. 12.

——Sch. 2, Para. 16 — Appeal — Arbitration without jurisdiction — Decree, appeal from.

No appeal is competent from a decree passed in accordance with an arbitration award on the ground that the reference to arbitration was without jurisdiction. AIR (Vol 32) 1945 Cal 156 : ILR (1944) 1 Cal 619 : 79 CLJ 128.

——Sch. 2. Paras. 16 and 21 — Trial Court giving decision on merits after accepting objections to an award — First Appellate Court passing decree according to award after accepting it as valid — Second appeal, if competent.

An appeal is a creature of statute and where a statute provides that right, it shall be given effect to unless it can be shown to have been expressly taken away. The provision that deals with the subject of second appeals is S. 100, Civil P. C. A right so given by S. 100, Civil P. C. can never be held to have been taken away by implication or by analogies drawn from other provisions or by any alleged illogical reasoning of the Legislature. The right of appeal is regulated in the Punjab by the Punjab Courts Act, S. 41. The language of S. 41, Punjab Courts Act, in conceding the right of second appeal, is more emphatic even than that employed in S. 100, Civil P. C. There is nothing in S. 41, Punjab Courts Act to restrict a right of second appeal in arbitration cases and the language used in Paras 16 and 21 of Sch. II. Civil P. C. in all cases refers to decrees of the trial Court and finality is given only to such decrees. There is nothing in the language used which imports into the procedure in appeal a finality in the decree which is given to the first Court in similar circumstances.

A second appeal is, therefore, competent in a case in which the trial Court, after accepting objections to an award, gives a decision on the merits and the first Appellate Court, holding the award to be valid, passes a decree in accordance with the award. AIR (Vol 32) 1945 Lah 127 : 47 PLR 114 : ILR (1945) Lah 335 : 220 Ind Cas 107 (FB).

——Sch. 2, Para. 16 — When competent.

A second appeal is maintainable where the Court of first instance sets aside the award and passes a decree on the merits and the lower appellate Court sets aside that decree and passes a decree in accordance with the award. The mere fact that the decree of the lower appellate Court is in accordance with the award is no ground for refusing the appeal. The provision of cl. (2), para. 16, Sch. 2, applies only where a decree has been pronounced by the trial Court in accordance with the terms of the award. AIR (Vol 15) 1928 Oudh 1 : 3 Luck 1 : 107 Ind Cas 545 : 4 OWN 1085 (FB).

14. "Suit".

——Sch. 2, Para. 16 — Arbitration — Award made decree of Court — Remedies — Suit for declaration **not competent.**

After an arbitration award has been made rule of the Court and a decree has been given, a suit for declaration by one of the parties that the award was illegal and ineffective is incompetent. The only remedies open to an aggrieved party are either to file objections before the award is made a decree of the Court or to appeal against the decree if it is in excess of or is not in accordance with the award. AIR (Vol 32) 1945 Oudh 92 : 1944 OWN 345 : 1944 AWR (CC) 238.

——Sch. II, Para. 16 (2) — Suit to set aside — Award — Decree on.

No suit to set aside an award is maintainable, the proper way being an application to the Court to set the award aside. AIR (Vol 6) 1919 Low-Bur 12: 13 Bur LT 34: 10 LBR 106: 56 Ind Cas 677 (DB).

——Sch. 2, Para 17.
1. Applicability and scope.
2. Fees of pleader.
3. Limitation and laches.
4. Objections to award.
5. Death of or refusal by arbitrator.
6. Powers and duties of Court.
See also, N. 1.
6-A. Forum.
See N. 6.
7. Reference to arbitration.
See also, N. 1 and 10.
7-A. Death of party.
8. Revision and appeal.
9. "Sufficient cause."
10. Validity of reference.
See also, N. 1 and 7.
11. Decree on award.

1. Applicability and scope.

——Sch. 2, Para 17.

——Sch. II, Paras. 17 and 19 — Agreement to refer cannot be specifically enforced — But arbitration falling under Sch. II, can be enforced by Paras. 17 and 19.

Although an agreement to refer to arbitration cannot be specifically enforced under the Specific Relief Act yet an arbitration, the subject of Sch. II can be enforced by the provisions of Paras. 17 and 19 AIR (V 28) 1941 Mad 129 : (1940) 2 MLJ 520: 52 MLW 556: (1940) MWN 1083 (DB).

——Sch. 2, Paras. 17, 20 — Applicability of Para. 17 to future disputes.

The Legislature has contemplated a case of a general agreement to refer disputes to arbitration as falling under Para 17, and a specified reference to arbitrators as falling under Para. 20. Paragraph 20 refers to a reference by the parties to arbitration about any dispute that might have arisen between them, while Para. 17 may apply to future disputes. AIR (Vol 23) 1936 Bom 401 : 38 Bom LR 607 : 166 Ind Cas 35.

——Sch. 2, Paras. 17, 20 — Award under Arbitration Act.

Where the award is purported to have been made by the arbitrators under the Arbitration Act, an application to file such an award cannot be made under Sch. II, Civil P. C. But the application may be amended so as to bring it in conformity with the provisions of Para. 17. AIR (V 23) 1936 Bom 401 : 38 Bom LR 607 : 166 Ind Cas 35.

——Sch. 2, Para 17 — An application under Sch. II, Para 17 asking the Court to file an agreement to refer a dispute to arbitration is not a suit within the meaning of S. 80. AIR (Vol 19) 1932 Lah 374 : 33 PLR 508 : 13 Lah 672 : 137 Ind Cas 266 (DB).

——Sch. 2, Para 17 — Jurisdiction of Court.

The jurisdiction of the Courts in the matter of an application under Sch. II, Para. 17, Civil P. C. to file an agreement to refer has to be determined with reference to Ss. 16 to 20, Civil P. C. AIR (Vol 18) 1931 Lah 673 : 32 PLR 464: 132 Ind Cas 218.

——Sch. 2, Para 17 — Per Anantakrishna Ayyar, J. — The provisions of Paras. 1 to 16, Sch. II, Civil P. C., could not be applied to an arbitration outside Court, except in so far as they are consistent with the provisions of the agreement between the parties filed under Para. 17. AIR (V 18) 1931 Mad 28 : 32 MLW 905 : (1930) MWN 1028 : 60 MLJ 676 : 54 Mad 469 : 129 Ind Cas 628.

——Sch. 2, Para 17 — Agricultural land in Punjab — Principle explained.

Per Jai Lal, J. — There should be no objection to civil Court pronouncing judgment with regard to partition of revenue paying land as Court merely files award by arbitrators and does not adjudicate upon merits. Where an agreement to refer authorizes the arbitrators to decide the question of title and also to make a partition of joint agricultural land along with other joint property, the Court can allow the agreement to be filed and make a reference to the arbitrators. Upon receipt of the award it may be that the Court can, however, only pass a decree with regard to non-agricultural property and can grant only a declaration of title with regard to the agricultural land, as determined by the award, leaving it to the parties to enforce partition in accordance with the award in revenue Court. AIR (V 17) 1930 Lah 836 (DB).

——Sch. 2, Para. 17 — Scope.

Clauses 17 to 21 do not apply to submissions to which the Arbitration Act applies. 94 Ind Cas 177 : 43 CLJ 292 : AIR (Vol 13) 1926 Cal. 730 (DB).

——Sch. 2, Para 17 — Court has no power without consent of parties to adjudicate upon an application made under Cl. 17 as though it were made under the Arbitration Act. 94 Ind Cas 177 : 43 CLJ 292 : AIR (Vol 13) 1926 Cal 730 (DB).

——Sch. 2, Paras. 17 (1) and (4) and 20 —Arbitration and award — Effect — Powers of arbitrator — Right of parties.

Where the reference to arbitration is valid the parties may go to Court and pray for filing the argeement and take action under it or on their own account to call the arbitrator to give a decision. If the the arbitrator makes an award the party in whose favour it is made, can sue for a decree in terms of the award.

Where there has once been a valid reference to arbitration, the arbitrator is entitled to proceed with it, even if one of the parties refuses to submit to his arbitration. A party cannot knowingly take advantage of a clerical error in the notice given to him by the arbitrator as regards the date of enquiry. A party may for just cause rescind a contract to refer to arbitration but is not entitled to do so without any cause whatsover. There can be no objection to a suit on an award with an alternative prayer for decision on the merits since such a combination is convenient and prejudices no one. 12 PR 1917 : 39 Ind Cas 349 : AIR (Vol 4) 1917 Lah 65 (DB).

——Sch. 2, Para. 17 (1) — Dispute as to right to public trust.

A dispute as to which of several claimants is mutawalli to a public trust cannot be settled by arbitrators and should be decided by Court. 1 Pat LW 260 : (1917) ACC 93 : 33 Ind Cas 296 : AIR (Vol 4) 1917 Pat 392 (DB).

2. Fees of pleader.

——Sch. 2, Para, 17 — Oudh Civil Rules.

Proceedings before an arbitrator and proceedings subsequent to the award are all proceedings in the matter of an application made by a party under para. 17, Sch. 2, and according to R. 289 (6) only one-fourth of the fee payable to pleaders in the case of suits decided on merits on contest can be taxed. 7 OWN 97 : AIR (Vol 17) 1930 Oudh 89 (DB).

3. Limitation and laches.

——Sch. 2, Para 17 — The statutory period of limitation cannot be cut down by mere inaction The delay must be such delay as to lead to the inference that the parties had abandoned the reference to arbitration, and anything short of this inference does not make any difference. AIR (Vol 20) 1933 Lah 18 : 150 Ind Cas 674.

——Sch. 2, Paras. 17, 5, 4 — Delay of three years — Effect — Lapse of agreement.

The claimant in a reference to arbitration is bound to prosecute the proceedings and if there is an unreasonable delay in proceedings with an agreement to refer, the agreement lapses and the

Court has no power to make the agreement a rule of the Court. AIR (Vol 18) 1931 Bom 529 (2) : 33 Bom LR 1022 : 134 Ind Cas 733.

——Sch. 2, Para. 17 (4) — Reference to arbitration — Inaction of parties — Agreement to refer — Filing of.

The conduct of the parties, coupled with the long and unexplained delay of six years amounted to a cancellation of the agreement to refer their disputes to arbitration and the agreement could not be filed. 54 Ind Cas 126 : AIR (Vol 7) 1920 Nag 29.

4. Objections to award.

——Sch. 2, Para 17 — Objection to award — Mistake in affixing court-fee due to bona fide mistake of Counsel—Deficit made good at earliest opportunity—Court should act under S. 149 Civil P. C. and accept the requisite court-fee and not dismiss the objections. AIR (Vol 24) 1937 Lah 276 : 174 Ind Cas 21.

——Sch. 2, Para. 17 — Omission to give notice. — Effect of.

The non-respresentation of a party at arbitration proceedings through want of formal notice of the proceedings is no ground for challenging an award when that party had actual knowledge of the proceedings and also an opportunity of putting its point of view before the Court. 123 Ind Cas 694 : AIR (Vol 17) 1930 Sind 190 (DB).

——Sch. 2, Para. 17 — Objection to jurisdiction after reference.

Where the parties accepted the decision of the Court who referred the matter in suit to arbitrators and appeared and fully prosecuted their case before the arbitrators. They could not afterwards, challenge the award on the ground of want of jurisdiction in the tribunal chosen by themselves. 59 Ind Cas 801 : 42 All 661 : 18 ALJ 644 : 2 UPLR (A) 240 : AIR (Vol 7) 1920 All 249 (DB).

5. Death of or refusal by arbitrator.

——Sch. 2, Paras. 17 and 5 — Scope — Agreement to refer to the arbitration of a named individual — Death of such individual before making award — Court, if can appoint another arbitrator in his place.

When an agreement provides for arbitration by a named arbitrator or arbitrators, and such arbitrator or any one of such arbitrators is not available on account of death, refusal to act or other reasons before an application is made under para. 17 of Sch. II of the C. P. Code, the Court has no power to appoint an arbitrator in his place. It is only if there is no provision in the agreement for the appointment of an arbitrator and the parties cannot agree, that the Court has power to appoint an arbitrator.

Where, however, on the date of an application under para. 17 the arbitrator was alive and died afterwards, the case should be decided on the footing that there was a valid order of reference to him and thereafter he died and the question, whether under para. 5 another arbitrator can be appointed by the Court in his place will have to be decided on the construction of the particular agreement.

If the intention of the parties as expressed in the muchilika is to be bound by the decision of a particular arbitrator, any provision which enables the Court to appoint another arbitrator would not be consistent with the agreement. The choice of a particular arbitrator by the parties is the result of personal confidence and trust in his knowledge character and qualification and the question of the personnel of the arbitrator cannot be said to be a subsidiary and incidental matter. ILR (1948) Mad 837: 61 LW 165: 1948 MWN 185: AIR (Vol 35) 1948 Mad 312: (1948) 1 MLJ 196 (FB).

——Sch. 2, Para. 17 — Private reference — Parties leaving a contingency unprovided for — Court, if can make provision for such contingency.

If parties to an agrement leave a contingency unprovided for, the Court will not be proceeding consistently with the agreement if it makes a provision for such contingency. The lacuna, if any, is to be filled by the parties themselves and not by the Court. Where, therefore, parties to an agreement agree to refer their dispute to arbitrators nominated by each of them but the agreement makes no provision for the nomination of an arbitrator in case any arbitrator already nominated refuses to act, the Court has no power to make the necessary appointment so as to make the agreement operative and effectual. AIR (Vol 25) 1938 Lah 859 : ILR (1939) Lah 23: 41 PLR 464: 179 Ind Cas 584 (DB).

——Sch. 2, Para. 17, Cls. 4, 5 — Agreement to refer to specified arbitrators — Refusal of some of them to act — Agreement becomes incapable of performance — Reference to arbitrators willing to act, if can be made.

An agreement to refer a matter to certain specified arbitrators becomes void and of no effect, if one of the arbitrators refuses to act, thus making the agreement incapable of performance and in such a case the Court has no jurisdiction under Cl. (4) of Para. 17 of Sch. II, Civil P. C., to make a reference to the arbitrators who are willing to act. Under Para. 5 of the Sch. II, Civil P. C. the Court has the power to appoint arbitrators in place of the arbitrator or arbitrators who refused to act, but Para. 19 of Sch. II, Civil P. C., can only come into operation when an order of reference has already been made under Para. 17 of the said Schedule. The fact that the application praying that the agreement be filed in Court and given effect to under Para 17 of Sch. II, Civil P. C., was made prior to the application of the arbitrators refusing to act as such, does not make any difference. AIR (Vol 22) 1935 Oudh 179 : 11 OWN (CC) 1188: 151 Ind Cas 1001 (DB).

——Sch. 2, Paras. 17, 5, 19 — Agreement to refer to named arbitrators — Fresh arbitrator, if can be appointed — Refusal of one arbitrator to act — Agreement, if becomes void.

When an agreement is to refer the matter to certain named arbitrators, the Court is bound to make an order of reference to such arbitrators and the Court cannot make an order of reference to two out of three arbitrators named in a deed of agreement, as such an order of reference will not be in accordance with the terms of the agreement within the meaning of Cl. (4) of Para. 17 of Sch. II, Civil P. C. The Court has no power to appoint a fresh arbitrator in the place of a person named who has refused to act unless an order of reference had already been made.

Apart from any enactment, an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators die or refuse to act, and thus make the agreement incapable of performance and in such a case the Court has no jurisdiction under Cl. (4) of Para. 17 of Sch. II, Civil P. C., to make a reference to the arbitrators who are willing to act. Under Para. 5 of Sch. II of the Code, the Court has the power to appoint arbitrators in place of the arbitrator who dies or who refuses to act, but Para. 19 of Sch. II of the Code can only come into operation when an order of reference had already been made under Para. 17 of the said

schedule. AIR (Vol 21) 1934 Oudh 67: 11 OWN (CC) 12: 9 Luck 321: 147 Ind Cas 1073 (DB).

——Sch. 2, Para. 17 — Arbitrator named in clause refusing to act — Power of Court to appoint fresh arbitrator when dominant intention is to refer to arbitration.

On the refusal of an arbitrator named in the arbitration clause to act, the question that arises is one of intention in each case. If the dominant intention of the parties is that the matter should be referred to arbitration, then the fact that in the same or subsequent agreement the parties agreed on the personnel of the arbitrator makes no difference, and when that arbitrator either becomes incapable or refuses to act, the agreement to refer to arbitration remains and the Court can appoint a fresh arbitrator, if, on the other hand, the agreement of the parties in essence is to refer the case to the arbitration of a particular person or persons and to him or to them alone, then on the failure of that person or persons to act or his or their incapacity to do so, the agreement to refer to arbitration is itself gone and, therefore, the Court has no power to appoint an arbitrator; it makes no difference whatsoever whether the contract itself contains the name of the arbitrator or whether the contract merely contains a clause to refer to arbitration and the arbitrator is appointed by the subsequent agreement. No doubt the presence of the name in the contract itself is a circumstance to be borne in mind in deciding the intention of the parties, but it does not affect the question further:

Held, on the facts of the case that the intention clearly was to have a reference to arbitration and the person of the arbitrator was a secondary agreement. AIR (Vol 20) 1933 Lah 18: 150 Ind Cas 674.

——Sch. 2, Paras. 17, 18 — Agreement to refer to named arbitrator — Absence of provision for appointment of new arbitrator, if any arbitrator refuses to act — Refusal to act by one of the named arbitrators — Power of Court to make reference under Para. 17 (4) — Institution of suit — Stay, if can be granted.

Where an agreement for reference to named arbitrators, contains no provision for the appointment of another arbitrator, in the case of refusal of any of the arbitrators named in the agreement to act, the Court has no power to make a reference under S. 17 (4), Civil P. C., and stay of a suit for declaration as regards the matter in dispute cannot be ordered under Para. 18, Sch. II, Civil P. C. AIR (Vol 20) 1933 Rang 331 : 148 Ind Cas 291.

——Sch. 2, Paras. 17, 5, 4 — Reference to two arbitrators and umpire — One refusing to act.

Paragraph 17 (4) of Sch. II to the Civil P. C., does not empower the Court to appoint an arbitrator where an arbitrator named in the agreement of reference refuses to act. Paragraph 5 applies to such a case. AIR (Vol 18) 1931 Bom 529 (2): 33 Bom LR 1022: 134 Ind Cas 733.

——Sch. 2, Para. 17 — Revocation of reference.

Where an order is made filing an agreement, but on finding that arbitrators were not willing to act the Court revokes the order of reference and dismisses the suit, the order is not appealable. 89 Ind Cas 404: 48 All 27: 23 ALJ 891: 6 LRA Civ 575 : AIR (Vol 13) 1926 All 55 (DB).

——Sch. 2, Para. 17 — Order under.

Any order which in the event of the death of an arbitrator should be made can only be made under the Arbitration Act and then only if the conditions as to written notices prescribed by S. 8 have been fulfilled. 94 Ind Cas 177: 43 CLJ 292: AIR (Vol 13) 1926 Cal 730 (DB).

——Sch. 2, Para. 17 — Reference out of Court — One arbitrator refusing to act.

Where a party has gone to arbitration in a case in which, if it had refused to go to arbitration, an order of reference would have been made under paragraph 17, it is too late for him, when a difficulty arises at a later stage of the proceedings, which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under paragraph 17. 67 Ind Cas 739: 44 All 523: 20 ALJ 327: AIR (Vol 9) 1922 All 133 (DB).

——Sch. 2, Para. 17 (4) — Refusal of one of the arbitrators to act — Effect of.

An agreement to refer a dispute to arbitration does not become incapable of performance by the refusal of one of the arbitrators to act where there is a distinct provision authorising a party to appoint another arbitrator in his place. 155 PR 1919: 55 PWR 1919: 51 Ind Cas 636: AIR (Vol 6) 1919 Lah 231 (DB).

——Sch. 2, Para 17 (4) — Death of two arbitrators — Rejection of application to file agreement.

An agreement to refer to arbitration becomes ipso facto inoperative by the death of some of the arbitrators before the agreement is made a rule of the Court. Where the agreement became incapable of performance it could not be filed in Court. 71 PR 1918: 44 Ind Cas 866: AIR (Vol 6) 1919 Lah 70 (DB).

See also 11 Bur LT 160 : 42 Ind Cas 911 (1) : AIR (V 5) 1918 LB 114 (DB).

——Sch. 2, Para. 17 (4) — Arbitrator refusing to act — Power to substitute.

Where after the filing of an agreement under Para. 17, Sch. II, C. P. C., one of the arbitrators refuses to act as such, the Court has power under Para 19, read with Paras. 5 and 9, Sch. II, to substitute another in his place. 4 OLJ 131: 40 Ind Cas 38 : AIR (Vol 4) 1917 Oudh 8 (DB).

(See contra — 11 Bur LT 160 : 42 Ind Cas 911 (1) : AIR (V 5) 1918 LB 114.)

——Sch. 2, Para. 17 (1) — Arbitrators named.

Clause 17 does not require that arbitrators should necessarily be named, in the agreement. 35 PR 1911: 70 PWR 1911: 85 PLR 1911: 9 Ind Cas 655.

6. Powers and duties of Court.

See also, N. 1.

——Sch. 2, Para 17 — Where there is only an agreement for reference to arbitration, which is sought to be filed in Court, the Court cannot go beyond the terms of the agreement. AIR (Vol 28) 1941 Pat 155: 19 Pat 927: 7 BR 615: 193 Ind Cas 756 (DB).

——Sch. 2, Para 17 — A person residing at M got certain ornaments insured with the defendant company — Clause of arbitration — Policy bearing the signatures of directors and of their local managers at C — The assured filing an application in the Court of M to file the agreement under Para. 17 — Company contending that the Court at M had no jurisdiction and that Sch. II did not apply :

Held, that the part of cause of action arose at M. But as the Arbitration Act applied, the Court at M had no jurisdiction to entertain the application. AIR (Vol 24) 1937 All 208 : (1937) ALJ 98 : 1937 AWR (HC) 52 : ILR (1937) All 234 : 167 Ind Cas 897 (DB).

——Sch. 2, Para. 17 — Reference to several arbitrators.

When a reference is made to two or more arbitrators the award is not valid unless it is concurred in by them all.

Where parties agree to refer a certain dispute to 3 arbitrators and one of them filed the agreement under Para. 17 (1), Court has no power to change the original agreement between parties and order that in case of disagreement among arbitrators the opinion of the majority should prevail. 97 Ind Cas 824 : 24 MLW 384 : AIR (Vol 13) 1926 Mad 1183 : 51 MLJ 440 (DB).

——Sch. 2, Para. 17 — Discretion.

There is no law which gives any power whatever to the Court to superimpose its will on the parties. It has no discretion whatever to refuse to make the reference to the arbitrator or arbitrators nominated by the parties. It is only when the parties cannot agree that it can exercise any discretion in the matter. 61 Ind Cas 390 : 2 PLT 277 : 6 PLJ 287 : 1921 PHCC 170 : AIR (Vol 8) 1921 Pat 161 (DB).

——Sch. 2, Para. 17 (1) — Civil Court — Jurisdiction — Application to file agreement for reference to arbitration — Partition of agricultural land involved in agreement.

A Civil Court has no jurisdiction to entertain an application under Sch. II, Cl. 17 of the C. P. Code for filing in Court an agreement for reference to arbitration, where the application related to the partition of agricultural land within the meaning of and for the purposes of S. 158 (2), Cls. (17) and (18) of the Punjab Land Revenue Act, (1887). 46 PLR 1914 : 55 PWR 1914 : 22 Ind Cas 381 : AIR (Vol 1) 1914 Lah 296

(For a case of partition of revenue paying land see 91 PLR 1917 : AIR (Vol 4) 1917 Lah 218 : 166 PWR 1917 : 42 Ind Cas 261 (1).)

——Sch. 2, Para. 17 (4) — Duty of Court — Terms of agreement.

In acting under Cl. 17, the Court must refer the matter to arbitration in accordance with the terms of the agreement. A Court acts with material irregularity if it does not strictly comply with the terms of the agreement to refer to arbitration. 35 PR 1911 : 70 PWR 1911 : 85 PLR 1911 : 9 Ind Cas 655.

——Sch. II, Para 17. — Reference to private arbitration by parties pending a suit — Arbitration — Award — Application to file the award — Parties.

The mere fact that litigants may agree to a private arbitration does not make that arbitration an arbitration in the suit unless there is an order of reference as contemplated by S. 506, C. P. C. (old) Consequently where the litigants in a suit referred the matter to arbitration, an application under S. 525, C. P. C. is necessary; and the Court has no power on that application to dismiss the suit pending before it, as soon as the other party denies the award, the application itself being foreign to the suit — (1906) 8 Bom LR 777 (DB).

6-A. Forum.

See N. 6.

7. Reference to arbitrator.

See also, N. 1 and 10.

——Sch. 2, Para 17 — Sons of deceased agreeing to refer dispute as to division of property to arbitration — One of them subsequently applying for letters of administration — Application by rest under Para. 17, for filing agreement — Competency of.

A private tribunal such as an arbitrator cannot oust the jurisdiction of Courts, but the rule applies only when the matter to be decided by the arbitrator is indentical with the matter to be decided by the Court.

Where the three sons of a deceased agreed to refer the dispute regarding division of the property of the deceased to arbitration, but one of them subsequently applied for letters of administration and the other two applied under Para. 17 of Sch. II, Civil P. C., for filing the agreement regarding reference to arbitration :

Held, that there was no conflict of jurisdiction as between the Courts and the arbitrator. The proper course for the Court dealing with the application for letters of administration in the circumstances would be to stay its proceedings until the question of the validity of the agreement to refer the dispute to arbitration was decided in the proceedings under Sch. II, Civil P. C., for this was the main issue in the latter proceedings and it had to be decided before making a reference to arbitration. AIR (Vol 24) 1937 Lah 843 : ILR (1937) Lah 433 : 39 PLR 852 : 172 Ind Cas 460 (DB).

——Sch. 2, Para 17 — Parties coming to agreement during pendency of suit to withdraw suit and refer dispute to arbitration — Agreement, if can be filed in Court.

Where during the pendency of a civil suit, the parties come to an agreement that the suit should be withdrawn and the matter in dispute referred to arbitration and the suit is accordingly withdrawn, the agreement can be filed in Court under Sch. II, Para. 17, Civil P. C. AIR (Vol 22) 1935 Lah 59 : 152 Ind Cas 614.

——Sch. 2, Para 17 — Cause of action for application under Sch. II, Para. 17 Civil P. C. — Refusal to refer is cause of action.

Refusal to refer to arbitration is a fundamental cause of action for filing an agreement of reference and this it is that decides the jurisdiction of the Court. AIR (Vol 20) 1933 Lah 18 : 150 Ind Cas 674.

——Sch. 2, Para. 17 — Reference without consent of court.

An agreement to refer to arbitration matters in differences between the parties in a pending suit without the order of the Court under paras. 1 to 3, Sch. 2 is illegal and cannot be filed under para. 17 of the schedule. 32 Bom LR 1403 : AIR (Vol 17) 1930 Bom. 98.

——Sch. 2, Para. 17 — Pending suit — Withdrawal of application maintainable.

During the pendency of a civil suit the parties to the case came to an agreement that the subject-matter of the dispute should be referred to arbitration and that the pending suit should be withdrawn. An application was accordingly presented to the Court that the parties intended to refer the matter to arbitration and the suit was allowed to be withdrawn. Thereupon an application was made under para. 17 (4) of the second Schedule of C. P. Code for the filing of the agreement in Court. An objection was raised on behalf of the defendants that the agreement could not be filed inasmuch as it was made during the pendency of the suit.

Held, that as the suit had been withdrawn and the subject-matter of the dispute was no longer before any Court there was no objection to the agreement being filed. 12 LLJ 24 : 122 Ind Cas 237 : AIR (Vol 17) 1930 Lah 1066.

——Sch. 2, Para. 17 — Reference on question of title.

Though civil Courts have no jurisdiction to divide revenue paying land by metes and bounds, the jurisdiction of the civil Court to decide questions of title is not affected by it and it is competent for the Court to refer such questions to arbitration. AIR (Vol 17) 1930 Lah 836 (DB).

——Sch. 2, Para. 17 — Reference on partnership dispute — Strict — Construction of arbitration clause.

A clause relating to the submission of a dispute to arbitration must be construed strictly and the provision in a partnership agreement that at the termination of the partnership arbitrators should

be appointed to settle all disputes does not include the question whether the partnership has been terminated or ousts the Court's jurisdiction to take accounts. 123 Ind Cas 696: AIR (Vol 17) 1930 Sind 202 (DB).

——Sch. 2, Para. 17 — Agreement with company to refer.

Where an agreement is made with a company to refer to arbitration under certain contingencies, a Court has no jurisdiction to file the agreement to refer inasmuch as Arbitration Act is made applicable to such agreements by S. 152, Companies Act and S. 3, Arbitration Act, excludes Sch. 2, Para. 17, from the operation of that Act. 118 Ind Cas 533: AIR (Vol 16) 1929 Lah 246.

——Sch. 2, Para. 17 — Parties cannot have an agreement to refer to arbitration disputes in a pending suit filed under Para. 17 of the second schedule. Such disputes cannot be referred under Para. 17 in conjunction with other disputes. 89 Ind Cas 335: AIR (Vol 13) 1926 Sind 5 (DB).

——Sch. 2, Para. 17 — Application under — Not a suit within Deccan Agriculturists' Relief Act, S. 3.

An application to file a reference under cl. 17 of Sch. 2, C. P. Code, is not a suit and it is doubtful if an application under cl. 20 to file an award even when an agriculturist is a party, can be called a suit; but in any case it is not a suit of the description mentioned in S. 3, cl. (w), (y) or (z) of the Deccan Agriculturists' Relief Act and the Court can file the award to which an agriculturist is a party and on whose property a mortgagee is created by the award, without adjusting accounts under Ss. 12 and 13 of the Act. 83 Ind Cas 548: 17 SLR 178: AIR (Vol 11) 1924 Sind 23 (DB).

——Sch. 2, Para. 17 — Order of Court — Right to.

The mere fact that the objecting party has gone to arbitration as though an order of reference had been made without insisting upon the order of reference, is conclusive against him if his opponent should at any later stage require an order of reference in order to file an application for some further step to be taken by the Court. The fact that a party has already consented to arbitration which has been going on for a very long time, entitles the opponent absolutely to an order of a reference under paragraph 17. 64 Ind Cas 459: 19 ALJ 823 : AIR (V 8) 1921 All 188 (DB).

——Sch. 2, Para. 17 — Withdrawal on the ground of misconception.

Where some of the parties to an agreement to arbitration are minors represented by their mother and the other party to the agreement enters into it under a misconception as to the authority of the minors' mother to enter into the agreement he is entitled to withdraw from the agreement when it is found that the mother has no authority to enter into such agreement. 26 CWN 246: AIR (Vol 8) 1921 Cal 818 (DB).

——Sch. 2, Para. 17 — Reference with consent — Second reference.

The Court is not competent, without the consent of the parties, to make another order of reference when the first arbitration proved abortive. 61 Ind Cas 390: 2 PLT 277: 6 PLJ 287: 1921 PHCC 170: AIR (Vol 8) 1921 Pat 161 (DB).

——Sch. 2, Para. 17 — Not a suit.

Although when an application is presented under para. 17 (1), the application has to be numbered and registered as a suit, yet that does not mean that the application is in fact a suit within the meaning of the term as used in the Code. 61 Ind Cas 390: 2 PLT 277: 6 PLJ 287: 1921 PHCC 170: AIR (Vol 8) 1921 Pat 161 (DB).

——Sch. 2, Para. 17 (1) — Pending suit — Agreement to refer.

A private agreement to refer to arbitration certain matters, some of which form the subject of pending suits is not interdicted but where an application is made to file it in Court the order of reference must be confined to matters not covered by the pending suits unless such suits have been meanwhile withdrawn or stayed pending reference. 4 OLJ 131: 40 Ind Cas 38: AIR (Vol 4) 1917 Oudh 8 (DB).

——Sch. 2, Para. 17 — Jurisdiction — Arbitration — Agreement to refer disputes under contract.

A clause in a contract to deliver wheat at Lahore providing that disputes arising under the contract would be referred to arbitration in Karachi, cannot be enforced in the case of a dispute as to non-delivery of wheat. 54 PWR 1913: 124 PLR 1913: 18 Ind Cas 316.

——Sch. 2, Para. 17 (1) — Agreement in writing — Pending suit.

Quaere: — Whether a petition for reference of a pending suit to arbitration is an agreement within the meaning of Para. 17. 17 PR 1911: 50 PLR 1911: 39 and 200 PWR 1911: 9 Ind Cas 195.

——Sch. 2, Para. 17 (1) — Future differences — Reference.

Per Pratt, J. C. — Though parties may agree to refer future differences to arbitration yet no actual reference can be made until such differences have arisen and are still subsisting. (1911) 5 SLR 92: 12 Ind Cas 639 (DB).

——Sch. 2, Para. 17 (1) — Parties — Agreement between some only.

An award made on a private reference to which some of the plaintiffs and the defendants were parties, is binding as between the parties. (1910) 37 Cal 63: 14 Cal WN 75: 10 CLJ 41: 2 Ind Cas 414 (DB).

(See contra 9 Bur LT 253: 38 Ind Cas 577: AIR (Vol 4) 1917 UB 6).

7A. Death of party.

——Sch. 2, Para. 17 (4) — Death of party — Refusal to proceed.

During the pendency of the arbitration proceedings on a private reference, one of the parties died and the arbitrator refused to go on with the arbitration. On an application for filing the agreement, held, the Court could not order the arbitrator to carry on the arbitration proceedings. 42 All 191: 1 UPLR (HC) 67: 18 ALJ 76: 54 Ind Cas 366: AIR (Vol 6) 1919 All 48 (DB).

8. Revision and appeal.

——Sch. 2, Paras. 17, 16, 19 — Award arrived at under Para. 17 — Decree following the award — Appeal, if lies from it.

No appeal lies from a decree following an award arrived at under Para. 17, Sch. II, Civil P. C. except in so far as the decree is at variance with the award. In the case of a pending suit no such appeal would lie under the terms of Para. 16 of the same schedule and in the case of an award without the intervention of a Court no appeal would lie under the terms of Para. 21 of the same schedule, and under Para. 19 all the foregoing provisions, i.e., all the provisions from Paras. 1 to 16 are made applicable to proceedings under Para. 17 so far as they are consistent with any agreement filed under that paragraph. AIR (Vol 23) 1936 Lah 617: 160 Ind Cas 1075 (DB).

——Sch. 2, Para. 17 — Procedure.

An order under the last portion of R. 17 (4) directing a party to nominate an arbitrator or to appoint one itself, is one ancillery to an order under the earlier portion of the sub-rule ordering an agreement to be filed and can be passed only when

an order under the earlier portion is in existence and where such an order is passed without an order under earlier portion, it is liable to be revised. 94 Ind Cas 483: AIR (Vol 13) 1926 Lah 505.

——Sch. 2, Paras. 17, 20 and 21 — Scope of — Application to file award — Material irregularity — Revision.

Sch. II, Para. 20 applies to an application for filing an award already made without the intervention of the Court and not to an application for filing an award which has not been passed even till the date of the application. Para. 17 is applicable to the latter case. A revision lies against a decree based upon an arbitration award on the ground of material irregularity with reference to the proceedings of the Lower Court and not with reference to the proceedings of the arbitrators. 90 PWR 1918: 45 Ind Cas 647: AIR (Vol 5) 1918 Lah 284.

——Sch. 2, Paras. 17 (4) and 19 -- Suit — Reference — Order setting aside award — Decree — Appeal.

A suit is a process for the recovery of a right or claim and can be prosecuted either in a regular Court of law or partly before a private tribunal and partly in a Court of law. An application to a Court asking for assistance to prosecute a claim before a private tribunal cannot be converted into a 'suit' by the mere process of numbering and registering the application as a suit. An order setting aside an award is not a decree and is not appealable. 8 SLR 260: 28 Ind Cas 60: AIR (Vol 1) 1914 Sind 122 (DB).

9. "Sufficient cause."

——Sch. 2, Para 17, Sub-Para 4 — "Sufficient cause" scope of — Held, that the agreement to refer should not be ordered to be filed.

The words "sufficient cause" in Sub-Para 4 or Para 17, Sch. II, Civil P. C., cover all the grounds of justice, equity and good conscience on which a Court thinks an agreement should not be ordered to be filed. The words should not be confined to grounds such as are mentioned in Para 14, namely, the award having left undetermined any of the matters referred to arbitration, or determining any matter not so referred, the award being indefinite and incapable of execution, and there being an objection to the legality of the award apparent on the face of it:

Held, that the circumstances that all the arbitrators were related to one of the parties to the referred, in one way or the other, showed that even if the arbitrators be not partial they could not command the confidence of the other party and it would be wholly inequitable to compel him to submit himself to their arbitration and consequently the agreement to refer should not be ordered to be filed. AIR (Vol 24) 1937 Oudh 436: 1937 OWN (CC) 792: 13 Luck 428: 170 Ind Cas 490 (DB).

——Sch. 2, Para 17 — Agreement not forthcoming and terms not known — Whether can be filed.

Paragraph 17 of Sch. II, Civil P. C. contemplates that the agreement should be in writing and should be before the Court, so that it may be ordered to be filed in order that an arbitrator may be appointed in accordance with its provisions and he may be called upon to act upon the agreement. It is not necessary that the document should be in the form of a written contract signed by the parties so as to be an instrument or document; but it is certainly necessary that there should be some writing which should embody the whole of the agreement. Once the Court is satisfied that the agreement, which is in writing and is before it was entered into by the parties, it can proceed under Para 17, but where no writing is produced and the terms of it are not admitted, the Court cannot order it to be filed without first ascertaining the terms as to which it would have to hold an enquiry. Where, therefore, the original document is not forthcoming and its terms cannot be ascertained exactly, and, therefore, it would be impossible for arbitrator to decide how to act, it is a sufficient cause for not ordering the agreement to be filed. AIR (Vol 22) 1935 All 886: (1935) ALJ 998: 1935 AWR (HC) 964: 156 Ind Cas 904 (DB).

——Sch. 2, Para 17 — Revocation of submission to arbitration — Relationship of arbitrator to a party — Whether sufficient cause.

It is not open to a party to an agreement of reference to revoke the submission to arbitration except for good cause. But on the other hand, when good cause has been shown there is no doubt that such revocations can be and are allowed. The fact that the arbitrator is related to one of the parties as the brother of his son-in-law affords a real likelihood of an operative prejudice on his part, and the existence of such relationship with one of the parties unknown to the other disqualifies him from acting as an arbitrator.

The words 'sufficient cause' are not to be confined within the narrow compass of fraud, coercion and undue influence. There are other causes besides these which may be sufficient for the reversal of an order under Sch. II, Para 17, Civil P. C.

Where a party is called upon to show cause why an order to revoke submission to arbitration should not be made, it is plainly necessary for him to show what cause he had there and then. It would not be proper for him to sit silent and to say nothing. If there was sufficient ground for setting aside the award when made, there could be no reason why the arbitrator should waste his time by going on with proceedings foredoomed to futility.

In case of arbitration where a person is appointed by two parties to exercise judicial duties there should be uberrima fides on the part of all parties concerned in relation to his selection and appointment, & every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post, ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made. AIR (Vol 20) 1933 Sind 68: 143 Ind Cas 635 (DB).

——Sch. II, Paras 17, 18 and 19 — Arbitration out of Court — Agreement to refer — Death of one of the arbitrators — Suit — Application for stay — Powers of Court.

The parties had agreed to refer their disputes to arbitration and abide by the unanimous award of three specified arbitrators. Pending arbitration proceedings, one of the arbitrators died. The agreement contained no provision for filling up the vacancy. One of the parties thereupon filed a suit and the other applied under para 18 (Sch. II C. P. Code) for stay.

Held, the Court had no power to stay the proceedings as the agreement became inoperative on the death of one of the arbitrators. Any reference made

by the Court to two of the arbitrators only or after substituting a new arbitrator in the place of the deceased would not be consistent with the agreement. That is a sufficient reason within the meaning of paras 17 (4) and 18 of Sch. II. The provisions of paras 4 and 5 cannot be invoked; those provisions can only be applied if they are consistent with the agreement. (vide para 19). 19 ALJ 823 and 44A 523 not followed. AIR (Vol 18) 1931 Mad 28: 1930 MWN 1028: 32 MLW 905 (DB).

10. Validity of reference.

See also, N. 1 and 7.

——Sch. 2, Para 17 — Power of guardian to refer dispute.

The guardian mother of minor has authority to agree to refer the disputes arising inside the family to the decision of arbitrators under Para 17 (1), where she finds that it is for the benefit of the minor. AIR (Vol 26) 1939 Cal 557: 187 Ind Cas 80 (DB).

——Sch. 2, Para 17 — Application to file agreement — Arbitrator delivering his award and filing it in Court before disposal of the application — Procedure pointed out.

In a case where at the time when the application under para 17 to file the agreement was made, the arbitrator had not entered upon the arbitration, but before the application could be disposed of, he had actually delivered his award and filed it in Court. Held, that the application had become infructuous and the Court cannot make another reference to the arbitrator as the object of having the agreement to refer to arbitration filed in Court under para 17 which is to direct the arbitrator to enter upon his duties and to deliver his award, is achieved though not through the agency of the Court. The proper course for the parties to follow in such a case is to take steps under para 20 to have the award made a rule of Court. This may be done either by amendment of the previous application or by withdrawing it and filing a fresh application under para 20. AIR (Vol 15) 1928 Lah 170: 108 Ind Cas 186.

——Sch. 2, Para 17 — Remission of award — There should be no distinction between reference through Court and private reference.

The provisions of para 21 have been interpreted as precluding the remission of an award to the arbitrator for reconsideration, but the distinction in the matter of remitting an award for reconsideration is difficult to understand between proceedings when reference to arbitration is filed in Court and those where no such reference is filed but only the final award is desired to be filed. There is no apparent reason to discourage arbitration without the intervention of a Court by penalizing it to this extent that a slight mistake therein which could easily be rectified by a remission to the arbitrator, would completely invalidate the award. In fact an award given without the intervention of the Court should be treated with greater indulgence, and larger opportunities for its rectification should be given as in such a case the arbitrator acts without any guidance from a Court of law. AIR (Vol 13) 1926 All 501: 95 Ind Cas 416: 48 All 475 : 24 ALJ 480 (DB).

——Sch. 2, Para 17 — Reference by pleader.

Pleader appearing for another pleader, cannot make a valid reference to arbitration on behalf of the latter's client, without a vakalatnama authorizing him to do so. AIR (Vol 13) 1926 Lah 563: 96 Ind Cas 277.

——Sch. 2, Para 17 (1) — Agreement by guardian.

Where one of the two appointed guardians consents to the agreement to refer to arbitration subsequently but not at the time of the agreement, the agreement is not valid. AIR (Vol 8) 1921 Cal 818: 47 Cal 713: 57 Ind Cas 945 (DB).

——Sch. 2, Para 17 (1) — Agreement to refer — Cross-contracts containing similar provisions — Effect

Where there is a contract for the sale of goods and a subsequent cross-contract containing the same clauses for the same quantity of goods of the same kind and for the same delivery, the earlier contract is extinguished by the later cross-contract which has the effect of fixing the difference to be paid by one party to the other. The parties to the earlier contract cannot claim arbitration as there is no difference which is referable to arbitration; mere non-payment is not such a difference. AIR (Vol 7) 1920 Sind 21: 14 SLR 18: 56 Ind Cas 514 (DB).

——Sch. 2, Para 17 (1) — Consent to reference obtained by misrepresentation.

A party induced by misrepresentation to refer a dispute to arbitration is at liberty to revoke the reference; such an agreement cannot be filed in Court. AIR (Vol 6) 1919 Lah 140: 50 Ind Cas 637.

——Sch. 2, Paras 17 (1) and 20 — Pending suit — Agreement to refer — Bar — Award.

Paras 17 and 20 apply only to cases when there is no suit relating to the same matter already pending between the parties who are affected by the agreement to refer or by the award. The previously instituted suit is not barred by reason only of an agreement being made between the parties for reference to arbitration without the intervention of the Court. An award in pursuance of such an agreement without reference to the Court cannot be taken cognizance of by the Court so as to be made the basis of a proceeding under Para 20. 115 PR 1912: 191 PWR 1912: 6 PLR 192 (Sup.): 15 Ind Cas 140 (DB).

——Sch. 2, Paras 17 (1) and 18 — Agreement to refer — Refusal by one party — Remedy of the other.

If one party to a contract to make reference, refuses to go on, the other party may within the period of limitation take steps to enforce the decision or may sue for damages for breach of contract; if he does neither, the contract is non-existent in the eye of law. (1910) 6 Ind Cas 420 (All) (DB).

11. Decree on award.

——Sch. 2, Para 17 — Mortgage decree on award.

Mortgage decree passed in terms of an award made under Sch. 2, para 17 is not a decree under O. 34, R. 4. and therefore R. 5 has no application. AIR (Vol 14) 1927 Sind 103: 19 SLR 202: 99 Ind Cas 178 (DB).

——Sch. 2, Paras 17, 20 and 21 and O. 23 R. 3 — Reference to arbitration — Decree in terms of award.

An award on a reference by the parties to a suit without the intervention of the Court is like an adjustment under O. 23, R. 3. The Court must find whether it binds the parties. Where defendant was given time to file an award while he had not filed, the written statement in the ordinary course.

Held, that the Court should have ordered the defendant to file a written statement pleading the award.

Per Macleod, C. J. — Where parties make an agreement to refer the dispute in a suit to arbitration

an order of the Court under Paras 1 to 16 will apply. But where they do not make an agreement an order of the Court cannot be filed under Para 17 nor the award under Para. 20 or 21. If the parties consent after the award is made they can get a consent decree and an order recording the terms of the adjustment is unnecessary. Any of the parties can sue to enforce the award and apply for a stay of the original suit, though either of them is entitled to have the question of the binding nature of the award determined in the original suit.

Per Fawcett, J. — An award on matters in suit prior to the decision of the suit can be recorded under O. 23, R. 3. Paras 20 and 21 do not apply to cases where matters referred to arbitration are the subject-matter of a pending suit. AIR (Vol 8) 1921 Bom 310: 22 Bom LR 1048: 59 Ind Cas 53 (DB).

——Sch. 2 Para 18.

See also Arbitration Act 1940, S. 34.

1. Scope and object.
2. "Earliest opportunity."
3. Award made prior to suit.
4. Sufficient cause — Burden of proof.
5. Direction of Court to stay suit.
6. Dispute as to agreement to refer — Validity of agreement.
7. Removal of stay order.
8. Appeal.
9. Presidency Small Cause Court's power to stay.

1. Scope of object.

——Sch. 2, Para 18 — Contract to refer matter to arbitration — One party backing out and suing other — No application by other party for stay — Jurisdiction.

Once a machinery by which the parties can have their dispute settled by arbitrators is provided, the choice to have the dispute so settled is to be left to them. If any party who has contracted to settle such dispute by arbitration backs out of it and institutes a suit in disregard of the contract, the Court has been given discretion at the instance of the other party to have the suit stayed. If the other party wishes to bind the party suing to their contract for settling the matter by arbitration, it must apply to the Court to stay the suit before settlement of issues. But if neither party wishes to have recourse to arbitration, the ordinary tribunals established by law will have jurisdiction to pronounce judgment upon the matters in dispute. AIR (Vol 26) 1939 Pat 118: 17 Pat 293: 5 BR 352: 4 CLT 17: 180 Ind Cas 122 (DB).

——Sch. 2, Para 18 — Agreement to arbitrate, if by itself stay of suit — Stay under Para 18, should not be sine die.

As Para 18 of Sch. II, itself shows, an agreement to arbitrate does not operate as a stay of suit.

The Court ought not to renounce its powers and its duties in the disposing of a suit; it is bound to exercise as much control as it can over the proceedings before the arbitrator. It is the duty of the Court to see that the parties do not delay the disposal of the arbitration proceedings and to see that as far as possible, they prosecute those proceedings. Where it adjourns a case under Para 18, Sch. II, the proper order to pass is not "adjourned sine die." AIR (Vol 25) 1938 Mad 205: (1938) 1 MLJ 38: (1938) MWN 1124 (2): 177 Ind Cas 440.

——Sch. 2, Para 18 — Provisions are mandatory.

The wording of Para 18, Sch. II, as well as of S. 22, Civil P. C., is clearly mandatory. Courts cannot treat some laws of the Legislature as being less binding on them than others. AIR (Vol 25) 1938 Mad 205: (1938) 1 MLJ 38: (1938) MWN 1124 (2): 177 Ind Cas 440.

——Sch. 2, Para 18 — Arbitration — Stay of pending suit.

Para 18 does not apply if an order for stay of a suit is vacated owing to the refusal of one of the arbitrators to act and the suit is proceeded with. The question whether the arbitration agreement and the proceedings had thereunder formed a bar to the suit will have to be determined in the suit itself. AIR (Vol 6) 1919 Cal 295: 23 CWN 293: 50 Ind Cas 879 (DB).

2. "Earliest opportunity."

——Sch. 2, Para 18 — Petition for stay, three years after suit and at instance of Court — Para 18, if complied with.

Where at the instance of the Court a petition for stay is filed after three years from the filing of the suit and after the framing of the issues, the provisions of Para 18 of Sch. II cannot be said to have been complied with. AIR (Vol 25) 1938 Mad 205: (1938) 1 MLJ 38: (1938) MWN 1124 (2): 177 Ind Cas 440.

——Sch. 2, Para 18 — Contract embodying arbitration clause — One party filing suit — The other not objecting or asking for stay :

Held, that the other party could not object later on as to the maintainability of the suit. AIR (Vol 22) 1935 Lah 775: 160 Ind Cas 739 (DB).

——Sch. 2, Para 18 — Stay of suit — Power of Court discretionary — Application by party to suit necessary — Application when should be made.

The power vested in a Court to stay a suit under Para 18 is purely discretionary and can be exercised only on an application made for that purpose by one of the parties to the suit at or before the settlement of issues. AIR (Vol 1) 1914 Lah 436: 92 PR 1913: 109 PLR 1914: 22 Ind Cas 811 (DB).

3. Award made prior to suit.

——Sch. 2, Para 8 — Suit stayed and award given — Award not filed in Court — Matter, if can be agitated in another forum.

When a suit is stayed under Sch. II, Para 18, Civil P. C., and once the award is given, no question of the continuance of the suit can arise. The matters in issue must be considered to have been decided and proceedings thereafter must commence de novo, whether under the provisions of the Second Schedule or otherwise upon the award. It is not necessary to apply to file an award in Court, but it does not follow that a party bound by an award can agitate in another forum matters covered by the reference to arbitration. AIR (Vol 30) 1943 Oudh 378: 1943 OWN (CC) 256: 212 Ind Cas 366 (DB).

——Sch. 2, Para 18 — Oral award.

Where an arbitrator has acted and given an award but has not reduced it to writing, he has performed his duties and has become functus officio except for the merely clerical duty of transcribing his award on paper, and so any person, who wishes to take action, should do so under para 20, Sch. 2, and so an order staying proceedings and passed under para 18 of the

Schedule is not in order and the proper order is that the suit must proceed. (1928) 110 Ind Cas 409 (Lah).

——Sch. 2, Para 18 — Award after suit — Validity.

In order to apply the doctrine that an award made during the pendency of a suit is invalid, the person instituting the suit must be party to the agreement to refer; the party wishing to stay the suit must have the right to apply to the Court to stay it, and the subject-matter of the dispute must be the same before the arbitrator and before the Court. Where some of the partners of a partnership refer their dispute concerning the partnership as regards their rights inter se, and the remaining partners institute a suit for partnership accounts, an award made pending such a suit is not ultra vires. AIR (V 14) 1927 Lah 465 : 101 Ind Cas 786.

——Sch. 2, Para 18 — Where an application for stay of the suit under paragraph 18 of the Second Schedule of the C. P. Code, or S. 19 of the Arbitration Act is not filed in proper time, or is dismissed, the award is no bar to the suit. AIR (Vol 13) 1926 Sind 86: 95 Ind Cas 481.

——Sch. 2, Para 18 — Reference to arbitration made — Suit instituted thereafter by a party — Authority of arbitrators cease — But defendant may ask Court to stay suit — Arbitrators may proceed if suit is stayed.

Where parties refer their disputes to arbitration, but subsequently thereto one of the parties files a suit in respect of that dispute the arbitrators lose their authority. If the defendant still desires that the controversy should be decided by arbitration, he must endeavour to obtain a stay of the suit by an appropriate application under para 18. If the application is refused by the Court in the exercise of its discretion, the remedy by arbitration ceases to be available. If the suit is stayed, two possible contingencies may require consideration. If the arbitrators have not yet made an award they are free to bring their proceedings to a termination and make an award in accordance with law. If they have made an award after the institution of the suit, the award cannot be pleaded as an effective bar to the suit. The award so made should be brought up before the Court under para 20, the Court will refuse to enforce it under para 21 read with para 14 (c), and as the award will thus stand cancelled because made without jurisdiction, the arbitrators will be left free thereafter to resume their proceedings on the basis of the original reference. If this view were not adopted, the result would follow that a party to a submission who had appeared throughout and had taken his chance before the arbitrators might at the very last moment, when the award, possibly an adverse award, was about to be made and when there would be no time left for his opponent to obtain a stay order, institute a suit and thereby render infructuous the entire proceedings. Where the defendant did not take recourse to the proper procedure, namely, to apply for stay of the suit, cancellation of the award as made without jurisdiction and thereafter remission of the matter to the arbitrators, even if his failure was possibly attributable to ignorance of the law. Held, the agreement to refer to arbitration not having provided for reconstitution of the committee of arbitrators, if one of them should die, the award must be rejected as made without jurisdiction, and the suit should be tried on the merits by the Court. AIR (Vol 10) 1923 Cal 135: 69 Ind Cas 863: 35 CLJ 482: 26 CWN 967 (DB).

——Sch. 2, Para 18 — Failure to apply for stay of — Arbitrator becomes functus officio.

The parties referred their dispute to arbitrators for decision. Plaintiff filed a suit against defendant but the plaint was returned for presentation to the proper Court. Some time after the passing of this order the arbitrators gave an ex parte award though after a long delay after giving notice to the parties. Held, the institution of a suit had not ipso facto the effect of superseding a previous reference to arbitration dealing with the same subject matter. But where either party fails to apply for stay of the hearing of the suit under para 18 the effect is to supersede the arbitration for good and the arbitrator becomes functus officio. Also where no application for stay is made within limitation the effect of the institution and the decision of a suit would be to supersede the arbitration and render the award unenforceable. AIR (Vol 9) 1922 Oudh 158: 68 Ind Cas 235: 25 Oudh Cases 63.

——Sch. 2, Paras 18 and 19 — Reference — Parties to — Resiling from — Effect.

When one of the parties to reference to an arbitration subsequently resiles from it and files a suit in respect of the subject matter, the arbitrator became functus officio on the filing of the suit and the award subsequent to it is ultra vires and a decree embodying the award could not legally be passed. The legislative provisions relating to arbitration do not affect a party's right to go to proper Courts but the Court has a discretion in a given case of reference to ask the arbitrator to give a decision if it finds that they could decide the case better than the Court itself. 41 Mad 115: 6 LW 243: 33 MLJ 177: 42 Ind Cas 514: AIR (Vol 5) 1918 M 719 (DB).

See contra (1920) 3 UBR 210: 57 Ind Cas 894: AIR (Vol 7) 1920 UB 6.

——Sch. 2, Paras 18 and 22.

A party to an agreement to refer a dispute to arbitration is not debarred from bringing an independent suit on title. AIR (Vol 1) 1914 All 275: 12 ALJ 757: 24 Ind Cas 490.

——Sch. 2, Para. 18 — Bar — Sp. Rel. Act, S. 21.

An award extinguishes all claims embraced in the submission, and afterwards furnishes the only basis on which the rights of the parties can be determined, and constitutes a bar to any action on the original demand apart from S. 21 of the Sp. Rel. Act which to some extent is replaced by Para 18, Sch. II, C. P. C. 7 Bur LT 308: 25 Ind Cas 220: AIR (Vol 1) 1914 LB 56 (DB).

4. Sufficient cause — Burden of proof.

——Sch. 2, Para 18 — Agreement to refer.

When a Court is apprised that a suit has been instituted in contravention of an arbitration agreement the Court has a discretion to stay the suit and the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be so referred and not on the defendant to show that no such reason exists. 60 Ind Cas 776: 2 Lah 19: 3 LLJ 61: 69 PLR 1921: AIR (Vol 9) 1922 Lah 97 (DB).

——Sch. 2, Para 18 — Suit in contravention of agreement.

A Court has discretion to stay a suit instituted in contravention of an arbitration agreement unless there

is sufficient reason and the burden of proving that there is sufficient reason lies on the plaintiff. (1921) 61 Ind Cas 322: 3 UPLR (Lah) 48 (DB).

5. Direction of Court to stay suit.

——Sch. 2, Para 18 — Stay of suit — When should be refused.

The stay of a suit under Para 18 of Sch. II, Civil P. C., as also under S. 19, Arbitration Act, is made by the Court only with a view that the parties may go to arbitration in accordance with their agreement. The stay of a suit will be refused when there are are impediments to arbitration; as for instance when the arbitrator named by the parties in their submission is dead or refuses to act. On an analogous principle the stay of a suit will have to be refused if there could not be an arbitration at all. An arbitration presupposes a dispute or difference between the parties and if there is no dispute or difference, there is no occasion for an arbitration and a pending suit between the parties ought not to be stayed in such a case. It follows, therefore, that where the plaintiff is not aware before the institution of the suit, that there is a difference between him and the defendant or of nature of the difference, he cannot be said to have gone back upon his agreement to refer to arbitration or was attempting to go back upon it, by rushing to Court. The Court under these circumstances would be justified in the exercise of its discretion in refusing to stay the suit. AIR (Vol 27) 1940 Cal 105: ILR (1939) 2 Cal 181: 70 CLJ 148: 43 CWN 879: 186 Ind Cas 617 (DB).

——Sch. 2, Para 18 — Arbitration — Agreement to refer — Suit in contravention — Reference procedure — Sp. Rel. Act, S. 21.

A defendant who was a party to a contract to refer present or future differences to arbitration cannot seek specific performance of the arbitration agreement, nor set it up as a bar to a suit brought against him in contravention of the agreement. When the Court is informed that a suit has been instituted in contravention of the arbitration agreement the Court has a discretion to stay the suit. The defendant can obtain a stay of the suit and either party can then apply under Para 17 (1) for a reference to arbitration by the Court under Para 17 (4). 46 Cal 1041: 23 CWN 716: 29 CLJ 399: 51 Ind Cas 80: AIR (Vol 6) 1919 Cal 479 (DB).

6. Dispute as to agreement to refer — Validity of agreement.

——Sch. 2, Para 18 — Discretion to stay suit, held not capricious or unjudicious.

Although a Court has a discretion to stay or to refuse to stay a suit under Para 18, Sch. II, Civil P. C., it is its duty to act upon the agreement to refer to arbitration unless it sees sufficient reason why the dispute should not be referred.

It cannot be said that the Court exercises its discretion in an unjudicious or capricious manner where it refuses to stay the suit, holding that there was no valid admission and that there was no contract regarding arbitration between the parties. AIR (Vol 24) 1937 Lah 206: 39 PLR 423: 172 Ind Cas 432.

——Sch. 2, Para 18 — Stay of suit, necessity of, before arbitrators can function.

The jurisdiction of the ordinary Court will continue until and unless it chooses to stay the action. Unless the action is stayed, any award given during the pendency of the suit will be null and void, because a private tribunal cannot oust the jurisdiction of ordinary Courts. If a party to a contract has gone to Court instead of referring a dispute to arbitrators in accordance with its terms he may be liable to pay damages for breach of the contract. But the arbitrators will not be able to function and give a valid award during the pendency of the suit, unless the suit is stayed by the Court itself. AIR (Vol 22) 1935 Lah 916: 38 PLR 636: 17 Lah 291: 157 Ind Cas 867.

——Sch. 2, Paras 18, 17 — Death of one arbitrator before reference — Powers of Court to appoint new arbitrator or to refer to surviving arbitrators — Suit by party — Power to stay.

Where the parties to a dispute agree out of Court to make a reference to certain named arbitrators and before an application under Para 17, Civil P. C. for filing the reference is made to the Court, one of the arbitrators dies, in the absence of any express provision in the agreement as to what ought to be done under such circumstances, the Court has no power to appoint a new arbitrator in the place of the deceased or to make a reference to the surviving arbitrators; and if one of the parties files a suit ignoring the agreement to refer, the Court has no power to stay the suit under Sch. II, Para 18, Civil P. C. AIR (Vol 18) 1931 Mad 28: 32 MLW 905: (1930) MWN 1028: 60 MLJ 676: 54 Mad 469: 129 Ind Cas 638 (DB).

——Sch. 2, Para 18 — Indent, arbitration clause in— Agreement to accept bills notwithstanding dispute — Suit on bills — No stay.

Where one of the clauses in the indent form provided "We hereby agree to purchase from you the undermentioned goods and authorise you or your correspondents to draw upon us at 30 days' sight with all relative shipping documents attached for payment. In case of need, seller's invoice to be taken in lieu of that which we engage and bind ourselves to accept on presentation and pay at maturity notwithstanding any objection we may have regarding or on account of any variation whatever from the terms of the indent, such objection to be settled by arbitration as provided for". Held, it is clear that drafts must be accepted on presentation and paid at maturity in spite of any objection the indentors may have regarding or an account of any variation from the terms of the indent. In the above case, when a suit brought upon the accepted but unpaid bills of exchange the defendant shall not be entitled to a stay of the proceedings. AIR (Vol 9) 1922 Lah 353: 66 Ind Cas 43: 2 Lah 335: 118 PLR 1921 (DB).

——Sch. 2, Para 18 — Contract providing for arbitration of disputes — Contract impeached — If arbitration should be stayed.

Where a contract between plaintiffs and defendants providing for reference to arbitration in case of disputes arising out of the contract, is impeached by a suit by the plaintiffs on equitable grounds, arbitration proceedings which had commenced should be stayed pending the disposal of the suit. AIR (Vol 6) 1919 Cal 1042 : 22 CWN 535 : 46 Ind Cas 173 (2) (DB).

——Sch. 2, Para 18 — Agreement to refer to arbitration after institution of suit — If adjustment within meaning of O. 23, R. 3 — Stay of suit.

Para 18 is restricted to cases in which a suit is instituted after an agreement to refer to arbitration. When the Court is seized of a case, its jurisdiction

cannot be ousted by the private and secret act of the parties. If they wish to alter the tribunal they must proceed under Sch. II, Paras 1 to 16, C. P. C. A private agreement between parties to a suit entered into, after institution of the suit to refer their dispute to an arbitrator is not a valid ground for staying the suit. 38 Bom 687: 16 Bom LR 653: 27 Ind Cas 46: AIR (Vol 1) 1914 Bom 184 (DB).

7. Removal of stay order.

——Sch. 2, Para 18 — Stay of suit — Revival — Stay must be vacated — Court hearing suit on merits without vacating stay order by separate order — Stay must be deemed to have been vacated by implication.

Where under Sch. II, Para 18, Civil P. C., the Court has stayed a suit, before it is revived the stay should be removed and then the Court should decide the suit on its merits. Where, however, no separate order vacating the original order of stay is written, and the Court proceeds to hear the suit, the order of stay must be deemed to have been vacated by implication. AIR (Vol 24) 1937 Sind 247: 171 Ind Cas 625 (DB).

8. Appeal.

——Sch. 2, Para 18 — Contract for sale of goods giving seller right of re-sale in case of buyer's default and providing for reference to arbitration of any dispute arising out of contract — Seller's exercise of right of re-sale resulting in loss and wishing to refer matter to arbitration — Buyer refusing to agree — His suit for declaration that defendant had no right to refer and for injunction restraining him from doing so — Meantime defendant referring matter to arbitration and applying for stay of plaintiff's suit under S. 19, Arbitration Act (IX of 1899) — Application rejected — Plaintiff obtaining decree declaring reference by defendant and award to be null and void — No appeal against decree — Application by defendant for stay of suit under Para 18, Sch. II, stating his willingness to refer to arbitration under ordinary law — Reference and award held should be ignored — Bar to fresh reference — Question held not intricate for determination by arbitrators — Arbitration clause also held rescinded — Remedy of seller.

The contract for sale of goods gave a right of re-sale to the seller of goods, in case of default on the part of the buyer and provided that "any dispute arising out of the agreement whatever be its nature, shall unless amicably settled be referred to the arbitration of certain persons who were to be appointed in the manner described therein." After the exercise of the right of re-sale the defendant who was alleged to have sustained a loss of Rs. 10,521 wanted to refer the dispute to arbitration as provided by the agreement but the plaintiff did not agree to do so and instituted a suit for a declaration that the defendant had no right to refer the dispute to arbitration and for an injunction restraining him from making the reference. In the meantime the defendant had appointed arbitrators who had delivered an award ex parte against the plaintiff and as soon as the defendant received notice of the institution of the plaintiff's suit he applied for stay under S. 19, Arbitration Act. But the application was rejected. In the meantime the plaintiff obtained a decree declaring the award obtained by the defendant as null and void. There was no appeal from the decree. The defendant applied under Sch. II, Para 18, Civil P. C. for stay of the suit stating that he was ready and willing to refer the dispute to arbitration under the ordinary law:

Held, that the 'reference' and the so-called 'award' having been declared void must, therefore, be ignored altogether, and the plaintiff could not use them in bar of a fresh reference, provided the submission clause had not been abrogated on other grounds.

Held, also that the questions involved were not of such intricacy as could not be determined appropriately by the arbitrators.

Held, further that the arbitration clause was an integral part of the contract; it was one of its important conditions, and if on the happening of a certain contingency, the contract was dissolved by operation of law, the clause went with it. The contract had come to an end on its rescission by the seller by exercise of his right of re-sale and hence neither party could, thereafter, clothe a person with authority to arbitrate with regard to disputes arising out of the contract.

Held, still further that the fact that S. 54 (4), Sale of Goods Act, kept alive the seller's right to damages arising out of buyer's default did not entitle the seller to enforce that claim by reference to arbitration under the arbitration clause which was no longer subsisting. The only way of enforcing the claim for damages was by way of a suit in a Court of Law. AIR (Vol 28) 1941 Lah 427: 43 PLR 693: ILR (1942) Lah 788: 198 Ind Cas 17 (DB).

——Sch. 2, Paras 18, 5 — Agreement to refer dispute to three named arbitrators — Application under Sch. II, Civil P. C., to stay trial of suit — Lower Court's finding that matter not covered by arbitration — Appeal — One arbitrator dying — Agreement rendered impossible of performance and, therefore, stay of proceedings out of question. (1936) 1936 MWN 407.

——Sch. 2, Para 18 — Power of Court — Appeal, when lies.

A Court can only take action under Para 18 in the case of a subsisting agreement to refer to arbitration. Both parties need not admit that there is an agreement to refer. It is for the Courts to decide whether or not such an agreement had as a matter of fact been made. Where a Judge finds that there was no such agreement and therefore a suit was not liable to be stayed under Para 18, this order is appealable under S. 104 (e), C. P. C. AIR (Vol 4) 1917 Lah 261: 62 PR 1917: 65 PWR 1917: 39 Ind Cas 508 (DB).

9. Presidency Small Cause Court's power to stay.

——Sch. 2, Para 18 — Reference by Small Cause Court — Bombay — Power to stay suits.

Schedule 2, C. P. C. is made applicable to the Bombay Court of Small Causes under the rules that were framed by the High Court in 1895 under S. 9, Presidency Small Cause Courts Act, 1882, as amended by the Act of 1895, and as there is nothing contained in S. 19, Arbitration Act, which is in substantial opposition to the provisions in para 18, Sch. 2, C. P. Code, para 18, C. P. Code, should be considered applicable in preference to the provisions of S. 19, Arbitration Act, and therefore under para 18, Sch. 2, of the Code, the Judge of Bombay Presidency Small Cause Court is empowered to stay a suit. AIR (Vol 15) 1928 Bom 275: 111 Ind Cas 641: 52 Bom 420: 30 Bom LR 661 (DB).

——Sch. 2, Para 18 — Revision.

Where the Court, wrongly holding that the parties were bound to refer the dispute between them to arbitration, stayed the suit.

Held, High Court could interfere in revision. AIR (Vol 15) 1928 Bom 275: 111 Ind Cas 641: 52 Bom 420: 30 Bom LR 661 (DB).

——Sch. 2, Para 19.

——Sch. 2, Para 19 — Remission of award.

A mere declaratory award is incomplete and should be remitted to arbitrators for completion. It cannot be executed. (1913) 6 SLR 146: 19 Ind Cas 374 (DB).

——Sch. 2, Para 20.

1. Appeal.
2. Applicability and scope.
3. Award.
4. Jurisdiction.
5. Limitation.
6. Revision.

1. Appeal.

——Sch. 2, Para 20 — Appeal from order on application to file award — Valuation for jurisdiction.

The subject-matter of an appeal from an order on an application to file an award which had been numbered and registered as a suit is the subject-matter of the award itself and the appeal should, therefore, be valued for purposes of jurisdiction on the basis of the subject-matter of the award. AIR (Vol 22) 1935 Mad 723 : (1935) MWN 552 : 156 Ind Cas 946.

——Sch. 2, Paras. 20, 21 — Procedure to be followed — Two separate orders on filing award and the other passing decree, if to be made.

When an application for the filing of the award under Para 20, Second Schedule of the Civil P. C. is made it is the duty of the Court to direct notice to be given to the parties to the arbitration other than the applicant requiring them to show cause within a time specified why the award should not be filed. Under Para. 21 of the same schedule if the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and that no grounds such as are mentioned or referred to in Paras. 14 and 15 exist, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

Two separate orders must be passed in such cases and the party should be allowed to elect as to which order he proposes to appeal against, inasmuch as when the Court orders an award to be filed, it is appealable under S. 104 (1) (f).

But when a decree is passed upon the basis of an award and that decree is challenged in appeal, the only ground that can be taken is that the decree is in excess or not in accordance with the award. AIR (Vol 20) 1933 All 166 : (1933) ALJ 40 : 147 Ind Cas 198.

——Sch. 2, Para 20 — Award filed with consent of parties — Objection in appeal — Estoppel.

Where a reference was made to arbitration with regard to matters in dispute in a pending suit without the intervention of the Court, and the award was filed with the consent of the parties, but at a latter stage, on the validity of the procedure being attacked by one of the parties, the other party pleaded (i) that the point was never taken in the Court below and being a mixed question of law and fact should not be allowed to be raised for the first time in appeal and (ii) that the appellants were estopped from challenging the validity of the award as they accepted it at the hearing of the appeal and agreed to a decree being passed in terms thereof in that appeal.

Held, (i) that as the error was patent on the record, it could be urged in appeal ;

(ii) that mere consent of the parties could not give judisdiction to file the award and there was also no estoppel as the matter was one of mere law. AIR (Vol 20) 1933 Lah 746 : 34 PLR 340 : 142 Ind Cas. 195.

——Sch. 2, Para 20 — Arbitration without intervention of Court — Application to file award in Court — Appeal against the order — Court-fee :

Held, that the appeal fell within the purview of Art. 11 Sch. II, of the Court-fees Act and was consequently chargeable with court-fee of Rs. 21 only. AIR (Vol 19) 1932 Oudh 282 : 9 OWN (CC) 800 : 6 Luck 703 : 139 Ind Cas 622 (DB).

——Sch. 2, para. 20 — Suit to enforce award.

Where a plaint was headed "Suit valued at Rs. 86 for enforcing an award" and ad volorem Court-fees had been paid accordingly, though at the conclusion of the plaint there was a prayer that the award may be ordered to be filed, but the prayer further asked that a decree be passed in accordance with its terms.

Held, that there was a suit for the enforcement of the award and not an application to file an award before the trial Judge and that a second appeal did therefore lie. 117 Ind Cas 574 : 7 Rang. 136 : AIR (Vol 16) 1929 Rang. 166.

——Sch. 2, Para. 20 — An appeal lies aganist an ex parte decree passed in an application filed under para. 20, Sch. 2 of the Code. 112 Ind Cas 691 : 29 MLW 490 : AIR (Vol 15) 1928 Mad 969 : 55 MLJ 262 (DB).

——Sch. 2, Para. 20 — Joint decree and award.

Where the order filing the award and the order passing a decree are both contained in the same order, the two parts can be separated and though there may be no appeal against the decree itself, an appeal can be filed against the earlier portion of the order which directs that the award should be filed. 112 Ind Cas 691 : 29 MLW 490 : AIR (Vol 15) 1928 Mad 969 : 55 MLJ 262 (DB).

——Sch. 2, Para. 20.

A Court is competent on an application under para. 20, Sch. II, to pass a decree on an award as modified by a lawful compromise filed by the parties and from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. 68 Ind Cas 209 : 9 OLJ 219 : 25 OC 213 : AIR (Vol 9) 1922 Oudh 189 (DB).

——Sch. 2, Para. 20 — Jurisdiction — Bengal Civil Courts Act, (XII of 1887), S. 21, Sub-s. (1), Cl. (a) — Disputes referred to arbitration — Application to file award — Value — Appeal.

Where disputes relating to mutual money claims were referred to a private arbitration and the arbitrator awarded a sum Rs. 2,000 as due by one party to the other and an application to file the award was allowed by the Subordinate Judge, an appeal against that order lies to the District Court and not to the High Court under S. 21, Sub-S. (1), Cl. (a) of the Bengal Civil Courts Act, (1887). 19 CLJ 260 : 18 CWN 867 : 22 Ind Cas 793 : AIR (V 1) 1914 Cal 683 (DB).

2. Applicability and scope.
   (a) Applicability and scope.
   (b) Nature of proceeding.
   (c) Suit to enforce award.
   (d) Procedure (or Duties and Powers of Court).

(a) Applicability and scope.

——Sch. 2, Para 20 — Paras. 11 and 20 are different and cannot be usefully compared. AIR (Vol 28) 1941 Mad 129 : (1940) 2 MLJ 520 : 52 MLW 556 : (1940) MWN 1083 (DB).

——Sch. 2, Para 20 — Powers given by Para. 20 of Sch. I cannot override the general power, given to parties under O. 23, R. 3 to adjust their disputes by a lawful compromise at any time after suit. AIR (Vol 25) 1938 Nag 492 : 178 Ind Cas 29.

——Sch. 2, Para 20 — The arbitrator is not "a person interested in the award" within the meaning of Para. 20. AIR (Vol 22) 1935 Lah 134.

——Sch. 2, Para 20 — An application to file award under Sch. II Para. 20 is not a suit but is required to be registered as a suit and falls within the ambit of expression "suit" in S. 16, Prov. Small Cause Courts Act. AIR (Vol 22) 1935 Sind 208 : 30 SLR 12 : 158 Ind Cas 1102.

——Sch. 2, Para 20 — Agreement to refer future disputes.

An agreement to refer future disputes to arbitration is not in any way illegal and award made in pursuance of such an agreement may be filed in Court under Sch. II, Para. 20, Civil P. C. To come within the purview of Sch. II, Para. 20, it is not necessary that there should have been a dispute in existence at the time of the agreement. AIR (Vol 19) 1932 Lah 459 : 33 PLR 934 : 137 Ind Cas 807.

——Sch. 2, Para. 20 — S. 10 does not apply.

An application under para. 20, Sch. 2, is not a plaint and that the hearing of such an application is not a suit though under sub-cl. 2, S. 20, it has to be numbered and registered as a suit. S. 10 is applicable only to suits. No doubt the principles embodied in S. 11 in some instances do apply when there have been previous litigious proceedings not amounting to suits but that does not mean that S. 10 aslo should be held to apply when one of the procedings is not suit. For S. 10 to apply the matter in issue in one suit must be directly and substantially in issue in the previously instituted suit. 117 Ind Cas 94 : 30 PLR 395 : AIR (Vol 16) 1929 Lah 533.

——Sch. 2, Para 20 — Marten, C, J. — Para. 20 does apply to arbitrations in a pending suit.

Crump, J. — A reference to arbitration in a pending suit without the intervention of the Court is not such a reference as is contemplated by para. 20. 105 Ind Cas 516 : 51 Bom. 908 : 29 Bom LR 1254 : AIR (Vol 14) 1927 Bom 565 (FB).

——Sch. 2, Para 20 — Withdrawal and adjustment of claim.

Section 89 does not preclude the application of O. 23, R. 3 to cases in which there has been a reference to arbitration. The power given by S. 20 of Schedule 2 to any person interested to apply to a Court is not to be understood as overiding the general power given to parties under O. 23, R. 3 to adjust their disputes by a lawful compromise at any time after the institution of a suit. 45 B. 245 Foll. which overrules 40 B 386. 76 Ind Cas 502 : AIR (Vol 12) 1925 Mad 50 (DB).

——Sch. 2, Para 20 — Umpire.

The umpire has no locus standi under para. 20, as he is not interested in the award;he is under no obligation to abide by the award and cannot avail himself of it. 69 Ind Cas 714 : 9 OLJ 410 : 26 OC 1: AIR (Vol 9) 1922 Oudh 276 (DB).

——Sch. 2, Para. 20 — Subject of reference.

The word "matter" means "matter in difference in Para. 1 of the same schedule". (1911) 5 SLR 92 : 12 Ind Cas 639 (DB).

(b) Nature of proceeding.

——Sch. 2, Para 20 — The word, used in S. 69 (1), Partnership Act is 'suit' and under Sch. II, Para. 20, Civil P. C., the party is authorised to apply to any Court having jurisdiction and the application shall be in writting and shall be numbered and registered as a suit between the applicant plaintiff and the opposite party as defendant. It follows therefore that only a 'suit' as understood in forensic language was excluded and not an application such as is contemplated in Para. 20, Sch. II: An application under Para. 20, Sch. II is not a plaint and though the proceeding may be treated as a suit for certain purposes, yet they are not a suit properly so called. AIR (Vol 23) 1936 Lah 136 : 162 Ind Cas 670.

——Sch. 2, Paras. 20, 17 — Application for filing award after withdrawal of suit — Maintainability.

The law prohibits proceedings under para. 17 or Para. 20, Civil P. C. only in cases where a suit is pending with regard to the same subject-matter at the time of the presentation of the application and not in other cases.

Therefore, where the matters in dispute in a pending suit are referred to arbitration and on the making of an award, the suit is allowed to be withdrawn, and an application is subsequently made to the Court for filing the award under Para. 20, Sch. II of the Civil P. C. it can be entertained and the Court may file the award and pass a decree in terms of it. AIR (Vol 20) 1933 Pesh 18 : 141 Ind Cas 83 (DB).

——Sch. 2, Para. 20

Where an agreement to refer to arbitration was made after a suit for pre-emption had terminated and before an appeal has been filed, Held that the suit was not pending during that period. 7 OWN 815 : AIR (Vol 17) 1930 Oudh 432 (DB).

——Sch. 2, Para. 20 — Private reference pending probate proceedings — Not illegal.

There is nothing to prevent the parties going to private arbitration with regard to the divisions of the estate although probate proceedings are pending in a Civil Court in respect of a will concerning the same estate.

The mere fact that it was entered upon before the probate proceedings had come to an end cannot possibly affect the question of its legality. 73 Ind Cas 415 : 25 Bom LR 437 : AIR (Vol 10) 1923 Bom. 365 (DB).

——Sch. 2, Para 20 — The proceedings under paras. 20 and 21 of the second Schedule are not proceedings in a suit, though for the purposes of convenience they may be numbered and registered as a suit. 59 Ind Cas 755 : 45 Bom. 329 : AIR (Vol 8) 1921 Bom 389 (DB).

(c) Suit to enforce award.

——Sch 2, Para. 20 — Regular suit to enforce award is not barred.

Paragraph 20 of Sch. II is not a bar to a regular suit to enforce the award. AIR (Vol 33) 1946 Sind 117 : 223 Ind Cas 307.

——Sch. 2, Paras. 20, 21, 14 (c) — Application to file an award — Rejection of — Grounds — Schedule is exhaustive—Award in favour of unregistered firm — Objection under S. 69, Partnership Act (IX of 1932 — Application to file award, if can be refused.

Dispute arose out of certain contracts and was referred to arbitration. One of the parties to the dispute was an unregistered firm in whose favour an award was given. The firm sought to file the award by an application under Paras. 20 and 21 of Sch. II, Civil P. C. It was objected to on the ground that the firm could not enforce its rights under the award it being an unregistered firm :

Held, that Sch. II is an exhaustive Code as regards grounds for rejecting an application to file an award and that the Court had no jurisdiction to go beyond the provisions of this schedule. There was nothing illegal on the face of the award within Para. 14 (c), and it was only by reference to S. 69 of the Partnership Act and by reference to the

facts of the case that it could possibly be held that the firm was not entitled to enforce the award. AIR (V 25) 1938 Pat 231 : 16 Pat 742 : 4 BR 587 : 19 PLT 549 : 175 Ind Cas 468 (DB).

——Sch. 2, Paras. 20, 21 — Suit to file award, whether bars subsequent suit for possession.

A suit for merely filing an award brought under Paras. 20 and 21 of Sch. II, Civil P. C., does not operate as a bar to the institution of a subsequent suit for possession. AIR (Vol 21) 1934 Mad 68 : (1933) MWN 1289 : 147 Ind Cas 684 (2).

——Sch. 2, Para 20 — Nature.

For the purpose of O. 9. R. 13. proceedings under para. 20, are a suit. 112 Ind Cas 691 : 29 MLW 490 : AIR (Vol 15) 1928 Mad 969 : 55 MLJ 262 (DB).

——Sch. 2, Para. 20 — Nature.

An application under S. 20 of Sch. 2 to enforce an award, when numbered and registered as a suit, becomes a suit for purposes of O. 38 and Court can direct attachment before judgment. 101 Ind Cas 430 : 29 Bom LR 342 : AIR (V 14) 1927 Bom 259 (DB).

——Sch. 2, Paras. 20 and 21 — Remedy by suit — Suit to enforce favourable part of award.

A plaintiff who has not carried out what he was directed to perform under the award cannot sue to enforce that part of the award which is favourable to him. 22 CWN 66 : 27 CLJ 486 : 42 Ind Cas 590 : AIR (Vol 5) 1918 Cal 899 (DB).

(d) Procedure (or duties and powers of court).

——Sch. 2, Para. 20 — Filing of award.

Under Arbitration Act, no order, directing that the award should be filed is necessary. Under the C. P. Code the matter is different. The person who wants to convert an award into a decree of Court has to apply for an order that it should be filed, and after notice and hearing the objections of the opposite side such an order has to be made. AIR (Vol 15) 1928 Mad 107 : 107 Ind Cas 793 : 39 MLT 563 : 27 MLW 267 : 1928 MWN 132 (DB).

——Sch. 2, Para. 20 — Power under O. 23, R. 3 is not overridden by para. 20.

If in a pending suit the parties go to a private arbitrator without the consent of the Court, the award cannot be enforced as an award, but there is nothing to prevent the Court from giving effect to the award, as if it was an adjusment by common consent. The power given by para. 20, Sch. 2, C. P. Code, cannot override the general power given to parties under O. 23. R. 3, C. P. Code, to adjust their disputes by a lawful compromise at any time after the institution of the suit. AIR (Vol 15) 1928 Nag 173 : 107 Ind Cas 525 : 24 NLR 55 (DB).

——Sch. 2, Para. 20 — Award amounts to adjustment under O. 21, R. 2.

When pending the proceedings in a Law Court parties enter into an agreement to refer their disputes to arbitration privately they cannot be deprived of the right to have recourse to the Court when the agreement is a mere agreement to refer, but they can deprive themselves of such rights by their own act after writ, as, for example, by going on with the arbitration and obtaining an award, and there would be nothing illegal in the arbitrator delivering his award in spite of the decrees of Court and directing that the decrees may be modified by the parties in terms of the award. In such a case the award would amount to an adjustment of the decrees under O. 21, R. 2, C. P. Code. And in cases where any suits are pending, the award may be filed by way of defence and a decree can be obtained on foot thereof. AIR (Vol 13) 1926 All 501 : 48 All 475 : 24 ALJ 480 : 95 Ind Cas 416 (DB).

——Sch. 2, Para. 20 — On an application under paras. 20 and 21 the Court has power to decide whether there was a reference to arbitration on behalf of the parties, and whether there was any matter in dispute between the parties to be referred to arbitration. The Court's power is not confined only to deciding any objections under paras 14 and 15. AIR (Vol 13) 1926 Lah 91 : 92 Ind Cas 705 : 7 LLJ 603.

——Sch. 2. Para. 20 — Private reference after suit — Not invalid — Lawful compromises always permitted.

The power given by S. 20 of Sch. 2, cannot be said to override the general power given to parties under O. 23, R. 3, to adjust their disputes by a lawful compromise at any time after the institution of a suit. Although it is a recognized principle that when once a Court is seized of a cause, its jurisdiction cannot be ousted by the private and secret act of the parties and if they desire to alter the tribunal they must proceed according to the law laid down in this connection, the Courts have given effect to an award passed out of Court after the institution of suit as if it was an adjustment by common consent. AIR (Vol 13) 1926 Nag 405 : 95 Ind Cas 89 : 23 NLR 100 : 9 NLJ 97.

——Sch. 2, Para 20 — Where the arbitration was without the intervention of the Court and where the award had been given on such reference.

Held, that the only course open to the Court was to order the award to be filed and to pronounce judgment according to the award or to refuse to order that the award be filed, and that it was not open to the Court to correct the award itself. AIR (Vol 12) 1925 Lah 570 : 88 Ind Cas 161 : 7 LLJ 463 : 26 PLR 706.

——Sch. 2, Para. 20 — Award partly invalid — Court cannot file award in part.

In dealing with an application to file an award, the Court has no power to modify or correct the award, to remit it for consideration or to set it aside. Its power is limited to filing the award and decreeing in accordance with it, or to refusing to file it. The provisions of paragraphs 20 and 21 of the Second Schedule only give the Court power to file the award and pass a decree in accordance with it, or to refuse to file it. No other course is open to the Court. Paragraph 21 gives the Court no power to file the award in part or to decide which part if any of the award is valid. Unless the award is valid in its entirely the only course open to the Court is to refuse to file it. That does not necessarily mean that the award is entirely invalid but merely that the procedure provided by paragraphs 20 and 21 of the Second Schedule for enforcing the award is not open to the applicants. AIR (Vol 10) 1923 Rang 130 : 72 Ind Cas 193 : 4 UBR 157 : 1 Bur LJ 265.

——Sch. 2, Para. 20 — It is the duty of every Judge before he allows arbitration awards to be filed in Court to satisfy himself that there has been some point of real difference which was submitted to arbitration and that there was an arbitration on the point of real difference. AIR (Vol 8) 1921 Sind 61 : 83 Ind Cas 913 : 17 SLR 211.

——Sch. 2, Para. 20 — Loss of award.

When an award has been reduced to writing and has been lost, the special procedure provided by Sch. II, Para. 20, C. P. C., cannot be resorted to and the parties should be referred to a regular suit. AIR (V 7) 1920 Lah 396 : 1 Lah 45 : 63 PLR 1920 : 55 Ind Cas 845.

——Sch. 2, Para. 20 — Filing of award — Court functus officio.

The powers of the Court in a proceeding under Para. 20, Sch. II are exhausted as soon as the Court decides either to file the award or refuses to

file it. AIR (Vol 5) 1918 Oudh 343 : 5 OLJ 471 : 47 Ind Cas 960.

——Sch. 2, Para. 20 — Nature of proceedings under — Duty of Court.

The proceedings contemplated by this section are of a private nature and the rules of evidence are not strictly applicable to them. A Court acting under this section is not bound to enter into the merits of the award. (1910) 38 Cal 143 : 7 Ind Cas 333 (DB).

3. Award.

(a) General.
(a-1) Validity.
(b) Validity in part.
(c) Procedure.
(d) Power of Court.

(a) General.

——Sch. 2, Paras. 20, 21 — Award directing produce to be sold at market price — Whether uncertain.

An award cannot be said to be uncertain, where it directs certain produce to be sold at a market price. In such a case, the amount to be realized is sufficiently certain. AIR (Vol 25) 1938 Sind 59 : 174 Ind Cas 334 (DB).

——Sch. 2, Para. 20 — Reference outside Court — Matters in dispute, subject-matter of pending suit — Award cannot be filed either under Arbitration Act or Sch. II, Civil P. C. AIR (Vol 22) 1935 Sind 184 : 158 Ind Cas 60.

——Sch. 2, Para. 20 — Arbitration without intervention of Court — Application to file award in Court — Appeal against order filing award.

Held, that order filing award was neither a decree nor order having the force of decree and hence appeal fell within purview of Art. 11, Sch. II, Court-fees Act. AIR (Vol 19) 1932 Oudh 282 : 9 OWN (CC) 800 : 6 Luck 703 : 139 Ind Cas 622.

——Sch. 2. Para. 20 — Award accepted and signed by parties.

An award which has been accepted by the parties and signed by them can and should be considered to be a compromise. AIR (Vol 17) 1930 Lah 860 : 31 PLR 225.

——Sch. 2, Para. 20 — Claim under award.

Where the document containing the agreement to refer an award is not signed by the person claiming under the award or by any other person on his behalf as his guardian he cannot base any claim on the award. AIR (Vol 16) 1929 Lah 814 (DB).

——Sch. 2, Para. 20 — Award to be final.

Arbitrators are bound to pass an award which is final as far as the nature of things will admit. AIR (Vol 15) 1928 Sind 144 : 108 Ind Cas 791 (DB).

——Sch. 2, Para. 20 — Effect of award — Binding character.

A settlement made by arbitrators cannot be reopened except on the ground of fraud. AIR (Vol 7) 1920 M 414 : 43 Mad 429 : 38 MLJ 247 : 27 MLT 242 : (1920) MWN 270 : 11 LW 405 : 56 Ind Cas 358 (DB).

——Sch. 2, Paras. 20 and 14 — Remission of private award — Provision.

There is no provision for remitting to the arbitrators an award made in arbitration without the intervention of the Court. AIR (Vol 1) 1914 LB 40 : 7 Bur LT 287 : 8 LBR 58 : 24 Ind Cas 132.

——Sch. 2, Para. 20 — Unstamped — Admissibility in evidence after paying penalty.

In proceedings under S. 20, an unstamped award may be admitted in evidence and filed in Court after paying the penalty under the Stamp Act. 66 PR 1913 : 291 PLR 1913 : 181 PWR 1913 : 20 Ind Cas 491 (DB).

(a-1) Validity.

——Sch. 2, Para. 20 — Property partly outside British India — Validity of award.

Per Mya Bu, J. — (In the Order of Reference). Under Cl. 20, Sch. II, the Court to which an application for the filing of an award lies is that which has jurisdiction over the subject-matter of the award. The Courts in British India have no jurisdiction over immovable property situate outside British India, and the assumption of jurisdiction by a British Indian Court over such property cannot be justified by virtue of the provisions of S. 17 of the Code even if a part of the property in suit be situate in British India.

Whether such want of jurisdiction vitiates the decree as regards both the property over which the Court has jurisdiction and that over which the Court has no jurisdiction, or only as regards the latter, depends on whether the nature of the case permits of a separation of the part concerning the one from that concerning the other without affecting its basis. Where such separation is impracticable, want of jurisdiction over part of the property vitiates the whole decree, which must be treated as having been passed without jurisdiction. AIR (Vol 18) 1938 Rang 252 : 9 Rang 480 : 135 Ind Cas 65 (FB).

——Sch. 2, Paras. 20 and 21 — Arbitration in pending suit without intervention of Court — Unanimous oral award but subsequent refusal of one arbitrator to sign — Validity — Sufficiency of oral award.

Where parties to a pending suit referred the matter to arbitration without the intervention of the Court and the arbitrators gave a unanimous oral award but on its being reduced to writing subsequently, one of them resiling from his decision, refused to sign the award.

Held, that under Paras. 20 and 21 of Sch. II, Civil P. C., an award need not necessarily be in writing and as there was a unanimous oral award, there was a valid award and effect could be given to it.

The case would be different if the arbitrators themselves had contemplated that there was to be no award unless it had been reduced to writing. AIR (Vol 23) 1936 Mad 713 : 44 MLW 32 : (1936) MWN 768 : 71 MLJ 342 : 164 Ind Cas 855.

——Sch. 2, Para. 20 — Award partitioning joint family property on reference by only some is binding on members joining reference.

An award partitioning joint family property, made on reference by only some members of the joint family is a valid award which can be filed under Para. 20, Sch. II. Civil P. C., and is binding on those members who actually join the reference and can be enforced against them. The mere fact that some members of the joint family do not join, does not make the award invalid. The award may or may not be set aside at the instance of a third person but that is not a matter which enters into consideration in proceedings under Para. 20 or 21. AIR (V 23) 1936 Pesh 96 : 2 JR 27 (DB).

——Sch. 2, Para. 20 (3) — Absence of one of the arbitrators — Subsequent signature — Whether validates award.

Certain disputes were referred to arbitrators who gave their award. One of the parties being dissatisfied with it, asked the arbitrators to re-consider their decision. The award was altered and was sought to be filed under Sch. II, of the Civil P. C. The objections taken were that when the first award was made, the authority of the arbitrators ceased and they could not review it and that one of the arbitrators was not present when the award was signed and he signed the award afterwards. From the evidence of the arbitrators, it was per-

fectly clear that the award was passed, it was signed by all the arbitrators, it was written on a rough piece of paper and was then handed over to one of the arbitrators, for the purpose of getting it engrossed on a stamp paper.

Held, that the writing of the award on a stamp paper; which would be necessary before it could be filed in a Court, is merely a ministerial act. The expression of the arbitrators' opinion on the dispute placed before them, which constitutes the award, may be oral, but when, it is in writing and has been signed by them, this constitutes the final award. Once the award is made and published, and signed by all the arbitrators, it is not open to the arbitrators to substitute another award for it, and where, the authority of the arbitrators ceased from the time they made the award, the consent of the parties could not render valid that which is absolutely void. The actual making of the signature by an arbitrator at a different time to the other arbitrators did not invalidate the award. But it is necessary that all the arbitrators should apply their minds to the making of the award.

Where a particular arbitrator has admitted in his deposition that he was in Bombay, and that he had nothing to do with the making of the award and he merely gave his consent afterwards from Bombay, and then he was sent for because his signature was necessary, and he did not even read the award.

Held, that there was no concurrence of this arbitrator in the judicial act and there was no combined action of the arbitrators or judicial exercise of the minds of the five arbitrators which is necessary. AIR (Vol 21) 1934 Bom 6 : 35 Bom LR 1101 : 149 Ind Cas 324 (DB).

——**Sch. 2, Paras. 20, 8 — Award given after period fixed — Absence of evidence of extension of time — Award validity of.**

Where an award is given after the expiry of the period fixed in the agreement and there is no evidence that the time has been extended, the award is invalid and not binding on the parties. AIR (Vol 20) 1933 Lah 173 : 145 Ind Cas 129 (DB).

——Sch. 2, Para. 20 — It is not necessary for the validity of an award that it must be filed in Court. AIR (Vol 14) 1927 All 733 : 100 Ind Cas 762.

——Sch. 2, Para. 20 — A suit can be filed to enforce an award without the plaintiff first obtaining an order that the award itself shall be filed. The validity of the award can be assailed in that suit. AIR (Vol 12) 1925 Bom 418 : 89 Ind Cas 68 : 27 Bom LR 652 (DB).

——**Sch. 2, Para. 20 — Decree on award.**

A decree on an award in respect of a right to pre-empt may be valid even if the application therefor is beyond the time for instituting a suit for pre-emption. But it will hold good only as between the parties. AIR (Vol 10) 1923 Oudh 91 : 74 Ind Cas 206 : 9 OLJ 546.

——Sch. 2, Para. 20 — **Remedy by suit — Award alleged invalid — Decree on original cause of action.**

Where the plaintiff alleges an award to be invalid but seeks its enforcement in case it is found to be invalid or in the alternative prays for a decree on the original cause of action in case the award is found to be invalid the Court must determine the validity of the award and pass a decree in its terms if it finds it to be valid or to adjudicate on the original cause of action if the award is found to be invalid. AIR (Vol 3) 1916 Lah 264 : 63 PWR 1916 : 33 Ind Cas 494 (DB).

——Sch. 2, Paras. 20 and 21 — **Validity of award** of arbitrator — **Decision — Contents of — Revision.**

Arbitrators need not give reasons for their decision and may even ignore any position advanced by the parties, as an award is not a judicial decision. Arbitrators are not bound to decide a point if the parties show by their conduct that they did not want a formal decision thereon. Per Sundara Iyer, J — Arbitrators are bound to decide all matters in dispute in their award and their failure to do so cannot be condoned because the Court does not sustain a contention not dealt with by them. (1912) MWN 1076 : 17 Ind Cas 33 (DB).

(b) Validity in part.

——**Sch. 2, Paras. 20, 21 — Part of subject-matter of arbitration reference also subject-matter of pending suit — Reference and award, when bad — Two awards — Second defendant on first — First invalid — Both must fail.**

If there is a reference under the Arbitration Act, relating to the subject-matter of a pending suit, the reference and the award under the Arbitration Act are bad, for there cannot be two conflicting jurisdictions relating to one and the same matter, the jurisdiction of the Court in the suit, and the jurisdiction of the arbitrators under the Arbitration Act. The rule applies even if the subject-matter of the two proceedings is, in part only, the same. Where the subject-matter of the pending suit is the possession of the land, and the subject-matter of the arbitration outside the Court is the possession of the land, and that the part of the award outside the Court relating to possession of the land cannot be separated from other parts of the award, then the whole award under the Arbitration Act must be said to be bad.

Where the two awards are to be taken together and the first award is invalid, the second award dependent on it, must be invalid too. Both must fall together. AIR (Vol 29) 1942 Sind 41 : ILR (1941) Kar 570 : 199 Ind Cas 291 (DB).

——**Sch. 2. Paras. 20, 21 — Application to file award without intervention of Court — Valid portion separable from invalid portion — Valid portion, if can be filed.**

When an application is made to file an award without intervention of Court, if portions of an award are separable it is permissible to separate the invalid portion of the award from the valid portion which the Court can direct to be filed and there is nothing in Paras 20 and 21, Sch. II, Civil P. C. which militates against this procedure. AIR (Vol 23) 1936 Lah 794 : 168 Ind Cas 213 (DB).

——**Sch. 2, Para. 20 — Splitting up of award.**

An award filed without the intervention of the Court can be split and need not be filed as a whole. AIR (Vol 16) 1929 Bom 193 : 117 Ind Cas 523 : 31 Bom LR 349.

——**Sch. 2. Para. 20 — Award in excess of authority — Separable portion to be expunged.**

Where a Court finds that arbitrators had been guilty of having exceeded their authority and that the additional portion of the award is separable from the rest, the Court can direct such additional portion to be expunged even in cases falling under Sch. 2, Para. 20, the remaining portion being made basis of the decree under Sch. 2, Para. 21. AIR (Vol 16) 1929 Sind 200 : 119 Ind Cas 562 (DB).

(c) Procedure.

——**Sch. 2, Paras. 20, 15 (c), S. 11 — Grounds for invalidity in Para. 15 (c) do not cover matters of procedure and not raised before arbitrator — Application under Para. 20 — Objection that applicant was partner of opposite party and so could not claim specific amount — Trial Court deciding point against opposite party — No decision of High Court on the point obtained — No such objection**

before arbitrator — Separate suit for dissolution of partnership by opposite party against applicant — Award, held could not be challenged — Decision on question whether parties were partners held did not operate as res judicata.

The grounds of invalidity of an award contemplated in Para. 15 (c), Sch. II, Civil P. C. refer to those matters which apparently go to the root of the award and matters which merely pertain to procedure and have not been agitated before the arbitrator are not covered by it.

On an application under Para. 20, an objection was raised, inter alia, that the party applying was a partner of the opposite party and consequently could not make a demand for a specific sum of money. No such objection was raised before the arbitrator. The point was decided against the opposite party in the trial Court. No decision was obtained on it from the High Court, but the opposite party instituted a separate suit for dissolution of the partnership and rendition of accounts against the applicant. It was contended in defence that the decision on the question whether the opposite party was a partner of the applicant operated as res judicata.

Held, that opposite party was not debarred from contesting the question in the suit for dissolution of partnership.

Held, also, that it was open to the opposite party to agree to the reference, although it was being sought by a partner, and to have the mutual adjustment of account made in a separate proceeding. Not having raised any objection before the arbitrator on the score of partnership to the claim put forward by the applicant, he could not afterward challenge the award on the ground that it had been obtained by one partner against another for a specific sum. AIR (Vol 25) 1938 Lah 604 : 40 PLR 972 : 181 Ind Cas 195 (DB).

——Sch. 2, Para. 20 — Award creating charge on immovable property made before Amending Act XXI of 1929 came into operation — Registration, if necessary — Such award, when becomes effective.

Where an award made out of Court creating a charge on immovable property is made before the Amending Act XXI of 1929 came into operation, the award need not be registered. Such an award becomes effective from the date when it is made and not from the date on which the Court orders it to be filed. AIR (Vol 24) 1937 Sind 7 : 30 SLR 337 : 166 Ind Cas 947 (DB).

——Sch. 2, Para. 20 — Application when rejected — Secretary arrogating functions of association as whole.

Two claimants for mahantship agreed to refer their dispute to an association known as Chatur Sampardai Vaishnava Maha Mandal with the intention that the association as such should act as the arbitrator, but the secretary arrogating all the powers and functions of the whole body made the award.

Held, that an application by one of the claiments to file that award could not be granted as the award had not been made by the association as was intended but by the secretary. AIR (Vol 16) 1929 Lah 826 : 11 LLJ 366 (DB).

——Sch. 2, Para. 20 — Absence of arbitrator.

If a party to an arbitration proceedings fails to take an objection to the absence of one out of several arbitrators, he will be deemed to have waived his right to take objection to the whole of the irregularity caused thereby and the award must be filed. AIR (Vol 9) 1922 Cal 181 : 67 Ind Cas 866 (DB).

——Sch. 2, Para. 20 — Procedure pointed out.

Parties in a suit who enter into an agreement to refer the matter in dispute in the suit or part of it to arbitration, may make the agreement an an order of Court and then paras. 1 to 16 of the 2nd Sch. apply. If they do not make the agreement an order of Court, they cannot ask for the agreement to be filed under para. 17 and they cannot ask for the award if made to be filed under paras. 20 and 21. 40 Bom 386 overruled; obiter in 4 Bom 1 held obsolete. If an award is made and both parties accept it they can apply for a consent decree in terms thereof, and there will be no need to apply for an order recording the terms of the adjustment. If the plaintiff disputes the award for any reason and proceeds with the suit, the defendant can plead the award and have the case set down for hearing on the issue whether the award is binding as an adjustment. If the defendant disputes the award, the plaintiff can set the case down for trial on the issue whether the award is binding as an adjustment. Either party can file a suit to enforce the award and apply for a stay of the original suit. If the parties to a suit agree to refer the matters in dispute to arbitration without the intervention of the Court, and an award is made on such submission prior to the decision of the suit the submission and award can be recorded under O. 23, R. 3, C. P. Code, as an agreement adjusting of compromising the suit, and a decree can be passed in terms of the award, provided the award to be effective for such a plea must be a valid one, according to the general rules of law governing the validity of awards in arbitration proceedings. (Case law discussed fully). AIR (Vol 8) 1921 Bom 310: 45 Bom 245: 59 Ind Cas 53 (DB).

——Sch. 2, Paras. 20 and 21 — Mediator — Record of settlement dispute made by the parties — Effect of — Contract.

Where a person is asked to act as mediator in settlement of a dispute and records a settlement agreed on by the parties, his act is not that of an arbitrator, and the record made by him is not an award and if that record is at all operative it is so only as a contract as between those who have signed it. It can have no operation whatever against persons who never joined it. AIR (Vol 6) 1919 Mad 374 : 53 Ind Cas 283 (DB). Also 238 PWR 1915 : 48 PLR 1915 : 28 Ind Cas 298 (1) : AIR (Vol 2) 1915 Lah 119.

(d) Power of Court.

——Sch. 2, Para. 20 — Reasonableness of award.

An award can only be challenged on the grounds specified in paras. 14 and 15 and a Court has no authority to go into the question of reasonableness of the award. AIR (Vol 17) 1930 Lah 22 : 119 Ind Cas 726 (DB).

——Sch. 2, Para 20 — Invalid award.

If any Court arrogates to itself the powers to file an award which on the face of it is invalid and hence cannot be filed, the filing of the award and the decree passed thereon are nullity. The executing Court to which such a decree has been sent for execution can refuse to execute it. AIR (Vol 17) 1930 Rang 337 (DB).

——Sch. 2, Para. 20 — Caste questions — Award cannot be enforced as it relates to questions for which no suit lies.

A certain panchayat and passed a resolution to the effect that no member of the panchayat should marry a second wife in the lifetime of his first wife, and whosoever would do so disregarding the resolution of the panchayat, shall not be considered as a member of the brother-

hood. A member married a second time when his first wife was living, and at a meeting of the panchayat an arbitrator was appointed to settle the dispute, who decided that the member should pay a certain sum as fine. The decision was accepted by the member as binding on him. When he refused to pay, a suit was brought to enforce the award.

Held, that a suit of this nature would clearly relate to matters affecting the internal autonomy of the caste and its social relations and it will not be open to the Court to go into the question of the validity or otherwise of a rule laid down by the Panchayat that a person marrying a second wife during the lifetime of a first wife would cease to be a member of the panchayat or with the adequacy or propriety of a fine imposed on a person breaking that rule as an alternative punishment. Although the delinquent here agreed to pay the fine, yet the agreement involved a caste question and, therefore, no suit would lie to enforce it.

Heid further, that as the disputes referred to arbitration related to caste questions which could not be made the subject of a suit, they could not also be the subject of an award enforceable in a Court of law, and even if the parties affected by such an award would agree not to challenge it, their consent cannot confer jurisdiction on a Court, where it has none to enforce the award. AIR (Vol 16) 1929 Sind 1 : 23 SLR 299 : 111 Ind Cas 425.

——Sch. 2, Para. 20 — Award under Arbitration Act — Distinction between the two awards.

Where an award filed under the Act is upheld by the Court as a good award, it is enforceable as if it were a decree of the Court; in other words, although it was not a decree and not a judgment of the Court, execution can be taken out on it in the same manner as though it were a decree and the Court is not to pronounce a judgment and decree as under C. P. Code, Sch. 2, para. 20. AIR (Vol 14) 1927 Cal 562 : 31 CWN 517 : 45 CLJ 597 : 102 Ind Cas 108 (DB).

——Sch. 2, Para. 20 — An original agreement to arbitrate during pendency of a suit does not bar the Court from following the procedure under para. 20. It cannot be disputed that when no suit is actually pending when the application is made to the Court under para. 20, the Court can proceed under para. 20. Paras. 20 and 21 provide for an adequate check of the proceedings before the award becomes rule of Court. AIR (Vol 11) 1924 Pat 488 : 3 Pat 443 : 1924 PH CC 110 : 6 PLT 122 : 3 Pat LR Civ 52 : 81 Ind Cas 994 (DB).

4. Jurisdiction.

(a) General.
(a-1) Civil Courts.
(b) Small Cause Courts.
(c) Revenue Courts.
(d) Property situated outside British India.

(a) General.

——Sch. 2, Paras. 20 (2), 21, Ss. 17, 115 — Reference relating to dispute between M's widow, A, B and C over estate left by M — Reference empowering arbitrator to decide dispute in such manner as he thought just and equitable — Arbitrator, held had power to charge with A's maintenance, property belonging to B which was in his possession and which did not come to him under award.

Where an application under Para. 20 (2) of Sch. II, Civil P. C., relates to property within the jurisdiction of two Courts in British India, it is open to the Court within the jurisdiction of which part of the property is situate to entertain the application. It is not necessary to divide one estate among two or more Courts merely because all the property is not situated within the jurisdiction of one Court. Where the immovable property is situated within the jurisdiction of L Court, the fact that certain movable properties, monies and ornaments, were in the jurisdiction of K Court, would not deprive L Court of jurisdiction.

A reference to arbitration related to a dispute over the estate left by deceased M. In a suit by A, the widow of M, against B and C, the parties referred the dispute to an arbitrator who was given power under the reference to decide th dispute between the parties in such a manner as appeared to him just and equitable B raised an objection to the award that the arbitrator had no power to charge property belonging to him for A's maintenance which did not come to him under the award, but was already in his possession. This property was mentioned in the schedule to the plaint and a charge was placed on the whole of some survey numbers instead of being spread further upon parts of others, in the interest of B himself and all concerned;

Held, that the power given to the arbitrator under the reference was wide enough to cover the arrangement as to the charge of the widow's maintenance upon B's land. In a revision against an order of the Court directing an award to be filed an objection can be taken only on the question of jurisdiction. AIR (Vol 29) 1942 Sind 79 : ILR (1942) Kar 36 : 202 Ind Cas 152 (DB).

——Sch. 2, Para. 20 (1) — Jurisdiction over whole subject-matter, if essential.

The words "Court having jurisdiction over the subject-matter of the award" in Para. 20, Sch. II, Civil P. C., do not mean that the Court must have jurisdiction over the whole of the subject-matter of the award and the question of whether the Court has jurisdiction over the subject-matter of the award or not should be decided in accordance with the general provisions in the body of the Code. In the result, if a suit to enforce the award would lie, then an application for the award to be filed will lie also, and there will be no difficulty in a case where the property is situated in different parts of British India. The matter is not affected by the provision of Para. 21 that if the decree is not in accordance with the award, an appeal will lie. The difficulty is solved by applying the principle of separability. Indeed the provision for such an appeal implies that the decree may be different from the award and that in appeal the question of whether the separation has been rightly or wrongly made may have to be considered. If the award is separable, the position would be substantially the same as it would be if each portion had been written on a separate piece of paper and formed a separate award. AIR (Vol 27) 1940 Nag 191 : 1940 NLJ 71 : ILR (1940) Nag 225 : 189 Ind Cas 550 (DB).

——Sch. 2, Paras. 20, 21 — Immovable property dealt with by award and parties within jurisdiction of Court — Certain business, the subject-matter of award carried on outside jurisdiction — Court, if can entertain application under Para. 20 and order award to be filed.

Where all the immovable property dealt with by the award is within the jurisdiction of the Court and so are the parties to the award, the mere fact that the business which is one of the subject-matters of the award was carried on by the parties at a place outside the jurisdiction is not sufficient to oust the jurisdiction of the Court over the said subject-matter. The Court has, therefore, jurisdiction to entertain an application

under Sch. II, Para. 20 of the Civil P. C., and order the award to be filed under Para. 21. AIR (Vol 25) 1938 Sind 59 : 174 Ind Cas 334 (DB).

——Sch. 2, Para. 20 — Part of award dealing with property outside jurisdiction — Court, if and when can file award.

In the case of an arbitration without the intervention of Court, where a part of an award deals with property outside the jurisdiction, if that part is separable without disturbing the basis and equilibrium of the award as a whole, the Court may delete that part of it and order the rest to be filed. AIR (Vol 24) 1937 Bom 211 : 39 Bom LR 159 : ILR (1937) Bom 338 : 169 Ind Cas 301 (DB).

——Sch. 2, Para. 20 — Valuation — Objection.

Application under — Value for jurisdiction fixed — Valuation cannot be questioned in execution when the objection was not taken in the proceedings under, or in any appeal arising therefrom. AIR (Vol 23) 1936 Lah 63.

——Sch. 2, Para. 20 — Award — Property outside jurisdiction — Power to file award.

In order to decide whether the Court has jurisdiction over the subject-matter of an award, it is necessary to consider the reliefs granted by the award and to determine whether the Court would have jurisdiction to try a regular suit between the parties in which the reliefs claimed were the reliefs granted by the award.

Where an award declared inter alia the legal ownership of certain persons over a property at Raitar and declared that they were entitled to retain their ownership until certain sums of money were paid to them and an application was made to the Court at Benares for filing the award:

Held, that under S. 16 (d) the suit could only be instituted in a Court within the local limits of whose jurisdiction the Raitar property was situated.

Held further, that the Benares Court would not be justified in treating the portion of the award as a nullity and filing the award as to the remaining portion. AIR (Vol 20) 1933 All 380 : (1933) ALJ 741 : 55 All 542 : 143 Ind Cas 571.

——Sch. 2, Para. 20 — Under Para. 20, Sch. II, Civil P. C., an application to file an award made without the intervention of the Court should be made to the Court having jurisdiction over the subject-matter of the award, and not over the subject-matter of the reference. Therefore, a Court has no jurisdiction to file award which creates a charge over immovable property situate outside its jurisdiction. The question whether the charge over immovable property was or was not the subject-matter of the reference is not material in considering whether the Court has jurisdiction to entertain the application. AIR (Vol 18) 1931 Sind 47 : 25 SLR 204 : 131 Ind Cas 182 (DB).

——Sch. 2, Para. 20 — Material irregularity.

Where both the parties to an award given in an arbitration in a pending suit without intervention of the Court sign the award, the Court refusing to consider the result of one of the parties signing the award commits material irregularity in exercise of jurisdiction. AIR (Vol 17) 1930 Lah 860.

——Sch. 2. Para. 20 — Suit after reference.

Knowledge of the institution of the suit on the part of the arbitrators is not essential to deprive them of jurisdiction. After the filing of the suit the private tribunal becomes functus officio. AIR (Vol 15) 1928 Mad 371 : 111 Ind Cas 555 (DB).

——Sch. 2, Para. 20 — Even in cases of a reference to arbitration without the intervention of a Court, when an application is made under Paragraph 20 to file an award, the Court is competent to make an order to file an award even where the award deals with matters in excess of the authority conferred upon the arbitrator, where the portion of the award dealing with such matters can be separated from the rest of the award. 1923 Pat 470, Not Foll.

The ground upon which the Court can refuse to file an award under paragraph 21 is the ground upon which the Court should remit an award under paragraph 14. and as the Court cannot remit an award under paragraph 14 if the portion in excess of the arbitrator's authority be separable from the rest, it follows that it cannot refuse to file the award under paragraph 21 in those circumstances. AIR (Vol 12) 1925 Pat 810 : 4 Pat 670 : 7 PLT 644 : 93 Ind Cas 261 (DB).

——Sch. 2, Para. 20 — Where the facts were that there was no substantial question decided by the award affecting property within the jurisdiction of the Berar Court. No one of the three temples to the management of which the award related, was within that jurisdiction, and two of them were within the dominions of the Nizam and outside British India. A large part of the award related to family questions and money payments to be made by members of the family. and all the members of the family were residing within the Nizam's dominions but merely two of the villages which formed the principal endowments of the temples were situated in Berar.

Held, that does not give the Berar Courts jurisdiction to file the award especially when there was no dispute concerning the ownership or management of the villages nor any denial that the revenues must be appropriated to the three temples. AIR (Vol 11) 1924 PC 95 : 5 LR PC 216 : 1924 MWN 79 : 7 NLJ 62 : 34 MLT 62 : 19 MLW 549 : 20 NLR 33 : 51 IA 72 : 22 ALJ 386 : 51 Cal 361 : 26 Bom LR 586 : 28 CWN 977 : 46 MLJ 628 : 83 Ind Cas 531.

——Sch. 2, Para. 20 — Subject-matter lying within the jurisdiction of two or more Courts — Power of Court to file award.

Per Sadasiva Iyer, J. — Para. 20 was devised for the purpose of enabling any Court having jurisdiction, where the subject-matter of the award lies within more than one jurisdiction to direct the award to be filed. The para. does not suggest any disability of the kind that arises on a consideration of S. 9 of the Code, provided there is something to arbitrate on, that there is a reference and an award then the policy of the law is that, that award should be given effect to, without minute inquiry by the Court. 37 Bom 442 : 15 Bom LR 362 : 19 Ind Cas 882 (DB).

(a-1) Civil Courts.

——Sch. 2, Para. 20 — Agreement for reference to arbitration — Partition of property including agricultural land — Competency of Civil Court to entertain application.

An application to file an agreement for reference to arbitration of a dispute about partition of certain properties including agricultural land, cannot be entertained by Civil Court as part of the agreement relates to the partition of agricultural land. AIR (Vol 20) 1933 Lah 732 (2) : 34 PLR 454 : 143 Ind Cas 143 (1) (DB).

——Sch. 2. Para. 20 — Civil Court — Private reference — Partition — Settlement of shares.

On a private reference to arbitration an award which is passed by the arbitrators and which does not partition agricultural land but only settles the shares of the parties can be validly filed in the Civil Court. AIR (Vol 5) 1918 Lah 68 : 81 PWR 1918 : 79 PLR 1918 : 45 Ind Cas 166.

——Sch. 2, Para. 20 — Public trust — Trustee suit.

A Civil Court cannot entertain an application to file an award passed in reference to arbitration as regards the trusteeship of a waqf. (1910) 32 All 503 : 7 ALJ 761 : 6 Ind Cas 219 (DB).

(b) Small Cause Courts.

——Sch. 2, Para. 20 — Application to file an award under Para. 20, Sch. II, is a suit within the meaning of S. 16 of the Small Cause Courts Act and the Provincial Small Cause Court had jurisdiction to entertain the applications. AIR (Vol 22) 1935 Sind 208 : (1936) 30 SLR 12 (DB).

——Sch. 2, Para. 20 — Small Cause Court — Jurisdiction to file award.

A Small Cause Court has no jurisdiction to file an award which though it directs payment of money within the limits of its pecuniary jurisdiction, goes on to declare the dissolution of marriage between the parties. The jurisdiction of the Court to file an award depends on the reliefs awarded. A party cannot get the award filed under Para. 20 where the other reliefs granted are beyond the competence of the Court. The expression "subject-matter of the award" means the whole matter dealt with and decreed by the award, and not any particular portion. AIR (Vol 6) 1919 Mad 22 : 10 LW 57 : 51 Ind Cas 53.

(c) Revenue Courts.

——Sch. 2, Para. 20 — Where some of the matters in dispute were within the jurisdiction of a Revenue Court only and there were actually suits pending in a Revenue Court with respect to some items of the matter in dispute mentioned in the agreement, such an agreement to refer the matter to arbitration cannot be filed in a Civil Court. AIR (Vol 25) 1938 Lah 635 : (1938) 40 PLR 966 (DB).

——Sch. 2, Para. 20 — Demarcation of boundaries — Revenue Court.

A Civil Court can accept the award passed on reference to arbitration by parties in a dispute as to the demarcation of boundaries under S. 41, U. P. Land Revenue Act (1901). AIR (Vol 6) 1919 Oudh 287 : 6 OLJ 84 : 50 Ind Cas 193.

(d) Property situated outside British India.

——Sch. 2, Para. 20 and Ss. 15 to 20 and S. 89 — Court having territorial jurisdiction by reason of S. 17 over part of subject-matter of award has jurisdiction over its entire subject-matter.

Paragraph 20 must receive a liberal rather than a restricted construction. Sections 15 to 20 are applicable to Sch. II. which is really a part of the Civil P. C., and there is no justification to regard it as a self contained chapter in itself. Therefore it is not only permissible but obligatory upon the Court to take note of the provisions of Ss. 15 to 20 and with their aid to ascertain which Court is the proper Court to entertain an application under Para. 20. Para. 20(2) makes it clear that the applications should be in every way treated as suits and that the procedure applying to suits should apply to them. S. 17 governs the consideration of the question as to which Court is to be held for the purpose of Sch. II, Para. 20 to have jurisdiction in a given case. Consequently, when a Court has jurisdiction under S. 17 by reason of part alone of the subject-matter of the award being within its local limits that jurisdiction extends over the entire subject-matter of the award. There is nothing in the language of S. 89 to warrant that the sections of the Code or the rules in Sch. I do not apply to matters arising under Sch. II. It is not permissible however in view of the explanation to S. 16 to extend the jurisdiction of the Court beyond British India or even to any place within it to which the Civil P. C., does not extend. Consequently, a distinction must be made between cases where the property lies within British India though in different jurisdictions to which the Code applies and a case where some portion of the property is within British India and some portion out of it, in a Native State or in any other place to which the Code as such is not, and could not be made applicable. Section 17 can be displaced only in a case where part of the property is situate outside British India and, not in a case where the whole of it is in British India though in different jurisdictions and therefore governed by the Code. AIR (Vol 28) 1941 Mad 129 : (1940) 2 MLJ 520 : 52 MLW 556 : (1940) MWN 1083 (DB).

——Sch. 2, Para. 20 — Properties situated partly outside British India — Jurisdiction to entertain application to file award.

Three brothers belonging to a joint Hindu family owning immovable properties within and outside British India agreed to settle their differences by arbitration. Two of the brothers applied to the Court at Palghat in Malabar that the award might be filed in Court. The other brother objected that the Court had no jurisdiction to entertain the application as the whole of the subject-matter of the award was not within the jurisdiction of the Court.

Held, that the Court had no jurisdiction to entertain the application and could not file the award even in respect of the properties within British India.

The words 'subject-matter' of the award in Para. 20, Sch. II, Civil P. C., mean the whole subject-matter dealt with.

When a question as to jurisdiction to entertain an application under Para. 20, Sch. II, Civil P. C., is raised that question has to be first considered and decided by the Court.

The provisions in Para. 20 do not constitute any bar to a regular suit to enforce the rights created by an award. AIR (Vol 19) 1932 Mad 462 : 62 MLJ 550 : (1932) MWN 234 : 35 MLW 565 : 55 Mad 689 : 139 Ind Cas 877 (DB).

——Sch. 2, Para. 20 — Award cannot be filed in British India.

Certain persons entered into partnership with the object of working a rice-factory out of British India. But after some time disputes arose between them which were referred to arbitration and an award was made. Application was made to get the award filed in British India.

Held, that the Court in British India had no jurisdiction over the subject-matter of the award in that the factory being admittedly out of British India, the Court had no jurisdiction to enforce the award. AIR (Vol 16) 1929 Lah 24 : 113 Ind Cas 899 : 10 LLJ 500 (DB).

——Sch. 2. Paras. 20 and 21 — Remedy by suit — Remedy by application — Cumulative — Property outside British India.

A suit is maintainable on a private award independently of the summary procedure provided in Cls. 20 and 21. If the award is free from all defects mentioned in Paras. 14 and 15 it can be filed within 6 months. A suit can be brought on an award when it is defective, the Court having power to rectify it. Obiter — If the property in respect of which an award is given, is situate in a Native, State the award cannot be converted into a decree by a British Indian Court. 34 PR 1910 : 11 PWR 1910 : 183 PLR 1910 : 5 Ind Cas 597 (DB).

5. Limitation.

——Sch. 2, Para. 20 — Section 6, Lim. Act does not apply to cases under Para. 20, of Sch. II, Civil P. C. AIR (V 23) 1936 Pat 161 : 17 PLT 20 : 14 Pat 855 : 2 BR 353 : 161 Ind Cas 691 (DB).

——Sch. 2, Para. 20 — Award by arbitrators under Co-operative Societies Act does not require filing under Para. 20, Sch. II and Art. 178, Lim. Act does not apply. (1936) 163 Ind Cas 591 : 39 CWN 1301.

——Sch. 2, Para. 20 — Person whose favour award is made can file regular suit.

An application under Para. 20 is not the only remedy open to a person in whose favour the award is made. He can file a regular suit in which case Art. 178, Lim. Act, does not apply. AIR (V 22) 1935 Lah 134.

——Sch. 2, Para. 20 — An application to file an award does not become a suit by the provisions of Para. 20 (2), Sch. 2, C. P. Code and hence the applicant cannot claim the benefit of S. 6 of the Limitation Act. AIR (V 10) 1923 Rang 226 : 76 Ind Cas 493 : 1 Rang 256 (DB).

——Sch. 2, Para. 20 — Suit to enforce award — Award not filed.

An award was made on an arbitration out of Court. An application to file was numbered as a suit but was summarily rejected as being time-barred. Plff. filed a regular suit to enforce the award.

Held, that the bar of res judicata did not apply. AIR (V 8) 1921 Bom 389 : 22 Bom LR 1377 : 59 Ind Cas 755 (DB).

See also AIR (V 8) 1921 All 384 : 18 A L J 960 (DB).

——Sch. 2, Para. 20 — Remedy by suit — Non-compliance with — Effect of.

A suit lies on an award even though the award has not been filed in Court under Para. 20 within 6 months as required by Art. 178 of the Limitation Act. AIR (V 3) 1916 Mad 583 : 2 LW 320 : 17 MLT 241 : 29 Ind Cas 49.

See also AIR (V 4) 1917 Oudh 126 : 4 OLJ 487 : 42 Ind Cas 116.

Also AIR (V 1) 1914 U B 53 : 2 U B R 26 : 7 Bur LT 279 : 27 Ind Cas 31.

——Sch. 2, Para. 20 — An application under Cl. 20, Sch. II to a Civil Court for filing an award by the arbitrator beyond six months after date of award is barred by Art. 178 of Sch. I of the Limitation Act.

Held in the circumstances of the case that S. 5 and S. 14 of the Lim. Act did not apply. AIR (V 2) 1915 A 369 : 38 All 85 : 13 ALJ 1115 : 31 Ind Cas 899 (DB).

——Sch. 2, Para. 20 — Notice — Issue of.

Para. 20 does not limit the time for the issue of a notice thereunder. 176 PWR 1913 : 310 PLR 1913 : 21 Ind Cas 298 (DB).

6. Revision.

——Sch. 2, Paras. 20, 21 — Parties, pending suit referring matter to arbitration without intervention of Court — Court, if can pass decree thereon — Appeal not preferred — Revision, if lies.

Where during the pendency of a suit, the parties refer the matter to arbitration without the intervention of any Court, the Court has jurisdiction to entertain an application to file the award made in such arbitration, and pass a decree in the absence of an application under S. 10, Civil P. C., to stay the proceeding. When no appeal is preferred, the order of the Court cannot be interfered with in revision. AIR (V 25) 1938 All 46 : (1937) A L J 1133 : 1937 AWR (HC) 1080 : 172 Ind Cas 967.

——Sch. 2, Para. 20 — High Court can interfere with the order of the Small Cause Court, staying the hearing of a petition under Sch. 2, S. 20, on the ground of there having been a prior instituted suit and that both the suits related to the same dispute, the order being one which is passed without jurisdiction. AIR (V 16) 1929 Lah 533 : 117 Ind Cas 94 : 30 PLR 395.

——Schedule 2, Para. 21.

See also Sch. 2, Para. 20.

1. Scope of enquiry.
2. Satisfaction of Court.
3. Grounds of objection under Paras. 14 and 15.
4. "Proved."
5. Order filing or refusing to file award — Appeal.
6. Appeal against decree on award — Sub-Para. (2).
7. Appeal to Privy Council.
8. Revision.
9. Suit to set aside award or decree on award

See N. 1.

10. Decree on award — Nature of.

See N. 1 and 2

1. Scope of enquiry.

——Sch. 2, Para. 21 — Decree on award is as binding on parties as any other decree in suit. AIR (Vol 27) 1940 Lah 107: 42 PLR 77.

——Sch. 2, Para. 21 — Court instead of passing separate order with respect to filing of award combining it and judgment into one — Neither party misled — Procedure.

Paragraph 21 of the Second Schedule to the Civil P. C. does not lay down any particular form of order. All it states is that the Court "shall order the award to be filed and shall proceed to pronounce judgment according to the award." Section 2 (9) defines judgment as "the statement given by the Judge of the grounds of a decree or order", and order as "the formal expression of any decision of a Civil Court which is not a decree." This formal expression can be given in the course of a judgment. All that is necessary is that the mandatory direction which constitutes the order must be present somewhere.

Where the Judge combines the order for filing the award and judgment into one, instead of passing separate order with respect to the filing of the award and then a judgment in terms of the award followed by a decree, the procedure is not irregular and even if it is, if it does not mislead either of the parties, it is curable under S. 99, Civil P. C. AIR (Vol 23) 1936 Nag 246: 167 Ind Cas 260.

——Sch. 2, Para. 21 — Error in law does not invalidate.

An arbitrator has very wide powers and even an error in law made by an arbitrator does not invalidate the award. AIR (Vol 18) 1931 Oudh 6: 7 OWN 1095 (DB).

——Sch. 2, Para. 21 — Combined order and award — Court should not make such order.

There was an arbitration and an application was made by the opposite parties to the Court for the filing of the award. The Court after hearing the objections and having come to the conclusion that the award had been lawfully arrived at, made an order in the following terms, "plaintiff's suit is decreed with costs. The decree is to be prepared according to the award as prayed."

Held, that the order with the Court ought to have made was one directing the award to be filed and that a separate order should have been made saying that a decree should follow in accordance with the award. AIR (Vol 16) 1929 All 799: 118 Ind Cas 236 (DB).

——Sch. 2, Para. 21 — Setting aside award.

Section 21 does not contemplate an application to set aside the award like S. 16 and S. 19 within ten days of their getting notice of filing the award. AIR (Vol 15) 1928 Mad 371 : 111 Ind Cas 555 (DB).

——Sch. 2, Para. 21 — Suit to set aside award.

Matters heard and determined in proceedings under para. 21 cannot be reopened in a subsequent suit between the same parties brought for the purpose of setting aside the award and the decree following upon the judgment delivered in accordance therewith. (1922) 70 Ind Cas 985: 26 CWN 940 (DB).

——Sch. 2, Para. 21 — Procedure.

The decree under para. 21 (2) of Sch. II is a decree under S. 2 (2) and the provisions of O. 9, R. 13 apply to it. The provisions of the C. P. Code apply so far as may be, to proceedings under Sch. 2 save where a special procedure is laid down in the Schedule. AIR (Vol 9) 1922 Pat 376 : 62 Ind Cas 927 : 1922 PHCC 76: 3 PLT 29: 1 Pat 48 (DB).

——Sch. 2, Para. 21 — Modification by compromise.

It is competent to the parties to compromise the proceedings by altering, amending or adding to the award. AIR (Vol 8) 1921 Lah 34: 61 Ind Cas 628: 2 Lah 114: 3 LLJ 349: 73 PLR 1921 (DB).

——Sch. 2, Para. 21 (2) — Award — Suit to set aside — Dismissal, effect of.

If a suit is filed before the award is made and the award is attacked as invalid, if the objections fail, the suit must be dismissed, and the plff. cannot claim a decree on the basis of the award. AIR (Vol 5) 1918 Sind 13: 13 SLR 75: 53 Ind Cas 337.

——Sch. 2, Para. 21 — Inquiry into merits.

An award is not in the nature of a foreign judgment and a Court is therefore not entitled to go into the merits of the same. AIR (Vol 3) 1916 M 583: 17 MLT 241: 2 LW 320: 29 Ind Cas 49.

——Sch. 2, Para. 21 — Finality of award.

Three brothers appointed an arbitrator by whose award they bound themselves in respect of partition of joint family property. The award was duly made. It stated that all the cash had been divided and that now no co-sharer had any right to demand accounts from another. Some years after, the sons of one of the brothers sued for an account from his uncle with regard to certain property and moneys which they alleged were to remain joint until realised. Held, that the plaintiffs were bound by the award which was final and that they could not claim an account as the award expressly stated that no co-sharer had a right to demand an account thereafter. AIR (Vol 1) 1914 PC 153: 17 OC 33: 18 CWN 426: 1 OLJ 159: 27 MLJ 128: 22 Ind Cas 315.

——Sch. 2, Para. 21 — Validity of award — Power of Court to enquire.

Courts can decide whether an agreement, on which an award is based, is itself void, though they cannot enter into the terms of the award itself. (1910) 37 Cal 229 : 39 IA 27 : 7 ALJ 125 : 7 MLT 63 : 12 Bom LR 257 : 14 CWN 261 : 11 CLJ 220 : 20 MLJ 171 : 5 Ind Cas 404 (PC).

(On appeal from (1905) 32 Cal 582: 9 CWN 421.)

——Sch. 2, Para. 21 — Validity of award — Provisional decision.

A provisional or incomplete award which does not completely and finally decide the matters in dispute between the parties is not an award and cannot form the basis of any proceedings thereon. (1909) 6 ALJ 467: 2 Ind Cas 304 (DB).

——Sch. 2, Para. 21 — Decree on award — Construction.

If a decree is passed on a private award the precision of language which characterises a decree by the Court itself cannot be expected. The decree should be read and interpreted as a whole. (1909) 3 SLR 120: 4 Ind Cas 606 (DB).

2. Satisfaction of Court.

(a) General.
(a-1) Validity of reference and award.
(b) Subject-matter of the award.
(c) Form of award.
(d) Part of award, if can be filed.

(a) General.

——Sch. 2, Para. 21 — In order to decide whether an award is to be filed, Court under Para. 21, Sch. II, has to consider terms of award with reference to matters referred to in Para. 14 and for that purpose it is being admitted as evidence of a transaction purporting to affect rights in immovable property for a private award affects such rights apart from passing of decree based on award. AIR (Vol 24) 1937 Cal 201: 171 Ind Cas 507 (DB).

——Sch. 2, Para. 21 — Finality of award.

The Court, in construing an award, shall make every reasonable intendment and presumption in favour of the award being a final, certain and sufficient termination of the matter in dispute. AIR (Vol 15) 1928 Sind 144: 108 Ind Cas 791 (DB).

——Sch. 2, Para. 21 (1) — Filing of award — Refusal.

The Court cannot refuse to file an award by imposing conditions beyond those mentioned in Para. 21 (1). AIR (Vol 4) 1917 M 312: (1916) 1 MWN 203: 19 MLT 228: 33 Ind Cas 67 (DB).

——Sch. 2, Para. 21 — Decree on award — Duty of Court.

Before passing a decree in accordance with the award of arbitrators appointed without the intervention of the Court, the Court should satisfy itself that the reference was bona fide made to the arbitrators. (1911) 5 SLR 92: 12 Ind Cas 639 (DB).

(a-1) Validity of reference and award.

——Sch. 2, Para. 21 — Binding effect.

When the award purports to interfere with the rights of strangers, the strangers will not in any event, be affected by it; but as between the parties to the award its provisions must be held to be operative. AIR (Vol 15) 1928 Cal 275: 32 CWN 108: 107 Ind Cas 70 (DB).

——Sch. 2, Para. 21 — Party's death pending award — Death of some of the parties after hearing completed — Award thereafter is not invalid.

Where an agreement was made to refer a dispute about property to arbitration by some of the parties on their own behalf and on behalf of the minors and the investigation had been finished and documents produced before the arbitrators but some of them died before the award was made.

Held, there is no rule of procedure by which the arbitrators could substitute the representatives or appoint guardian ad litem for infants, and the fact that the arbitrators omitted to do so does not make the award illegal and not binding on the representatives or minors. The question, whether the award would be

binding or not, must depend upon the circumstances of each case. An award made on proper reference ought not to be set aside on the ground of the alleged defect in procedure not affecting the merits where substantial justice has been done. AIR (Vol 9) 1922 Cal 226: 70 Ind Cas 459: 26 CWN 804 (DB).

——**Sch. 2, Para. 21 — Conditions for validity.**

A Court must, before enforcing award, satisfy itself that it is enforceable in the same way as a decree is enforceable if it were a decree. Where an award is a mere declaration of the respective rights and liabilities of the parties or is an attempt to pass a sort of order for specific performance in a matter where no such decree can be passed in law, it would not be enforceable. AIR (Vol 7) 1920 All 258: 42 All 525: 18 ALJ 652: 59 Ind Cas 75: 2 UPLR (All) 243 (DB).

——**Sch. 2, Para. 21 — Disputes arising from contract — Power of arbitrator to determine existence of contract — Forgery.**

Where a contract provides for submission of disputes to arbitration it is competent for the arbitrators under the terms of the submission to decide whether or not an alleged interpolation was in the contract as originally made. AIR (Vol 7) 1920 Cal 633 : 24 CWN 567 : 59 Ind Cas 439.

——**Sch. 2, Para. 21 — Compromise during suit — Court's duty to inquire if parties are bound by compromise set up by one of them.**

The plff. sued for a certain sum basing his claim on a balance of account struck by deft. The claim was dismissed as not proved. The deft. put in applications stating that under pressure of people in the village, a certain compromise was arrived at between the parties. On appeal, the Civil Judge without going into the merits of the case, decreed the claim for the sum settled by the compromise. Held, that the Appellate Court should have inquired as to whether the compromise was binding between the parties or whether the plff. had proved his case on the merits. 63 PLR 1912: 142 PWR 1912: 15 Ind Cas 478.

——**Sch. 2, Para. 21 — Effect of award.**

An award though not filed in Court, may be pleaded in defence. An unsuccessful application for filing an award, provided the validity of award is not decided against in the application, is no bar to the plea. (1910) 6 NLR 1 : 5 Ind Cas 425.

(b) Subject-matter of the award

——Sch. 2, Para. 21 — Where all the immovable property dealt with by the award is within the jurisdiction of the Court and so are the parties to the award, the mere fact that the business, which is one of the subject-matters of the award was carried on by the parties at a place outside the jurisdiction, is not sufficient to oust the jurisdiction of the Court over the said subject-matter. The Court has, therefore, jurisdiction to entertain an application under Sch. II, Para 20, of the Civil P. C. and order the award to be filed under Para. 21. AIR (Vol 25) 1938 Sind 59: 174 Ind Cas 334 (DB)

——**Sch. 2, Para 21 — Void award.**

Where in an agreement to refer a matter in dispute to arbitration of four arbitrators it is expressly laid down that the parties would abide by the award of the majority of them, an award by three out of the four arbitrators, made without final discussion with and in the absence of the fourth and to which he does not agree, is not binding on the parties. The three arbitrators must be regarded as having been guilty of misconduct. AIR (Vol 17) 1930 Rang 136 : 121 Ind Cas 801 : 7 Rang 715 (DB).

——Sch. 2, Para 21 — Award determining matters not referred to arbitration canot be filed. (1928) 110 Ind Cas 745 (Lah).

——**Sch. 2, Para 21 — Power of arbitrator.**

Where a contract provides for submission of disputes to arbitration it is competent for the arbitrators under the terms of the submission to decide whether or not an alleged interpolation was in the contract as originally made. AIR (Vol 7) 1920 Cal 633 : 59 Ind Cas 439 : 24 CWN 567.

——**Sch. 2, Para 21 — Decree on award.**

Where a person was a party to arbitration but was not a party to the decree which followed upon the award he could not enforce the decree. AIR (Vol 6) 1919 Oudh 247 : 6 OLJ 322 : 52 Ind Cas 849.

——**Sch. 2, Para 21 — Validity of award — Persons not party — If can enforce — Parties to reference — Award.**

Where the question of the partition of the joint family properties is referred to arbitration and some of the members of the family are not parties to the reference the award in pursuance of such reference partitioning the family property is invalid and cannot be filed under Para. 21. AIR (Vol 5) 1918 Pat 132 : (1919) PHCC 141 : 48 Ind Cas 953 (DB).

(c) Form of award.

——**Sch. 2, Para 21 — Arbitration without intervention of Court — Award not signed by arbitrators — Validity.**

An award made on a reference to arbitration without the intervention of the Court is not invalid merely because it has not been signed by the arbitrators unless the parties had made it a condition of reference. AIR (Vol 19) 1932 Pat 60: 12 PLT 733: 11 Pat 131: 135 Ind Cas 518 (DB).

——**Sch. 2, Para 21 — Order filing private award.**

An order filing or refusing to file an award in an arbitration without the intervention of the Court is not and cannot be regarded as a decree. AIR (Vol 15) 1928 Lah 137 : 9 Lah 380 : 107 Ind Cas 756 (DB).

——**Sch. 2, Para. 21 — Oral award — Effect of — Transfer of property — Writing and registration.**

An award by arbitrators may be either oral or in writing, and both are equally binding on the parties. An award may be enforced as an oral partition which is effective without writing or registration. An award by arbitrators is binding on the parties as a judgment of Court and a right of suit accrues to a party when a bond is allotted by virtue of such award. An award is sufficient to pass title to property. The transfer of Property Act is not exhaustive of the modes of transfer. A suit on a hypothecation bond allotted to the holder by an oral award is maintainable without the execution of further instruments. AIR (Vol 6) 1919 Mad 1113: 34 MLJ 184: 45 Ind Cas 813. (DB).

——**Sch. 2, Para 21 — Validity of award — Majority decision.**

In the absence of a contrary provision, parties, agreeing to settle their differences by the judgment of a body made up of an uneven number of persons are presumed to imply that they would accept the decision of the majority. AIR (Vol 4) 1917 Bom 128 : 42 Bom 669 : 19 Bom LR 618 : 41 Ind Cas 264.

(d). Part of award, if can be filed.

——Sch. 2, Paras. 21, 24 — **Part of dispute referred left undealt — Award if can be filed.**

Where the award has left undetermined any of the matters referred to arbitration the award cannot be filed. Where the award which deals with the subject-matter of the dispute cannot be separated from the portions which have not been dealt with, it cannot be filed on the ground that the matter undealt would be decided subsequently. AIR (V 25) 1938 Pat 129: 19 PLT 16: 4 BR 462: 174 Ind Cas 592.

——Sch. 2, Para. 21 — Where a portion of an award is invalid but is separable, the Court can delete that portion of the award and file the remaining portion even in the case of an award delivered out of Court. AIR (V 19) 1932 All 154 (154, 155).

——**Sch. 2, Para. 21 — Failure to dispose all matters — Award is not necessarily invalid.**

Where parties agreed to the partition by stages and asked that the properties remaining undivided should be the subject of a further award to be made by the same arbitrators and the arbitrators followed the direction of the parties, but where unable themselves to perform the further work of partitioning the remaining properties in a separate award.

Held, that the award was not invalid on the ground of its not disposing all matters referred. AIR (V 15) 1928 Pat 7: 6 Pat 556: 109 Ind Cas 821 (DB).

——**Sch. 2, Para. 21 — Suit to enforce award.**

Where in an appeal, an application to file an award is rejected, a subsequent suit to enforce the award is not barred. The enactment of C. P. Code (1908), S. 89 and S. 104 (f) has not altered the law in this respect. AIR (V 8) 1921 All 384: 60 Ind Cas 626: 43 All 108 (DB).

——**Sch. 2, Para. 21 — Valadity of award — Bad in part — Splitting up of — Siguing of award.**

When an award goes beyond the powers of the arbitrator, it is permissible to separate such portion of the award, and to maintain the remainder if good. Ordinarily an arbitrator after he had delivered his award is functus officio but if the parties after delivery of his award again make a reference asking for the reconsideration of a part of the award, and the arbitrator thereupon reconsiders that part of his award and amends it accordingly, the amendments so made is within his powers. An award of arbitrators derives its binding force as against the parties entirely from the previous submission and their consequent signature in token of consent in no way affects the character of the award. AIR (V 6) 1919 Nag 131 : 53 Ind Cas 992 (DB).

——**Sch. 2, Para. 21 — Validity of award — Award deciding matters not referred to — Whether legal.**

A private award which decides matters not referred to arbitration cannot be filed and no decree can be passed thereon though such matters are separable from the rest of the award. A plea based on the deft's. acquiescence in the award can be raised in a regular suit but not in proceedings under paras. 25 and 21. AIR (V 1) 1914 Lah 471: 30 PR 1914: 11 PWR 1914: 31 PLR 1914 : 23 Ind Cas 422 (2) (DB).

——**Sch. 2, Para. 21 — Filing of award — Portion alone filed.**

A Court has no power to direct the filing of an award which is open to attack in part. (1912) 15 CLJ 110: 16 CWN 256: 13 Ind Cas 118 (DB).

3. Grounds of objection under paras. 14 and 15.

——**Sch. 2, Paras. 21 and 14, 15 — Provision in award objectionable with reference to Para. 14 or Para. 15 severable from rest of award — Award so far as it is unobjectionable can be enforced.**

If the award contains any provision which is objectionable with reference to Para. 14 or Para. 15 and if that provision is severable from the rest of the award the Court can enforce the award so far as it is unobjectionable. AIR (V 28), 1941 Mad 266: (1940) MWN 879.

——**Sch. 2, Para. 21 — Award made after long delay and under suspicious circumstances — Right of parties to call upon arbitrator to decide within time.**

It would not be in consonance with either equity or law to direct the filing of an award which had not been promulgated till 5 years after the reference which would probably not have been made at all but for the defendant's agent having brought a criminal complaint against one of the arbitrators on that date. The period of time which should be allowed for arbitrators issuing their award is a matter which must be decided with reference to the facts of each case and it is always open to either party to call on the arbitrators either to give their award or to renounce their appointment. AIR (Vol 6) 1919 Lah 406: 71 PR 1919: 52 Ind Cas 847 (DB).

——**Sch. 2, Para. 21 — Remission of, award — Power of Court to file private award.**

Under Para. 21 a Court can direct a private award to be filed if the grounds mentioned in Paras. 14 and 15 are not established. If such grounds are established the Court must refuse to file the award. A private invalid award cannot be remitted to the arbitrators to enable them to make it proper award. An award on a reference made out of Court is bad if it decides questions not referred and leaves questions within the authority undecided. If an award is open to objection in material particulars, the entire award must be deemed null and void. An invalid portion of an award may be separated and enforced apart from the objectionable part. (1913) 21 CL J 248 : 19 Ind Cas 941 (DB).

4. "Proved".

——**Sch. 2, Paras. 21, 20 — Setting aside of award on ground of uncertainty.**

The Courts will make every reasonable intendment in favour of an award being a final, certain and sufficient termination of the matters in dispute. Unless and until the contrary is shown, the Court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him, and the burden of proving that the arbitrator has given his award on matters not within the submission or has failed or omitted to award on matters which were within the submission lies upon the party who seeks to impeach the award. AIR (V 25) 1938 Sind 59: 174 Ind Cas 334 (DB).

——**Sch. 2, Para. 21 — Effect of award — Right to rely on — Conditions of.**

A party relying on an award must prove that he has abided by its conditions. AIR (V 5) 1918 Cal 234 : 41 Ind Cas 245 (DB).

5. Order filing or refusing to file award.—Appeal.

——**Sch. 2, Paras. 21, 16, S. 104 — Second appeal from order filing or refusing to file award, competency of.**

Although a decree upon an award which is in accordance with the award is normally not appealable, nevertheless an appeal will lie from such a decree where the submission or reference to arbitration is challenged as being invalid. From this, however, it does not follow that a second appeal will lie from an order filing or refusing to file an award when the validity of the reference

to arbitration is challenged. An order filing or refusing to file an award not being a decree is appealable only to the extent allowed by S. 104, Civil P. C., which prohibits a second appeal. AIR (V 28) 1941 Cal 202: ILR (1940) 2 Cal 551: 44 C WN 1034: 194 Ind Cas 610.

——Sch. 2, Paras. 21,16, S. 104 — No explicit order filing award — Decree upon award — Appeal against whole decision must be treated as one against implied order filing award — S. 104 (2), Civil P. C.

Where there is no separate order passed filing the award the appeal from the decision of the Court passing a decree upon the award should be treated as an appeal which is in substance an appeal from an implied order filing the award. In such a case the order passed in the appeal is governed by S. 104 (2), Civil P. C. AIR (V 28) 1941 Cal 202: ILR (1940) 2 Cal 551: 44 CWN 1034: 194 Ind Cas 610.

——Sch. 2, Para. 21, S. 104 (f) — Right of appeal if taken away by Sch. II, Para. 21.

Schedule II, Para. 21, Civil P. C., does not take away the right of appeal given to a person aggrieved by S. 104, Cl. (f) but only enacts that if a person wants to file an appeal against the decree though the decree is in accordance with the award and not in excess of the award, such an appeal will be incompetent. The fact that the filing of the award was followed by judgment and decree does not disentitle a person aggrieved from filing an appeal against the order filing or refusing to file the award, the same being expressly permitted by S. 104, Cl. (f). AIR (V 27) 1940 Nag 386: 1940 NLJ 393: ILR (1940) Nag 659: 192 Ind Cas 371.

——Sch. 2, Para. 21 — An order filing or refusing to file an award is appealable and the fact that a decree is passed in pursuance of award does not take away the right of appeal. AIR (V 18) 1931 Oudh 345: 8 OWN (CC) 789: 7 Luck 128: 128 Ind Cas 474.

——Sch. 2, Para. 21 — Appeal is competent.

Where an order directing an award to be filed and a decree in accordance with the award were not separately passed but the Court disposed of the whole case by a Single Order.

Held, that the appeal was in substance an appeal from an order directing the award to be filed, and as such was competent. AIR (V 12) 1925 All 404: 88 Ind Cas 76: 23 ALJ 440: 6 LRA Civ. 350: 47 All 743 (DB).

——Sch. 2, Para. 21 — 'Order filing the award' does not mean the order by which the arbitrators are directed to send their award or bring their award to Court before the objections have been lodged or disposed of; but an order filing an award is passed after the objections have been disposed of and an appeal does lie from an order filing an award even if in consequence the decree has to be set aside. In this connection the provisions of S. 104 (f) should be observed and paragraph 21 (2), Sch. II of the Code should be treated as a dead letter. AIR (V 11) 1924 Lah 231: 73 Ind Cas 820.

——Sch. 2, Para. 21 (2) and S. 104 (f) — Appeal — Application to file award — Refusal — Appealability.

An appeal lies against an order refusing to grant an application to file an award. 28 All 21 Diss. (1910) 38 Cal 143 : 7 Ind Cas 333 (DB).

——Sch. 2, Para. 21 (2) — Appeal — Award — Decree — Private reference — Order filing award.

An appeal lies under S. 104 (f), C. P. C. from an order filing an award in an arbitration without the intervention of the Court, in spite of the fact that the Court has under Cl. 21 (1) proceeded to pronounce judgment according to the award. 123 PR (1912): 103 PWR 1912: 172 PLR 1911: 10 Ind Cas 512 (DB).

See also (1910) 13 CLJ 399: 10 Ind Cas 454.

——Sch. 2, Para. 21 (2) — Appeal — Award.

An order directing an award to be filed is appealable. The mere drawing up of a decree in terms of the award has not the effect of taking away the right of appeal against the order. AIR (Vol 6) 1919 All 98 : 42 All 185 : 18 ALJ 78 : 1 UPLR (C.P.) 177 : 54 Ind Cas 443.

But see (1909) 12 OC 40: 1 Ind Cas 693.

6. Appeal against decree on award — Sub-Para (2).

——Sch. 2, Para. 21 — Award filed in Court — Whether can be attacked.

Arbitrators are judges of fact as well as law and have jurisdiction and authority to decide wrong as well as right. Accordingly, if they reach a decision and reach it fairly after hearing both sides their award cannot be attacked. The Court filing the award has no power to sit in appeal on the decision of the arbitrator. AIR (V 35) 1948 Nag 162: ILR (1947) Nag 631: 1948 NLJ 28 (DB).

——Sch. 2, Para. 21, S. 151 — Decree on award — Appeal if lies on ground that reference was invalid — Appellate Court if can set aside decree under S. 151.

Where a decree is passed in accordance with an award, the objection that the reference to arbitration was invalid can only be decided by the trial Court and no appeal is maintainable on that ground. The Appellate Court is not justified in invoking the inherent powers under S. 151, Civil P. C., to set aside the decree when the appeal is not competent. AIR (Vol 27) 1940 Lah 123 : 189 Ind Cas 812.

——Sch. 2, Para. 21 (2) — No allegation that decree was in excess of or not in accordance with award — Appeal challenging validity of award on ground that it was beyond terms of reference and one of parties was acting for minor — Competency.

Where it is not urged that the decree of the Court was in excess of or not in accordance with the award an appeal in which the validity of the award itself is attacked on the ground that one of the parties to the reference was acting not for herself but merely on behalf of minor, and that the award had gone beyond the terms of reference is incompetent. AIR (V 27) 1940 Rang 238: 190 Ind Cas 713.

——Sch. 2, Paras. 21, 14, 15, S. 104 (f) — Power of Appellate Court to go into question indicated by Para. 14 or Para. 15 — Decree in terms of award — Whether should bear same date as order filing award.

The words of the first part of Para. 21, Sch. II, Civil P. C., clearly imply that proof of the existence of any ground such as is mentioned or referred to in Para. 14 or Para. 15 is a bar which prevents the Court from ordering that the award be filed. Hence it cannot be held that proof in respect of these grounds should be taken after the order for filing. It follows that S. 104(f) of the Code empowers the Appellate Court not only to go into the question of the existence of the reference and of the award, but also to go into questions such as are indicated by Para. 14 or Para. 15. There is nothing in the Code which necessitates the decree bearing the same date as the order filing the award and one effect of these provisions is that it settles the date for the purpose of limitation of appeal; another effect is that if the trial Court disobeys the direction given in Cl. (1) of

Para. 21 and pronounces judgment in excess of or not in accordance with the award, there will be a remedy by an appeal from the decree as distinct from the appeal against the filing. AIR (V 22) 1935 Pesh 69: 155 Ind Cas 1022 (DB).

——**Sch. 2, Para. 21 — Fraud.**

A decree passed in terms of award cannot be challenged in appeal on the ground of fraud, nor can it be set aside by the Court by virtue of its inherent powers under S. 151. The remedy of the party lies by a separate suit. AIR (V 16) 1929 Nag 111: 118 Ind Cas 61.

——**Sch. 2, Para. 21 — Decree differing from award.**

Although a person can appeal against the decree passed on an award, so far as it is in excess of or not in accordance with the award, he is not entitled to re-open the whole case and to address on all other questions which were raised before the lower Court. AIR (V 15) 1928 Lah 849: 110 Ind Cas 298 (DB)

——**Sch. 2, Para. 21 — Merits of award — Distinction between the two provisions — Court cannot go into merits of decision in award.**

The effect of S. 104 (1) (f) seems to give a right of appeal against the decision of the Court on the question whether the award should be filed or not. Paragraph 21 (2) of the Second Schedule allows an appeal also if the decree of the Court does not correctly interpret the award and on an appeal under this provision the decree can be corrected so as to bring it in accordance with the award. But when the decree does correctly interpret the award then there is no appeal against the decree, in other words, when an award has lawfully been made there is no appeal against the decision of the abitrators. The Court has invariably to go into the merits of the decision contained in the award. It is limited to the three questions whether there has been a reference; whether there has been an award and whether any grounds under paras. 14 and 15 have been proved. AIR (V 10) 1923 Rang 199: 76 Ind Cas 504: 1 Rang 265.

——**Sch. 2, Para. 21 (2) — Appeal — Refusal to set aside — Ex parte award.**

An order refusing to set aside an ex parte decree passed in accordance with an award is appealable. AIR (V 3) 1916 All 51: 38 All 297: 14 ALJ 332: 33 Ind Cas 80 (DB).

——**Sch. 2, Para. 21 — Valadity of award — Arbitration — Reference — Capacity to make — Executor — Power of appeal from award.**

Capacity to make a submission to an arbitrator is co-extensive with capacity to contract and so in the case of persons whose capacity to contract is restricted, the power of making a submission, is in the same manner and to the same extent limited. Consequently, if parties enter into a submission concerning a subject-matter over which one or other has no authority or only a restricted power of disposition, an award ordering such a party to do that which he cannot lawfully do, will have no legal effect whatever. Pure questions of law may be referred for the decision of an arbitrator. As a submission only refers to the arbitrator, questions between the parties, the moment he touches the interest of strangers, he exceeds his authority and his award is void. Submission to an arbitration does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter. The fact that a decree is drawn up on the basis of the judgment which follows the order filing an award in an arbitration without the intervention of the Court cannot take away the right of appeal of the party aggrieved by the order. If the appeal is allowed the decree will become infructuous; the whole foundation of the decree will disappear and the Appellate Court can declare the decree vacated. AIR (V 2) 1915 Cal 745: 19 CWN 948: 21 CLJ 273: 28 Ind Cas 557 (DB).

——**Sch. 2, Para. 21 (2) — Appeal — Revision.**

A decree based on an award filed under Para. 20 is not open to appeal or revision. (1911) 7 PWR 1911: 14 PLR 1911: 9 Ind Cas 38 (DB).

——**Sch. 2, Para. 21 (2) — Appeal — Award invalid.**

Where submission to arbitration is not signed by all parties, there is no reference to arbitration, the arbitrators have no power to decide the matter. Their award is ultra vires and an appeal lies from a decree passed in accordance with such invalid award. (1909) 31 All 450: 6 ALJ 496: 2 Ind Cas 363 (DB).

——**Sch. 2, Para. 21 (2) — Appeal — Decree in excess of award.**

A decree for costs not allowed by arbitrators is in excess of the award and is therefore, appealable. (1909) 97 PLR 1909: 111 PWR 1909: 4 Ind Cas 1042.

——Sch. 2, Para. 21 (2) — No appeal lies against a decree passed in accordance with an award of the arbitrators to which the parties to a suit had made a reference on the ground that the award is invalid or void ab initio. (1909) 32 Mad 510: 6 MLT 176: 19 MLJ 480: 4 Ind Cas 871 (DB).

7. Appeal to privy council.

——**Sch. 2, Para. 21 (2).**

The provisions of Para. 21 (2) do not affect the right of applicant to go in appeal to the Privy Council. (1912) 15 OC 55: 15 Ind Cas 2 (DB).

8. Revision.

——**Sch. 2, Paras. 21, 14, 15 — Power of Court to uphold award in part — Registered agreement to refer to five arbitrators — Subsequent oral agreement to abide by decision of four — Validity.**

Where a registered agreement for reference to arbitration provides for arbitation by five persons a subsequent oral agreement of the parties that only four out of the five arbitrators should proceed with and decide the disputes could not legally have the effect of modifying the previous registered agreement so as to make the award by four only out of the five arbitrators regular.

But the High Court will not exercise its discretion in revision in favour of a party who has agreed to such a procedure.

Where a portion of an award is invalid but is separable, the Court can delete that portion of the award and file the remaining portion even in the case of an award delivered out of Court. AIR (Vol 19) 1932 All 154: (1931) ALJ 1087: 135 Ind Cas 230 (DB).

——**Sch. 2, Para. 21 (2) — Punjab Court's Act, S. 70 — Decree based on Private award.**

A decree based on a private award filed in Court is not open to revision by the Chief Court under S. 70 of the Punjab Court's Act, (amended). 13 PWR 1914 : 114 PLR 1914: 23 Ind Cas 950: AIR (Vol 1) 1914 Lah 477.

(See also 31 PWR 1919: 49 Ind Cas 979 (1): AIR (Vol 6) 1919 Lah 349).

9. Suit to set aside award or decree on award.

See N. 1.

10. Decree on award — Nature of.

See N. 1 and 2.

——Sch. 2, Para. 22.

——Sch. 2, Para. 22 — Sp. Rel. Act, S. 21.

After Para. 22 was enacted, S. 21 of Special Relief Act has no application to any agreement to refer to arbitration or to any award to which the schedule applies. 9 Bur LT 98: 35 Ind Cas 710 : AIR (Vol 3) 1916 LB 101.

——Sch. 3.

See also Civil P. C., Ss. 42 and 63 to 70.

——Sch. 3 — Collector to whom execution is transferred under Sch. III is not a Court although the power to execute a certain class of decrees is conferred on him by a notification under S. 68. Hence an intimation of the adjustment recorded by the Collector cannot be treated as certification under O. 21, R. 2. AIR (Vol 24) 1937 Nag 217: 19 NLJ 175: 169 Ind Cas 110 (DB).

——Sch. 3 — Management by Collector.

The incompetency of the mortgage during the period of the collector's management only extends to the property of which the Collector has expressly assumed management. 106 Ind Cas 14: AIR (Vol 15) 1928 Nag 128.

——Sch. 3 — Private sale with permission.

There is no warrant for the contention that the sale by judgment-debtor with the permission of the Collector, when the Collector is in the management of the property has the same effect as the sale by the Collector. 87 Ind Cas 995: AIR (Vol 12) 1925 Nag 341.

——Sch. 3 — Amended C form.

Because a new number is given to the proceedings on the corrected "Form C" the original proceedings received by the Collector, are not terminated when the "Form C" is returned for amendment but remains pending while it is with the Civil Court and continues on its return. 64 Ind Cas 420: 18 NLR 152: 4 NLJ 118: AIR (Vol 9) 1922 Nag 267.

——Sch. 3 — Investigation of claims.

The Collector is invested with "all the powers which the Court might exercise in the execution of the decree." These include the power to dismiss under R. 57 of O. 21, but do not include the power to investigate claims made or objections preferred under R. 58 because such an investigation would not be "in the execution of the decree". 64 Ind Cas 420: 18 NLR 152: 4 NLJ 118: AIR (Vol 9) 1922 Nag 267.

——Sch. 3, (old Code, S. 325-A) — Alienate, meaning of.

The word 'alienate' in S. 325 (a), C. P. C., was used ejusdem generis with the words preceding, viz., "mortgage charge and lease" and contemplates a transfer which could have present effect and not a demise which can only have operation after the death of the testator. A judgment-debtor, therefore in respect of whose property the Collector could perform all powers or duties conferred or imposed upon him by Ss. 322-325, could make a will in respect of such property. (1910) 7 ALJ 1176: 33 All 233 (235): 8 Ind Cas 834 (DB).

——Sch. 3, Para. 1.

——Sch. 3. Para. 1 — Collector, if Court.

Per Broomfield J.—The Collector to whom a decree has been transferred for execution is not a Court. AIR (Vol 30) 1943 Bom 12: 44 Bom LR 819: ILR (1943) Bom 104: 204 Ind Cas 402 (DB).

——Sch. 3, Paras. 1 to 10 — Property under the control of the Collector who could perform the powers conferred on him by Paras. 1 to 10 — Transfer made during the time — A point that the transfer was invalid is a mixed question of law and fact and cannot be taken for the first time in appeal. AIR (Vol 27) 1940 All 500: 1940 AWR (HC) 470: (1940) ALJ 744: ILR (1940) All 681 : 191 Ind Cas 745 (DB).

——Sch. 3, Para. 1 — Honorary Assistant Collector dismissing execution application on public holiday — Order, if ultra vires.

Honorary Assistant Collector are as much bound by the standing orders of the Government of India as Assistant Collector in the service of the Government. Where, therefore, an Honorary Assistant Collector passes an order dismissing an application for execution on a public holiday, on which day, according to standing orders of the Government of India, no work of a civil nature can be done, the order is ultra vires and prejudicial to the applicant especially when he was not even informed by the Honorary Assistant Collector that his application for execution of the decree would be taken up and heard on a public holiday. The order passed against him takes away his right of executing his decree, as any fresh application for execution would be time barred. AIR (Vol 24) 1937 Oudh 272 : 1937 OWN (CC) 247 : 167 Ind Cas 280.

——Sch. 3, Para. 1 — Decree against Hindu father — Transfer of execution to Collector — Mortgage by father and son before papers are sent back to Civil Court — Validity.

Where the execution of certain decrees obtained against a Hindu father was transferred to the Collector and before the papers were sent back to the Civil Court, the judgment-debtor and his son executed a mortgage of the family properties:

Held, (i) that the mortgage by the judgment-debtor was entirely void and inoperative;

(ii) that the mortgage was void even with regard to the son's share in the properties. inasmuch as the Collector was seized of the entire estate and was entitled to sell the entire estate in execution of the decree against the father. AIR (Vol 18) 1931 All 541: (1931) ALJ 400: 132 Ind Cas 568 (DB).

——Sch. 3, Para. 1 — Mortgage decree.

It is open to the executing authority to effect a mortgage of a part of the property to satisfy a mortgage decree. 86 Ind Cas 846 : 27 Bom LR 217: AIR (Vol 12) 1925 Bom 277 (DB).

——Sch. 3, Para. 1 — Decree for joint possession — Revenue paying estate — Duty of Collector to allot — Reference to Civil Court.

After a Civil Court passes a decree for joint possession of a revenue paying estate the Collector not only has to make allotment but to complete the partition by delivery of possession and he fails to exercise a jurisdiction vested in him by law if he refers the parties to the Civil Court for this purpose. After allotment, the parties cannot claim to be joint owners of the property though the partition proceedings are not completed according to law. 56 Ind Cas 806 : AIR (Vol 7) 1920 Nag 204.

——Sch. 3. Para. 1 — Powers of Civil and Revenue Courts.

When a decree is transferred to the Collector for execution he can send back papers, if he fails in effecting a sale of the property. For good reasons the Court which passed the decree can also send back the papers to the Collector without fresh application for execution. In this case the Court enforces what it has already ordered. 42 All 152 : 11 LW 384: (1920) MWN 3: 24 CWN 394: 38 MLJ 259: 2 UPLR (PC) 55: 22 Bom LR 451: 18 ALJ 235: 55 Ind Cas 486 : AIR (Vol 6) 1919 PC 60.

——Sch. 3, Para. 2.

——Sch. 3. Para. 2 (old Code S. 322) — Execution by Collector — Procedure — Provisions of C. P. C. do not apply — See (1903) 30 Cal 425 (427).

——Sch. 3. Para. 3.

——Sch. 3, Para. 3 — Where judgment-debtor transfers his property to his wife by gift before attachment and property is attached without making wife party to execution proceedings and wife has obtained mutation of names in her favour, she is not bound by order rejecting objection by judgment-debtor that he had no interest in property on ground that he having gifted away property had no locus standi. It is the duty of Collector to whom decree is sent for execution to take action under Sch. III, Para. 3 and serve her with notice calling upon her to submit statement of her claim. AIR (Vol 23) 1936 Oudh 195 : 1935 CWN (CC) 879 : 37 Cr LJ 1037 : 164 Ind Cas 995.

——Sch. 3, Para. 7.

——Sch. 3, Paras. 7 and 11 — Execution by Collector — Mortgage by judgment-debtor without leave of the Collector — Personal covenant.

Held, that though the mortgage as such was void, the personal covenant to pay was severable and valid and could be enforced against the mortgagor. AIR (Vol 20) 1933 All 468: (1933) ALJ 1522: 144 Ind Cas 373 (DB).

——Sch. 3, Para. 7 — Power of Insolvency Court — Provincial Insolvency Act (1920), S. 60 (1) (c) — Insolvency Court is not absolutely barred from alienating insolvent's lands.

There is no absolute bar to the insolvency Court permanently alienating the land of an insolvent or to its departing from the principles governing the execution of ordinary decrees, if a fit case is made out for such action. 117 Ind Cas 669: 29 PLR 606: AIR (Vol 16) 1929 Lah 66.

——Sch. 3, Para. 7 (1) (b) — Interest —Upto date of application.

Under S. 7 (1) (b) of Sch. III, C. P. C., the Collector has to take into account the whole decretal amount with interest. That includes not merely interest upto the date of darkhast but also interest which runs according to the decree upto the date of payment, in spite of an omission by the decree-holders to mention in his application the claim for further interest. The Collector cannot return the decree as satisfied till the whole amount including interest upto date of satisfaction has been paid. (1912) 37 Bom 32: 14 Bom LR 787: 17 Ind Cas 142 (DB).

——Sch. 3, Para. 7 — Execution — Power of executing Court — Lease granted execution — Power to extend period or grant of fresh lease.

After the lease of the judgment-debtors property is granted in satisfaction of the decree by the executing Court, the decree must be considered to have been satisfied and the executing Court becomes functus officio and has no power to authorise the grant of a fresh lease or to extent the term of the original lease or to alienate the property in any other way. (1910) 8 Ind Cas 410 (Oudh).

——Sch. 3, Para. 9.

——Sch. 3, Para. 9 — A final mortgage-decree for sale awarded interest up to date of decree and also future interest — Execution application — Omission of future interest — Execution transferred to Collector —Collector disposing the balance of sale proceeds by paying to an attaching creditor and to the judgment-debtor:

Held, that the Collector had no power to dispose of the balance without instructions from the Civil Court. AIR (Vol 18) 1931 All 700: (1931) ALJ 1064: 133 Ind Cas 423 (DB).

——Sch. 3, Para. 9 — Expenses of sale — Revenue authorities — Right to recover.

Where decree is sent for execution to the Collector, the Revenue Authorities have legal power to recover, as expenses of sale, under R. 9 of Sch. 3, fees on the scale which applies in the case of sales under the Land Revenue Code. The fact that a specific estimate of such charges is not made in each case that arises, but there is a prescribed general rate covering such expenses does not invalidate the levy of such fees, and the Civil Court transferring the decree to the Collector is not competent to direct the Revenue Authorities to refund such charges and no legal objection can be taken to the levy of poundage by Civil Court in such a case. 28 Bom LR 1191: 99 Ind Cas 289: AIR (Vol 14) 1927 Bom 17 (DB).

——Sch. 3, Para. 9 — In execution proceedings the expenses of sale cannot be deducted from the poundage levied on proceeds of a sale conducted through the Collector. 28 Bom LR 590 :98 Ind Cas 363: AIR (Vol 13) 1926 Bom 335 (DB).

——Sch. 3, Para. 9; Ss. 68, 70, 71 (Case under old Code) — Execution Proceedings transferred to a Collector — Court's power under S. 324-A — Collector's duties.

A Collector acting under S. 320, C. P. C., has power to include on the debit side only such charges as can be incurred under the provisions of the chapter; and the court is perfectly justified under S. 324-A in regarding as at its disposal, the balance which is left after such charges have been deducted; and if in the accounts, there be any charges which have not been so incurred, but which have been inserted in the accounts, such charges, being improper, cannot affect or restrict the disposing power of the court over the balance. The power of the Court as to the application of the balance is complete although the fund itself remains in the hands of the Collector as trustee. The amount of maintenance to be determined for the judgment-debtor is a matter for the Court to consider and decide and one which it cannot allow the Taluqdari Settlement Officer (acting as a Collector) to decide. The Collector, like an agent, though bound under S. 324-A to render accounts cannot be compelled to give up the account books into court, nor does the section require him to pay the balance into court. (1904) 6 Bom LR 825 (831) (DB).

——Sch. 3, Para. 9 (Case under old Code) — Maintenance of judgment-debtor's family a matter for determination by the Court.

When an estate is in the hands of the Taluqdari Settlement Officer by reason of the provisions of S. 324-A the section must be closely followed. The provision for the maintenance of the judgment-debtor's family is a matter for determination by the Court and not by the executing officer. (1904) 6 Bom LR 822 (824) (DB).

——Sch. 3 Para 11

See also, Civil P. C. S. 68.

1. **Incompetency to transfer.**
2. **Alienation subsequent to adjustment.**
3. **Permission of the collector.**
4. **Power of Civil Court to issue process.**
5. **Termination of the collector's power.**
6. **Limitation.**

1. Incompetency to transfer.

(a) General.

(a-1) Alienate — meaning of.

(b) Scope.
(c) Void transaction.

(a) General

——Sch. 3, Para. 11 — Judgment-debtor selling property under Collector's management — Covenant to refund in sale-deed — Validity. See 1949 NLJ 163 : AIR (Vol 36) 1949 Nag 292.

——Sch. 3, Para. 11 — Transfer of property takes place on date of instrument and not when it is registered — Property under Collector's management when sale deed executed but not when registered — Sale, if valid.

The transfer of property takes effect on the date of the execution of the instrument of transfer and not on the date of the registration of the instrument.

Where, therefore, the property sold was under the Collector's management when the sale deed was executed but was not so when it was registered, the sale is a nullity as it not postponed until registration. That nullity cannot be turned into an effective transfer simply by registration of an ineffective transfer at a date after the Collector had ceased to function. AIR (Vol 25) 1938 Nag 253 : ILR (1939) Nag 652 : 175 Ind Cas 384 (DB).

——Sch. 3, Para 11 — Sale in contravention of Para. 11, Sch. III, whether good — Vendee, if can take benefit of S. 65 or 70, Contract Act (IX of 1872).

Where a money-decree was obtained against a judgment-debtor, and the decree was transferred for execution to a Collector who fixed a date for sale of field, under Para. 11 of Sch. III of the Civil P. C., judgment-debtor is incompetent to sell this field if at the time of the sale the Collector had jurisdiction to execute the decree.

But where the deed of transfer is executed on the same day as the decree-holder is paid off it may perhaps be fairly presumed that the decree-holder was paid off and that, therefore, the decree was adjusted before the sale was executed, possibly on the principle that the law does not ordinarily take notice of fractions of the day but where the deed of transfer is executed two days before the the decree holders were paid off, it cannot possibly be presumed that the decree-holder was paid off or that the decree was adjusted before the transfer was executed.

A transfer made in contravention of the provisions of Para. 11 of Sch. III, is void and of no legal effect whatesover and no title passes to the transferee.

Section 65, Contract Act, starts from the basis of there being a contract between competent parties and has no application to a case in which there never was and never could have been any contract, and a person who is incompetent to transfer property under Para. 11 of Sch. III stands on the same footing as a minor or lunatic and is incompetent to contract. In such a case S. 65 cannot be of any help to the transferee. AIR (Vol 24) 1937 Nag 330 : ILR (1937) Nag 111 : 169 Ind Cas 675.

——Sch. 3, Para 11 — C Form embodying three properties — One withheld from sale by Collector as others were thought enough to satisfy debt — Judgment-debtor, if competent to sell that property.

Where the C Form sent by the Civil Court embodied an order or sale of Mauza R, 12 annas share of Mouza B and the absolute occupancy fields of Mouza A and the Collector provisionally withheld Mouza R from sale as he estimated that the sale proceeds of the other two items would be sufficient to satisfy the debt :

Held, that because R village was the last in the order in which the attachment property was intended to be sold, it could not be said that the Collector could not exercise his power in respect of it. The judgment-debtor was, therefore, no more competent to transfer R than he was to transfer the other two items of the property. AIR (Vol 21) 1934 Nag 285 : 31 NLR 129 : 153 Ind Cas 687.

——Sch. 3, Para. 11 — Part of judgment debtor's property under management of Collector — Mortgage, if can be created of other property.

Where part of the judgment-debtor's property is under the Collector's management, the judgment-debtor can validly mortgage the rest of his property. The words "such property or part" in Para. 1, Sch. III, relate back to the earlier words "the judgment-debtor's immovable property or any part thereof" in respect of which the Collector is exercising his functions. Any part of the property in respect of which such functions are not being exercised is available to the owners thereof to deal with as they wish. AIR (Vol 21) 1934 Nag 264 : 30 NLR 331 : 153 Ind Cas 115 (DB).

——Sch. 3, Para 11 — Mortgage by judgment-debtor without Collector's sanction.

Though Para 11 of Sch. III, prohibits a mortgage by the judgment debtor of his immovable property in the circumstances mentioned therein, the stage at which an objection to the validity of the mortgage on this score should be raised is in the suit to enforce the same. If the defendant does not raise this plea in the suit and a decree for sale is passed, it is not open to him or to his successors in interest to raise such an objection at any subsequent stage. AIR (Vol 18) 1931 All 38 : (1930) ALJ 1594 : 133 Ind Cas 314 (DB).

——Sch. 3, Para. 11 — Part property under management.

Where part of the judgment-debtor's property is under the Collector's management in execution of a money decree, the judgment-debtor can validly mortgage the rest of his property. 122 Ind Cas 369: 13 NLJ 36: AIR (Vol 17) 1930 Nag 237 (DB).

——Sch. 3, Para. 11 — Private transfer.

Where the property which forms the subject matter of the gift is admittedly under the control of the Collector on the date of the gift, it cannot be given as a gift without the written permission of the Collector and such gift is incompetent. 6 OWN 843: AIR (Vol 16) 1929 Oudh 435.

——Sch. 3, Para. 11 — Refund of consideration if paid.

While proceedings regarding the sale of absolute occupancy holding were pending in the Court of the Collector, the defendant entered into an agreement for the sale of that holding and executed a conveyance, in favour of the plaintiff. The defendant being incompetent to alienate the field under para. 11 of Sch. III, sued the plaintiff for specific performance to sell or in default for the refund of the consideration money and damages. The claim for specific performance was subsequently withdrawn.

Held, that the parties did nothing illegal with their eyes open but had been caught by the fiction that they should have known the law, that S 65 of the Contract Act applied and plaintiff was entitled to refund of consideration money. 78 Ind Cas 343: 20 NLR 87: AIR (Vol 11) 1924 Nag 132.

——Sch. 3, Para. 11 — Charge by operation of law.

The judgment-debtor does not charge the property by agreeing to sell it or accepting the purchase money but the charge arises by operation of the law out of that transaction and therefore the para. 11, Sch. III, does not apply to the case. 66 Ind Cas 850: AIR (Vol 9) 1922 Nag 81.

(a-1) Alienate — Meaning of.

——Sch. 3, Para. 11 — Agreements to transfer — Not affected.

The word "alienate" in Para. 11 of Sch. 3, is used 'ejusdem generis' with the preceding words "mortgage, charge and lease". The provision of Para. 11 does not prohibit the transfer in future of an interest in the property but only lays an embargo against the transfer of the present interest therein, and as an agreement to sell does not create a present interest in the property, it is not affected. 100 Ind Cas 863: AIR (Vol 14) 1927 Nag 177.

——Sch. 3, Para 11 — The word "alienate" in S. 325-A of the C. P. Code, (1882), Sch. III, Para. 2 of New Code is used 'ejusdem generis' with the words preceding it viz., mortgage, charge and lease and covers a transfer having present effect and not a devise which can only operate after testator's death. A judgment-debtor in respect of whose immovable property the Collector can exercise powers or perform duties under Ss. 322-325 can make a will of such property. (1910) 33 All 233: 7 ALJ 1176: 8 Ind Cas 834 (DB).

(b) Scope.

——Sch. 3, Para. 11 — All that para. 11 of Sch. III does is to impose a partial disability on the judgment-debtor in respect of whose immoveable property the Collector can exercise the powers conferred upon him or perform the duties enjoined upon him by paras. 1 to 10 of the said schedule. AIR (Vol 24) 1937 Oudh 87 : 1936 OWN (CC) 1033 : 12 Luck 435 : 164 Ind Cas 945 (DB).

——Sch. 3, Para. 11 — Attachment and sale of an unexpired portion of the lease granted by the Collector is not void if lease is under Para. 1.

The assumption, that, under Para. 11, Sch. III, in every case where the Collector exercises any powers or duties under preceding paragraphs 1 to 10 the whole of the judgment-debtor's immoveable property comes under the jurisdiction of the Collector and the judgment-debtor becomes incompetent to deal with it without the Collector's written permission, is not correct. When the Collector proceeds under para. 1 of the Schedule, his jurisdiction only extends to the property ordered to be sold and the lease of the judgment-debtor's whole property is outside his jurisdiction. There is therefore no infringement of the provisions of paragraph 11 if unexpired portion of the lease is attached and the attachment is not void. 61 Ind Cas 579: 18 NLR 131: AIR (Vol 9) 1922 Nag 243.

(c) Void transaction.

——Sch. 3, Para. 11 — Execution transferred to Collector — Mortgage of property — Whether void.

No sooner an order for transfer of a decree for execution to the Collector is made then he is seized of the case and not on the date such order reaches him. Consequently a mortgage-deed executed after transfer of the execution to the Collector is void under Para. 11 of Sch. III of the Civil P. C. AIR (Vol 23) 1936 Oudh 280: 1936 OWN (CC) 489: 12 Luck 185: 162 Ind Cas 362 (DB).

——Sch. 3, Para. 11 — Execution proceedings pending before Collector — Absence of written permission to transfer — Judgment-debtor, if competent — Mortgage, if void 'ab initio'.

Where execution proceedings are pending before the Collector who is in a position to exercise powers under Ss. 322 to 325, old Civil P. C., and, no written permission is obtained from him, the judgment-debtor is incompetent to mortgage his property under S. 325-A, old Civil P. C., i.e., Sch. III, Para. 11, Civil P. C. When a mortgage is executed without such consent the deed is void 'ab initio'. AIR (Vol 22) 1935 Oudh 121: 11 OWN (CC) 1571: 10 Luck 361: 153 Ind Cas 585 (DB).

——Sch. 3, Para. 11 — Execution of decree ordering sale of immovable property transferred to Collector — Mortgage by judgment-debtor — Whether void.

When the execution of a decree ordering the sale of immovable property has been transferred to the Collector under S. 320 of the Civil P. C. 1882, the effect of S. 325-A (corresponding to Para. 11 of Sch. III of the present Code) is that a mortgage of the property or any part of it, made by the judgment-debtor while the Collector was in a position to exercise the powers given to him by Ss. 322 to 325 of old Code is absolutely void, and not merely voidable as against the Collector and those claiming under him. AIR (Vol 22) 1935 Oudh 56: 11 OWN (CC) 1626: 10 Luck 459: 153 Ind Cas 612 (DB).

——Sch. 3, Para. 11 — Mortgage in contravention of Para. 11 — Validity of.

A mortgage made in contravention of Para. 11 of Sch. III, is absolutely void and the charge is incapable of being enforced. AIR (Vol 20) 1933 All 908: (1933) ALJ 1564: 56 All 134: 147 Ind Cas 575 (2) (DB).

——Sch. 3, Para. 11 — Construction.

The provision of Para. 11 must be construed strictly and the declaration that a judgment-debtor shall be incompetent to alienate his property must be read in the exact and plain sense which the words imply. Where, therefore, a judgment-debtor effects a sale of property under attachment in execution of money decree, and the permission of Collector has not been obtained, the transfer is not only voidable but is void. 121 Ind Cas 888: 6 OWN 750: AIR (Vol 16) 1929 Oudh 441 (DB).

——Sch. 3, Para. 11 — While the property is under the control of the Collector the judgment-debtor is disqualified from entering into any transaction in contravention of the terms of R. 11. The disqualification imposed by the rule is absolute in its nature making all such transaction void and cannot be said to be applicable only to those cases in which a sale has been actually made by the Collector. 6 OWN 843: AIR (Vol 16) 1929 Oudh 435.

——Sch. 3, Para. 11 — Sale before appeal — Void.

Where judgment-debtor deposited the decretal amount in Court under O. 21, R. 89, C. P. Code and the auction sale was set aside by sub-divisional officer and an appeal was preferred against that decision to the Collector who reversed the order.

Held, that a private sale of property before the appeal was filed but after the auction sale was set aside was covered by Para. 11, and was void. 78 Ind Cas 270: AIR (Vol 11) 1924 Nag 216.

——Sch. 3, Para. 11 — Transfer of property during the management of the Collector executing a decree is void and payment of prior encumbrances on the strength of such a transfer does not give the transferee the benefit of the charge of the prior debts. 11 OLJ 82 : 83 Ind Cas 854 : 27 OC 56 : AIR (Vol 11) 1924 Oudh 302 (DB).

——Sch. 3, Para. 11 — Transfer in contravention of — Void — Incompetent — Meaning — C. P. Code (1882), S. 325-A.

A transfer made in contravention of the provisions of S. 325-A of the C. P. Code of 1882 (C. P. C., Sch. III, Para. 11) is absolutely void and of no legal effect whatsoever. It is not merely void against the Collector, and those claiming under him. The word 'incompetent' in the section is to be read in the exact and plain sense that the word implies. 36 Bom 510, Disappr. 46 Cal 183 : 45 IA 219 : 14 NLR 181 : 35 MLJ 783 : 16 ALJ 993 : 25 MLT 64: 23 CWN 350: 29 CLJ 201: 1 UPLR (PC) 14;

2 Bom LR 541 : 9 LW 327 : 48 Ind Cas 312 : AIR (Vol 5) 1918 PC 168.

2. Alienation subsequent to adjustment

——Sch. 3, Para 11 — Alienation by judgment-debtor whose property is under management of Collector, validity — Land of judgment debtor attached in execution, and decree transferred to Collector for execution — Sale deed executed by judgment debtor in full satisfaction of debt, during pendency of proceedings before Collector — Validity — Subsequent ratification.

An alienatnion by a judgment-debtor whose property is under the management of the Collector under Sch. III, Civil P.C. is void ab initio and not merely voidable at the instance of the decree-holder or the Collector.

Some fields besides a house were attached in execution and the decree was transferred to the Collector for execution. While the proceedings before the Collector were pending, the judgment-debtor sold the fields to her judgment creditor, in full satisfaction of her judgment-debt. Subsequently the parties applied to the Collector for the recording of the adjustment of the decree :

Held, that the sale having been made before the extinction of the decre, and termination of the Collector's power the judgment-debtor was incompetent to transfer and hence the sale was void. As the transfer was void in its inception, it could not be validated by any subsequent ratification. AIR (Vol 28) 1941 Nag 12: 1940 NLJ 616: ILR (1941) Nag 214: 192 Ind Cas 312.

——Sch. 3, Para 11 — Mortgage-decree — Execution proceedings — Judgment debtor executing fresh mortgage of suit property with Collector's permission to satisfy decree — Subsequent mortgage of same property without Collector's permission — Subsequent mortgage falls within words "discovered to be void" in S. 65, Contract Act.

In the execution proceedings of a mortgage decree before a Collector, a fresh mortgage of the suit property was executed with the Collector's permission by the judgment debtor, to satisfy the decree. But no permission for a subsequent mortgage of the same property was obtained.

Held, that the subsequent mortgage was void. The fact that the transaction was beneficial to the mortgagor did not affect the invalidity and in view of the clear terms of Para. 11, Sch. III, it could not be said that the subsequent mortgage was an extra-judicial proceeding and no sanction was necessary;

Held, also, that the personal liability of the mortgagor under the subsequent mortgage for the money actually paid could be enforced.

Held, further that the subsequent mortgage-deed fell within the words "discovered to be void" in S. 65, Contract Act. AIR (Vol 27) 1940 PC 204 : 7 BR 218: 52 MLW 777: 1941 MWN 1: ILR (1940) Kar (PC) 419 Sup.: 67 I A 431 : 1941 OWN (CC) 513 : 1940 AWR (CC) 158: (1941) ALJ 316: 43 Bom LR 465: 73 CLJ 121: 191 Ind Cas 94.

——Sch. 3, Para 11 — Decree satisfied and property no longer under management of Collector—Registration of mortgage deed — Validity of deed — Practi e —Plea that mortgage was executed while property was under Collector's management and hence void should be accepted with caution.

Held, that the mortgage deed registered after the execution case is struck off as fully satisfied is valid as the property is no longer under the management of the Collector.

Although it is correct in principle that a mortgage executed whilst the property is under the management of the Collector is absolutely void, that plea should be accepted with great caution when it is put forth by a mortgagor with the intention of defeating the mortgage which he himself has executed. (1936) 160 Ind Cas 924: 18 NLJ 134.

——Sch. 3, Para 11 — Family settlement — Whether affected by Para 11.

Where an agreement is no more than a settlement based on an assumption that there was an antecedent title of some kind in the parties and is neither a mortgage, charge or lease but is only a family settlement, it cannot be treated as an alienation and Para 11 of Sch. III, will not affect it. AIR (Vol 22) 1935 Oudh 245 : 1935 OWN (CC) 278 : 10 Luck 690 : 154 Ind Cas 267 (DB).

—Sch. 3, Para 11 — Decree certified as paid — Subsequent setting aside of sale — Collector's jurisdiction.

The question whether the Colector can exercise powers or not should be judged not from a purely theoretical point of view, but from the standpoint as to whether he could-practically and effectively exercise any of his powers with respect to the property alienated under Sch. III to the Civil P. C. After the Collector's certification of payment of the decree, the property the sale of which was set aside must be considered to have gone out of the jurisdiction of the Collector. AIR (Vol 21) 1934 Nag. 285: 31 NLR 129: 153 Ind Cas 687.

——Sch. 3, Para 11, O. 41, R. 20 — Execution by Collector — Payment of decree-holder and mortgage of attached properties on same day — Presumption — Formal continuation of proceedings by Collector, effect of — Mortgage — Paramount title, can be raised by fresh suit — No res judicata.

In respect of those defendants against whom the decision in a suit to enforce a mortgage has proceeded ex parte there is nothing to prevent them if they so choose in a future suit to set up a paramount title. Even in respect of those who had appeared. if no express decision on the question of title has been given by reason of the indefiniteness of the defendants pleadings and the evidence in support thereof they with the connected defendants would be equally entitled to raise the question of paramount title in a separate suit.

Certain properties of the defendant were under attachment by a Collector in execution of a decree. On September 3, 1909 the defendant sold certain crops to the plaintiff and paid the decree-holder. On the same date he executed also a mortgage in favour of the plaintiff over the same properties. Final orders in execution were made by the Collector only on September 8 and 9:

Held, (i) that since the decree in connection with which the attachment in the Collector's Court arose was satisfied on the same day the mortgage-deed was executed, a strong presumption arises and matters were so arranged as to release the property before the mortgage was executed, and the burden lies heavily on the defendants who alleged that it was otherwise.

(ii) that the Collector's power over the properties ceased on September 3, when the decree-holder was paid in the presence of the Collector;

(iii) that once the Collector's power over the property has terminated as a result of satisfaction, the subsequent alienation would not be invalid merely on the ground of formal continuation of proceedings before the Collector such as occurred in the present case. AIR (Vol 21) 1934 Nag 33: 15 NLJ 173: 144 Ind Cas 267.

——Sch. 3, Para 11 — Execution by Collector — Mortgage by judgment-debtor to pay off decree-holder — Validity.

The execution of a decree was transferred to the Collector and the Collector fixed December 12, for sale of the properties of the judgment-debtor. On that day, the judgment-debtor executed a mortgage of his properties to a third person to pay off the decree-holder and the decree-holder was paid on the same day. The payment was certified to the Collector only on December 14;

Held in a suit to enforce the mortgage, that the mortgage, was not void under Para. 11, Sch. III Civil P.C. inasmuch as owing to the payment out of Court on December 12, the decree was satisfied and the Collector could not exercise any of the powers conferred upon him by the Code and therefore, the incompetency of the judgment-debtor to mortgage his property ceased. AIR (Vol 20) 1933 Nag 238: 147 Ind Cas 725.

——Sch. 3, Para 11 — Surrender of tenancy rights.

The surrender by a tenant of his tenancy right to the landlord cannot be held to be an alienation within the meaning of R. 11, Sch. III. AIR (Vol 12) 1925 Nag 455: 89 Ind Cas 174.

——Sch. 3, Para 11 — Lessee from Collector — Rights of.

The incompetency created by S. 325 A, C.P.C. 1882 does not extend to the lessee from the Collector. An alienation by such lessee would be binding upon him for the term of the lease even though the lease may contain conditions making the transfer voidable at the instance of the lessor. AIR (Vol 6) 1919 Nag 29 : 53 Ind Cas 776 (DB).

3. Permission of the Collector.

——Sch. 3 Para 11 — Sale by judgment-debtor without Collector's permission — Validity — False representation by him that such permission has been obtained — Estoppel — T.P. Act, S. 43 and Evidence Act. S. 115

Where the property of a judgment-debtor is under the management of the Collector under the Third Schedule to the C. P. Code, a sale by him without the permission of the Collector as required by Para 11 of that Schedule is invalid, because the vendor is incompetent to transfer the property without such permission. No question of estoppel can arise against the vendor under S. 43 of the T. P. Act or under S. 115 of the Evidence Act on the ground that he made a false representation that such permission had been obtained when at the time of the execution of the sale deed the vendee knew that the property was under the Collector's management and that no permission had been taken. AIR (Vol 35) 1948 Nag 122 : 1947 NLJ 500.

——Sch. 3, Para 11 — Oudh Revenue Manual, Para 1010 — Collector can delegate to Assistant Collector his power to allow judgment-debtor to sell his property privately —S. 114 (e), Evidence Act.

Paragraph 1010 of the Oudh Revenue Manual lays down that the Collector can make over to the Assistant Collector, First Class, any of the powers and duties conferred and imposed upon him, except certain powers which are specified under that paragraph. These excepted powers do not include the power which is conferred upon a Collector under Para. 11 of Sch. III, Civil P. C., that is to say, the power to allow the judgment-debtor under his written permission to mortgage, charge lease or alienate his property. It follows, therefore, that there is no prohibition imposed upon the Collector to delegate the power of sale to the Assistant Collector and that the latter can under his written permission allow the judgment-debtor to execute a private sale of his property.

Where is is not disputed that the Assistant Collector was appointed as the sale officer by the Collector and that the sale deeds were executed with his permission a presumption can be made under S. 114 (e) Evi. Act, that the Collector had delegated to the sale officer the power to grant permission to private sales. AIR (Vol 31) 1944 Oudh 60 : 1943 OWN (CC) 488 : 1943 AWR (CC) 180 : 19 Luck 463 : 214 Ind Cas 39 (DB).

——Sch. 3, Para 11 — Mortgage of property after execution sale but before its cancellation on payment under O. 21, R. 89, Civil Procedure Code (Act V of 1908) — Property still being under Collector's control, mortgage.

The Collector directed that certain villages be sold in lots and the sales be stayed when the decretal amount was satisfied. The sale officer sold only two villages and on fetching required amount the other villages were discharged from sale. One of the exempted villages was then mortgaged without the permission of the Collector. The execution sale was however ultimately cancelled under O. 21, R. 89 Civil P. C.:

Held, that the mortgage though an open, honest and reasonable transaction was invalid, the property being under the control of the Collector under Para 11, Sch III Civil P.C., till the auction sale was cancelled on payment under O. 21 R. 89 AIR (Vol 30) 1943 PC 29: 47 CWN 509: 1943 OWN (CC) 214: (1943) 1 MLJ 508: 9 BR 353: 18 Luck 130: (1943) ALJ 421 : 1943 AWR (CC) 52 : 70 IA 1 : ILR (1943) Kar (PC) 19: 46 Bom LR 170: 206 Ind Cas 457.

——Sch. 3, Para 11 — Object of — Fully substantiated and certain permission from Collector, necessity of — Written record of facts showing that permission was given — Whether fulfills requirements.

The object of Para 11, of the Third Schedule is that there shall be a fully substantiated and certain permission on the part of the Collector, which is to be given in such a manner that the fact of its having been given is indisputable. The essence of the paragraph is that there shall be a written permission as opposed to an oral permission, which would be susceptible of evidence of varying degrees of credibility, in order to establish the necessary proof. What is required is certainly, and where there is a written record of facts which cannot be disputed, an unmistakable inference drawn from this written record that permission was given fulfils the requirements of the paragraph and a formal permission is then unnecessary. AIR (Vol 25) 1938 Nag 309 : ILR (1938) Nag 573 : 177 Ind Cas 971.

——Sch. 3, Para 11 — Permission to mortgage not of limited nature — Negotiation failing — Sale directed by Collector — Permission, if impliedly revoked.

The effect of the Collector giving the permission in writing to mortgage certain property is to remove the incapacity which is imposed by Para. 11, Sch. III Civil P.C., on a judgment-debtor and to confer upon him a capacity to transfer the property in such a manner as to avoid conflict with the rights of the decree-holder. Any transfer made after such a permission is liable to be set aside not as being void ab initio but only at the instance of the decree-holder if he is prejudiced. The permission not being of a limited nature is not therefore, impliedly revoked on account of a failure of the negotiations relating to the contemplated mortgage and the subsequent order of the Collector directing sale of that property. AIR (Vol 21) 1934 Nag 285: 31 NLR 129: 153 Ind Cas 687.

——Sch. 3, Para 11. — Inference from correspondence.

Held, that if permision can be inferred from written words employed by the Collector from time to time there was written permission granted in the case. AIR (Vol 17) 1930 Oudh 510: 7 OWN 988. (DB).

——Sch. 3, Para. 11 — Where the Collector is never asked to give his permission in writing and signs nothing, the mere fact that the officer conducting the sale of immoveable property attached in execution of a money decree permits the alienee to pay a certain amount in satisfaction of the money decree in execution of which the property of the judgment-debtor is under attachment does not amount to an implied permission in writing of the Collector authorizing the judgment-debtor to alienate property. AIR (Vol 16) 1929 Oudh 441: 121 Ind Cas 888: 6 OWN 750.

——Sch. 3, Para 11 — No special form necessary—Every detail need not be sanctioned.

No special form of permission is required by the Schedule and it is sufficient that the Collector knew that the mortgage was being executed and that he did in substance sanction its execution by an order in writing.

It is not necessary that every detail of the transaction should be sanctioned by the Collector or even that there should be a separate permission in respect of each deed. All that is required is that the judgment-debtors shall have his written permission to mortgage the property. The permission need not take the form of a certificate under O. 21, R. 83.

O. 21, R. 83, and para 11, of the third Schedule are two entirely independent provisions and there is no warrant for reading the former into the latter. AIR (Vol 8) 1921 Oudh 176: 66 Ind Cas 642: 8 OLJ 358. (DB).

——Sch. 3, Para 11 — Effect.

Sch. III, para 11 creates an absolute disability on the part of the debtor to deal with the property while the powers conferred by the Schedule on the Collector are in force. AIR (Vol 8) 1921 Oudh 176: 66 Ind Cas 642 : 8 OLJ 358 (DB).

—Sch. 3, Para 11 — Sale-deed—Permission after execution and before registration.

Where during the pendency of the execution proceedings but after the attachment of property, the judgment debtors sold the property without the permission of the Court or Collector but before the sale-deed was executed permission was obtained. Held, under the circumstances the sale was a valid transaction. AIR(Vol 5) 1918 Nag 107: 45 Ind Cas 240.

4. Power of Civil Court to issue process.

——Sch. 3, Para 11 — Attachment by Civil Court during Collector proceedings — Validity.

An attachment of property by a Civil Court in execution of a decree for payment of money after the property has come under the jurisdiction of the Collector under paras. 1 to 10 of Sch . III C.P. Code, is void in view of para. 11 of that schedule. AIR (Vol 33) 1946 Nag 170 : ILR (1946) Nag 400 : 222 Ind Cas 652 : 1946 NLJ 329.

——Sch. 3, Para 11 — Civil Court, if can issue process of attachment against property over which Collector is exercising jurisdiction — Sale in pursuance of such attachment.

The plaintiff instituted a suit against G, for possession of a certain ground that he was the purchaser thereof in execution of a decree obtained by him against one D. The defence of G in the case was that she had also obtained a decree against D and had attached and sold through the Collector this very property in execution of her decree and had herself purchased the same, and that she was in possession thereof under a valid title. He contended that the plaintiff's sale under which he claimed was invalid in law inasmuch as that sale was held while the Collector was exercising powers under Paras, 1 to 10 Sch III of the Civil P. C. He contended that the plaintiff attached the property and obtained an order for sale thereof through the Collector when proceedings were pending before the Collector for sale of the same property in execution of his own decree. It was also contended that the property attached and purchased by the plaintiff was not identical with the property purchased by the defendant. Both the Courts below came to the conclusion that the plaintiff failed to prove that the property attached and sold in execution of his decree was identical with that which was attached and sold in execution of the decree of the defendant. They also held that the Civil Court had no jurisdiction to issue process of attachment and sale of the same property if identical while proceedings were pending in the Court of the Collector for satisfaction of the decree of the defendant. On this ground also the Courts held that the sale in favour of the plaintiff was invalid and did not clothe the plaintiff with any title. In second appeal:

Held, that the defendant's contention was well-founded as the Civil Court was incompetent to issue a process for attachment and sale of the property and the sale in favour of the plaintiff was therefore, invalid. AIR (V 30) 1943 Nag 166 : 1943 NLJ 104 : ILR (1943) Nag 199 : 206 Ind Cas 470.

——Sch. 3, Para 11 — Scope of — Prohibition in Para. 11 does not apply to decree in which sale is ordered.

It is only in the case of a money decree that the sale is prohibited by the words "a Civil Court shall not issue any process against such property or part thereof in execution of a decree for payment of money" in Para. 11. The prohibition does not apply to a decree in which the Court has ordered the sale of any specific property. AIR (V 18) 1931 All 38 : 1930 ALJ 1594 (DB).

—Sch. 3, Para 11 — Direction to pay surplus sale proceeds to another decree-holder is not "issuing process"

While the judgment-debtor's immoveable property was being dealt with by the Collector under S. 68, and Sch. III C.P. Code in execution of a decree obtained by a creditor, an order by Court directing that if the Collector found he had any surplus sale proceeds in his hands after selling the property in execution of the decree, he should not pay over the surplus cash to the judgment-debtor, but should retain it for payment to another decree-holder is not "issuing a process" against the immoveable property within para 11, of Sch III; the order can at most be taken as issuing a process against the sale proceeds of the immoveable property. AIR (Vol 14) 1927 Oudh 216: 102 Ind Cas 94: 4 OWN 510. (DB).

——Sch. 3, Para. 11 — No Civil Court can order in execution of a money decree, the appointment of a Receiver to take the annual income of a property which is within the control of the Collector under S. 68. But in the particular circumstances of the case, as the objection was raised by the judgment-debtor and that at very late stage, the Court refused to order the refund of the money actually collected but directed the removal of the Receiver. AIR (Vol 12) 1925 Oudh 448: 87 Ind Cas 21: 12 OLJ 146: 2 OWN 73: 28 Oudh Cas 330 (DB).

——Sch 3, Para 11 — Attachment before judgment —Not void.

Attachment before judgment is not a process in execution of a decree, for at the time of the attachment there is no decree and therefore there can be no process that could be issued in execution of the same. An attachment before judgment, made while the estate is still under the Collector's control, is therefore not void under paragraph 11. The object of the provision in the latter part of paragraph 11 (1) is to protect the debtor as far as possible from the risk of losing his property wholly or for all time and mere attachment before judgment does not defeat that object. AIR (V 9) 1922 Nag 238 : 68 Ind Cas 188.

——Sch. 3, Para 11 — Jurisdiction of Civil Court.

The moment a Civil Court transfers a decree to another Court, whether it be another Civil Court or the Collector, it ceases to have any power to act in execution of that decree. From the date the order of transfer to the Collector is passed the executing Court may be regarded as ceasing to exercise jurisdiction for all practical purposes. AIR 1922 Nag 267, Not foll. AIR (V 13) 1926 Nag 246 : 92 Ind Cas 44.

——Sch. 3, Para 11 — Sch. 3, Para 11 makes it illegal for the Civil Court to issue process against the property during the period during which the powers conferred by the Schedule are exercisable by the Collector; and a process which was illegal when it was issued cannot become effective when the Collector ceases to be in charge of the execution proceedings. AIR (Vol 8) 1921 Oudh 176: 66 Ind Cas 62: 8 OLJ 358 (DB).

5. Termination of the Collector's power

——Sch. 3, Para 11 — As soon as payment sufficient to satisfy decree is made.

Collector's power over property attached in execution of a decree terminates as soon as a payment sufficient to satisfy the decree has been made and alienation, effected after that payment, is not invalid merely because the proceedings before the Collector formally continued. AIR (Vol 17) 1930 Nag 220: 122 Ind Cas 371. (DB).

——Sch 3, Para 11 — Judgment-debtor — Incompetency to transfer.

The Collector's powers under Para 11 do not come to an end as soon as the property is sold by auction and fetches more than the decretal amount. They exist, at least till the confirmation of the sale. AIR (Vol 7) 1920 Nag 254: 16 NLR 194: 60 Ind Cas 310.

——Sch 3, Para 11 — Transfer when voidable.

A party seeking to avoid transfer under Para 11 must show that on the date of transfer the Collector was exercising powers under the Code and the decree was still unsatisfied. The incompetency under the section relates to the period during which the Collector is executing the decree. If by lease of property he has satisfied the decretal amount the judgment-debtor may sell the property subject to the lease. (1912) 8 NLR 182: 17 Ind Cas 887.

6. Limitation

——Sch 3, Para 11 — Cl. (1) of Para 11 is confined to property over which Collector has assumed management — Civil Court can execute same decree against other property of judgment-debtor over which Collector has not assumed management — Cl. (3), if can be pleaded in execution of such decree to save limitation.

Incompetency of the judgment-debtor under Cl. (1) of Para 11, Sch. III is confined to the property of which the Collector had assumed management and does not extend to property which is not under his control. The jurisdiction of the Civil Court to execute the decree against the property which has not been attached and not included in the Form C and in respect of which the Collector has not made any provision under Para 7 is not therefore ousted, only because the Collector was executing the same decree against the other property of the judgment-debtor.

The decree-holder therefore, is not entitled to invoke Cl. (3) of Para 11 to overcome the bar of limitation in executing his decree against property not under the Collector's management by seeking to exclude the time during which the sale proceeding in respect of the judgment-debtor's other property was pending. AIR (V 32) 1945 Nag 239 : ILR (1945) Nag 555: 1945 NLJ 261 (DB).

——Sch. 3, Para. 11 — Although Para. 11 (3) Sch. III controls S. 48 it is of no assistance to a decree-holder who cannot be said to have been deprived of his remedy during the period that the previous execution proceedings were pending. AIR (Vol 21) 1934 Oudh 465 : 11 OWN (CC) 1103 : 10 Luck 208 : 151 Ind Cas 541 (DB).

——Sch. 3. Para 11 — Applicability.

The presentation of a Darkhast for execution by one of the surviving co-parceners of the deceased decree-holder cannot be said to be invalid and so as to render the proceedings before the Collector invalid and so as to prevent the deduction of the time mentioned in sub-para. (3) of Para. 11 of the 3rd Sch. of the Code. AIR (Vol 14) 1927 Bom 123: 100 Ind Cas 619 : 51 Bom 143 : 29 Bom LR 75 (DB).

——Sch. 3, Para 11 — The period, during which proceedings are pending before the Collector, can be excluded only in cases where a provision has been made under R. 7 for the satisfaction of a decree and where the decree-holder has in consequence been

temporarily deprived of his remedy. AIR (Vol 8) 1921 Nag 64: 64 Ind Cas 855.

——Sch. 3, Para. 11 (3) — Period prescribed by S. 48 C. P. Code.

The words "period of limitation" in Para 11 (3) apply to the restrictions placed upon the right of a decree-holder to take out execution of his decree both by the Act and S 48, C.P.C. AIR (Vol 6) 1919 All 64 : 42 All 118 : 17 ALJ 1140 : 52 Ind Cas 742 (DB).

——Sch. 3, Para 11 (3) — The protection extended to a decree-holder by Para 11 (3) Sch. III applies both to the limitation of twelve years in S. 48, CPC and also to the limitation of 3 years in Art. 112 of the Lim. Act. 1910 13 OC 303: 8 Ind Cas 377 (DB).

——Sch. 3, Para 11 (1882, S. 325-A) — Execution in Civil Court.

S. 325-A of the Old Code excludes the period when the decree is with the Collector for execution and the exclusion applies to proceedings for execution in the Civil Court. 8 MLT 235: 21 MLJ 464. (1911) 1 MWN 15: 7 Ind Cas 860. (DB).

CIVIL PROCEDURE CODE (AMENDMENT) ACT (21 of 1936)

Act is retrospective in operation. AIR (V 25) 1938 Lah 515 : 40 PLR 857 : 179 Ind Cas 146 (DB).

CIVIL PROCEDURE CODE (SECOND AMENDMENT) ACT (9 of 1937).

——S. 2.

See also Civil P. C. (Act V of 1908), S. 60.

——S. 2 — "Salary", whether includes salary of head clerk of tea estate.

Quaere — Per Biswas. J. — Whether "salary" in S. 2 refers only to the salary of labourers and domestic servants or whether it includes salary of a head clerk in a tea estate. AIR (Vol 25) 1938 Cal 325: 177 Ind Cas 352. (DB).

——S. 3.

See also Civil P. C. (1908), S. 60.

——S. 3 — Applicability of amendment to proceedings other than those arising from suits.

Section 3 of Act IX of 1937 which amends S. 60, Civil P.C., has application to proceedings other than those arising from suits. AIR (V 27) 1940 Sind 160 : 191 Ind Cas 36.

——S. 3 — Application for execution of award under Bomaby Co-operative Societies Act, if "proceeding arising out of suit."

An application to execute an award made under the provisions of the Bom. Co-operative Societies Act, 1925 is not a "proceeding arising out of a suit" within the meaning of these words in S. 3 of Act IX of 1937. AIR (V 27) 1940 Sind 147 : 191 Ind Cas 31.

——S. 3 — Insolvency case, if proceeding arising out of suit.

An insolvency case is not a suit or any proceeding arising out of it within the meaning of S. 3, Civil PC (Amendment Act) IX of 1937. AIR (Vol 25) 1938 Cal 325: 177 Ind Cas 352. (DB).

—S. 3 — Word "suit" — Applicability to execution proceedings resulting on award.

It was not the intention of the Legislature that the word "suit" in S. 3 of the Civil P. C. (Second) Amending Act should necessarily be confined to a proceeding which is initiated by the presentation of a plaint. The word 'suit' should not, in this section, be used in any restricted sense. The word is also applicable to execution proceedings resulting on an award. AIR (V 25) 1938 Sind 176 : 177 Ind Cas 504.

CIVIL RULES.

See respective High Courts.

CIVIL RULES OF PRACTICE.

See Civil P. C., S. 157 and respective provinces.

CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES.

See Govt. of India Act, 1915, S. 96-B.

CIVIL SUIT.

See (1) Civil PC S. 9
(2) Criminal PC S. 145.
(3) Criminal Trial.

CLAIM.

See Civil P. C., O. 21, Rr. 58 to 63.

CLAIM PETITION.

See CP Code, O. 21, R. 58

CLASS.

——Gift to.

See T. P. Act, S. 15.

CLERGY DISCIPLINE ACT (1892) (55 and 56 Vict, Ch 92).

——Conviction under — Offence must be clearly proved.

Where a person is charged with an "offence against the laws ecclesiastical, being an offence against morality", he is entitled to have such an offence proved against him as clearly as if he were the subject of a prosecution before an ordinary Criminal Court, & he is to be convicted if at all not on grounds of suspicion, however strong, not by reason of the peril to the church of an acquittal on doubtful evidence. But only such proof as if the charge were of an offence against the criminal law, would require a verdict of guilty. AIR (Vol 8) 1921 PC 168 (PC)

——S. 2.

——S. 2 — Position of assessors — The assessors occupy a portion in deciding questions of fact which is not that ordinarily held by assessors, and is more closely analogous to that ordinarily occupied by a full member of the Court, or in some respects, by a jury. AIR (V 8) 1921 PC 168 (PC).

——S. 2 — When to be granted.

The petitioners must satisfy the Board, either that the evidence before the Consistory Court was not such as to justify the conclusion at which that Court arrived, that is, that the decision of that Court was against the weight of evidence, or that since the hearing before the Consistory Court the petitioner has obtained, and is now in a position to tender definite evidence—the effect of which must be made clear — which, if it had been before the Consistory Court might or would or ought to have affected the decision. In the last case a satisfactory explanation must be offered to the Board as to why that evidence was not produced before the Consistory Court. But leave to appeal may also be granted because the manner in which the evidence, or some of it was presented to, and dealt with by the Court was such as to render the whole trial unsatisfactory.

Thus where a documentary evidence very damaging to the petitioner is presented very late in the proceedings at a stage when the petitioner's Counsel cannot examine it or consider its effect minutely, leave to appeal should be granted. AIR (Vol 8) 1921 PC 168 (PC).

CLERICAL MISTAKE.

See (1) Civil P. C., Ss. 151 and 152.
(2) Criminal P. C., S. 561-A.

CLIENT.

See (1) Civil P. C., O. 3, R. 4.
(2) Evidence Act, Ss. 126-129.
(3) Legal Practitioner.
(4) Legal Practitioners' Act.

CLOG.

—Equity of redemption.

See (1) Deed — Construction — Mortgage or sale.
(2) Mortgage — Redemption.
(3) T. P. Act, S. 60.

CLUB.

See also
(1) Association.
(2) Civil P. C., S. 9.
(3) Company.
(4) Racing.

——**Social club — Relationship between members — How governed — Dissolution — Law governing.**

A social club is not a profit sharing institution and the analogy of a partnership would not apply. The terms on which members would associate with each other depend generally on their choice and they are governed by the rules that they frame for their own conduct. So it can be taken that the relationship between the members of such a club is governed by the law of contract and, if the members have agreed to certain terms which are embodied in the rules, then in existence, or to be made thereafter, in accordance with the terms agreed upon by the members, those rules would govern their relationship. If the rules provide that the decision on a particular question must be by a majority, the decision would bind all the members unless the act complained of is a fraud on the minority or is ultra vires the Association. In all other matters about which the rules are silent, the majority does not have any right to coerce the minority.

As regards the law governing the question of the dissolution of such a club, where the rules do not make any provision for dissolution on the vote of the majority, it can only take place under the general law of contract. The law requires in the absence of any rules, that all members of the club must agree to its dissolution. Further, in a fit case the Court has jurisdiction to dissolve a club. AIR (V 35) 1948 A. 146: ILR (1947) All 758: 1947 ALJ 637 (FB).

——**Membership of association — Resignation of — Effect — Membership of Society when ceases — Acceptance of resignation — Necessity.**

The general principle is that any member of a voluntary association or society, who is not under any contractual or other obligation to perform some undertaking, can withdraw from that society at any time he pleases, and it is immaterial whether his resignation of his membership is accepted or not, unless the rules provide otherwise. When there is no such provision to the contrary in the rules of the society, a member ceases to be such on tendering his resignation and thereafter, the society has no power to impose a fine or any penalty on such member on the ground that he, after resignation, traded or otherwise acted in a way prohibited by the rules of the society. AIR (V 35) 1948 Nag 327: 1948 NLJ 285: ILR (1948) Nag 449 (DB).

——**Rules in enquiry against member, explained.**

A domestic tribunal is not bound by the ordinary rules of evidence, with which its members may well be unacquainted; nor is it bound to follow the procedure of the Courts of law or anything like it. It is not even bound to hear the parties, but may reach its decision even by correspondence. It is not bound to act in a way that "the man in the street" would necessarily regard as just. AIR (V 33) 1946 Bom 88: 47 Bom LR 916.

——**Incorporated -- Tribunal set up club taking disciplinary action against member of club — Suit for damages by such member lies against club and not against tribunal.**

Where a tribunal set up by a larger association of persons, such as a racing club, acts judicially or quasi-judicially in the case of a member by expelling him or in that of a licensee by taking away the license, the tribunal acts as the agent of the association and not as an independent tribunal. Consequently, if the association is an incorporated one, a suit for damages by such member or licensee lies against the association and not against the individuals who composed the tribunal alleged to have acted wrongly. AIR (V 33) 1946 Bom 88: 47 Bom LR 916 (DB).

——**Racing club — Meeting — Notice — Quorum.**

Where a committee or other body like a racing club is empowered to act by a certain number of its members as a quorum, there is no quorum and the proceedings of the meeting are invalid unless notice of the meeting is given to all the members of that committee or other body as 'quorum' in fact means a given number of individuals out of the whole body, all of whom have had notice of the meeting, who have attended the meeting. This at least is the case in the absence of any rule to the contrary. AIR (V 33) 1946 Bom 88: 47 Bom LR 916 (DB).

——**Domestic tribunal — "Bias" — What amounts to, explained.**

"Bias" in order to disqualify a tribunal must be something tending to make the mind to go one way rather than another, and improperly tending to do so. In a social club, those of the committee who know the offending member cannot help having an opinion of him whose conduct they are asked to investigate. And, every member of the club has some pecuniary interest in the question whether a member shall or shall not be expelled. But this does not in itself amount to bias. AIR (V 33) 1946 Bom 88: 47 Bom LR 916.

—**Expulsion of member—Jurisdiction of Court.**

The foundation of the jurisdiction of Court to interfere with the expulsion of a member from a club or some similar institution or organisation is the right of property vested in the member and of which he is unjustly deprived by an unlawful expulsion. The prospective right of a member to the given benefits a benevolent fund in certain contingencies, even though only a contingent right is enough in itself to support the power of the Court to give relief in a case of wrongful expulsion.

The Court will not interfere against the decision of the members of a club professing to act under their rules, unless it can be shown either that the rules are contrary to natural justice, or that what has been done is contrary to the rules. ILR (1946) 2 Cal. 88: 51 CWN. 612. (DB).

——**Expulsion of member — Notice of particulars of charge — Need for — Explusion of member of Masonic body — General charge of "unmasonic conduct" — If sufficient.**

A member of a club or of a masonic body or of any other institution who is sought to be expelled from it is entitled to be given no less information than an accused person must be afforded in a criminal prosecution. Where a rule of a masonic conclave empowering the explusion of a member provides that "such members shall have been served with due notice in writing of the complaint made against him" a notice in general terms intimating that the question why he should not be excluded for "unmasonic con-

duct" would be considered at a meeting of the conclave to be held on a certain date without giving particulars of the acts or behaviour alleged to constitute such conduct, does not comply either with that rule or with the ordinary principles of natural justice. The mere presence of the member at the meeting at which the resolution of expulsion was passed creates no waiver with regard to the defective notice and no acquiescence with the defective notice or with the proceedings, and the resolution is entirely invalid and totally inoperative.

Per Ormond, J.—"The phrase 'due notice in writing of the complaint made against him' must entail charges sufficiently particularised to enable the person who is charged to know what case he has to meet." ILR (1946) 2 Cal 88 : 51 CWN 612 (DB).

—Expulsion of member — Rule empowering expulsion by majority of two-thirds of members "present and voting" — Interpretation.

Where a rule of a club provided that the power of expulsion of a member "can only be exercised by a majority of not less than two-thirds of the members present and voting."

Held, per Gentle, J. — The words "and voting", coupled with the other words, meant, of the members present, those who voted and a resolution was properly passed by a majority of two-thirds of the actual votes cast.

Per Ormond, J. — I am inclined to the view that "voting" here means "qualified to vote". ILR (1946) 2 Cal. 88: 51 CWN 612. (DB).

——Expulsion from — Interference by Court, when justified — Rule of club providing for expulsion of member — Member expelled from club after passing of resolution by General Committee — No reasons for expulsion given in requisition for meeting — Chairman not allowing reasons for expulsion to be discussed — Expelled member remaining absent from meeting — Suit by him for declaration that resolution was illegal and ultra vires and for injunction — Civil Court could interfere and plaintiff entitled to reliefs claimed.

A club is an autonomous institution and a Court of Law will not lightly interfere with its action in expelling a member unless it has violated the recognized rules of procedure in that connection or those of natural justice. Interference by the Court to prevent expulsion would not be justified if the rules providing for expulsion have been strictly observed, the member expelled has had due notice and full opportunity of answering the charges made against him, there has been no want of good faith in the exercise of the power of expulsion, and the decision arrived at is not manifestly absurd. The important question in all cases, where an institution has purported to act within its powers is whether there has been due inquiry.

A rule of a certain club providing for expulsion of a member from the club was as follows : The General Committee may, by a two-thirds majority, for sufficient reasons, exclude any member whose presence in the club they may consider to be detrimental to its interest without assigning any particular reason for their so doing, from the membership of the club, but no such business shall be transacted in a non-quorum General Meeting. By a resolution of the General Committee of the club passed at an Extraordinary General Meeting of the members, the plaintiff was expelled from the club. The notice of this meeting was given to all the members including the plaintiff. At the meeting the reasons for plaintiff's exclusion were not allowed by the Chairman to be discussed. The requisition for the meeting gave no reasons for the expulsion, nor was there any correspondence between the plaintiff and the Managing Committee or the Honorary Secretary or any member of the club in connection with the behaviour of the plaintiff of which the members of the club intended to take notice. The plaintiff deliberately abstained from attending the meeting. Plaintiff brought a suit for declaration that the resolution was illegal and ultra vires and claimed also an injunction restraining the members of the club and its officers from excluding him from the club premises:

Held, that the action on the part of the members of the club offended against the elementary principles of natural justice and reason and justified the Civil Court's interference. The resolution was illegal and ultra vires and the plaintiff was entitled to injunction claimed. AIR (Vol 26) 1939 Bom 35: 40 Bom LR 1213: 180 Ind Cas 685.

——Quorum — Persons present but not voting cannot be regarded as absent.

Persons who are present at a meeting in fact but who do not take active part in the proceedings or vote, cannot be regarded as absent for the purpose of a quorum. AIR (Vol 13) 1926 Cal 665: 91 Ind Cas 642 (DB).

CO-ACCUSED.

See (1) Criminal P. C., Ss. 239, 337—339.
(2) Evidence Act, Ss. 30, 114 and 133.

COASTING VESSELS ACT (19 of 1838)

——S. 13 — Vessel registered in name of father of joint Hindu family — Death of father — Son plying without license — Offence.

Where after father's death his son continued to ply a vessel without fresh registry, he commits an offence under S. 13 of the Coasting Vessels Act on account of change of ownership by the father's death. AIR (Vol 1) 1914 Bom 189: 38 Bom 111: 15 Bom LR 994 : 14 Cr LJ 653 : 21 Ind Cas 893 (DB).

COCHIN ACTS, RULES AND REGULATIONS.

Agriculturists' Relief Act (18 of 1114 M. E.)
Buildings (Lease and Rent Control) Act (24 of 1124 M. E.)
Chief Court Reg. (2 of 1076 M. E.)
Civil Procedure Code (29 of 1111 M. E.)
Civil P. C. (Regulation, 1 of 1079 M. E.)
Companies Regulation (2 of 1088).
Court-Fees (Amendment) Act (14 of 1122).
Insolvency Reg. (7 of 1098 M. E.)
Limitation Regulation.
Negotiable Instruments Act.
Tenancy Act (15 of 1113).
Transfer of Property Act (17 of 1111).

COCHIN AGRICULTURISTS' RELIEF ACT (18 of 1114 M. E.), Ss. 9, Expl. and 10.

——Scope — Usufructuary mortgage — Lease back — Arrears of rent under — Recoverability.

Arrears of pattom rent due under a lease back executed by the mortgagor to the usufructuary mortgagee cannot be deemed to be discharged, but are recoverable, under S. 10, read with the Explanation to S. 9, of the Cochin Agriculturists' Relief Act. AIR (Vol 37) 1950 TC 33 (DB).

——S. 24.

——S. 24 — Scope — Scaling down — If amendment — Fresh start of limitation for execution — Limitation Act, Art. 166 (4).

The scaling down of a decree-debt under S. 24 of the Cochin Agriculturists' Relief Act is an amendment of the decree; such amendment gives the decree-holder a fresh start of limitation for execution under Cl. 4 of Art. 166 of the Limitation Act. AIR (V 38) 1951 Trav-Co 79 (DB).

COCHIN BUILDINGS (LEASE AND RENT CONTROL) ACT (XXIV of 1124, M. E.).

——Scope — If retrospective — Petition for eviction under Proclamation of 1122 — Order — Appeal from — New Act coming into force pending appeal — If governs appeal.

Cochin Act XXIV of 1124 is not retrospective in operation and does not apply to or govern proceedings instituted prior to and pending at the time of its coming into operation. They will be governed by the law in force at the time they were instituted. A landlord who filed a petition for eviction while the proclamation of 1122 was in force, and who has appealed against the order thereon cannot take advantage of the Act of 1124, which came into force during the pendency of the appeal. AIR (Vol 38) 1951 Trav-Co 91.

COCHIN CHIEF COURT REGULATION (II of 1076 M. E.)

——S. 15 — Appeal from scheme suit — Forum.

Where under S. 15 of the Cochin Chief Court Regulation, an appeal from a decree in a scheme suit is to be heard by a Division Bench of three Judges, but such an appeal was actually heard by a Bench of two Judges and the question as to want of jurisdiction escaped the notice of both the Bench and the Bar :

Held, that as there was an entire absence of jurisdiction in the Court which heard the appeal, the parties were aggrieved by the judgment and decree and an application for review of the judgment was maintainable and that the omission of the Bench to take notice of the fact that it had no jurisdiction to hear the appeal was an error apparent on the face of the record because, it was self-evident upon the inherent nature of the subject-matter of the appeal itself and was not dependent upon any other facts or circumstances :

Held, also, that the proper remedy of the aggrieved party was to move the Court for review and not to appeal to the inherent powers of the Court. (1933) 144 Ind Cas 181 (182, 183) (Cochin).

COCHIN C. P. CODE (XXIX of 1111, M. E.)

——S. 9 — Erroneous decision on point of law — Res judicata.

Even a wrong decision on a point of law would operate as res judicata, if the other conditions are satisfied. Though an erroneous decision on a point of law cannot alter the law for the parties to that adjudication for all time, yet for the particular suit and the subject-matter with reference to which the law was wrongly laid down, the decision would be final and conclusive. The parties or their representatives litigating under the same title are bound by the decisions of the same matter in a previously instituted suit. AIR (Vol 37) 1950 TC 73: (1950) KLT 6 (DB).

——S. 9, Expl. 6 — Parties or representatives — Decree against Hindu father and adult members — If conclusive as against latter's minor sons and other members — Res judicata. See AIR (Vol 37) 1950 TC 73: (1950) KLT 6 (DB).

——S. 32.

——S. 32 — Applicability — Vexatious suit — Compensatory costs.

Where a suit is vexatious, brought with the object of getting rid of a decree which was passed in a previous suit by the highest Court of the State after carefully considering and taking note of all points raised in one form or other, and the case appears to be one in which anyone going through the judgment in the prior suit would hesitate even to cross the gates of the Court house to present a plaint of the kind, the plaintiffs must be made liable for compensatory costs under S. 32, C. P. Code. AIR (Vol 37) 1950 TC 73: (1950) KLT 6 (DB).

——S. 41

——S. 41 — Scope — Enquiry into profits made by decree-holder while in possession pending application to set aside sale and claim for damages for waste committed by him while in such possession — Duty of executing Court — Relegation to separate suit — Propriety — O. 21, R. 2 — Applicability.

Where pending an application to set aside an execution sale, the jugdment-debtor puts the decree-holder purchaser in possession of some items of the property sold, and subsequently after the sale is set aside, the judgment-debtor in answer to a fresh execution petition by the decree-holder pleads adjustment and satisfaction of the decree on the ground that by a payment made into Court together with the profits realised by the decree-holder when in possession, the decree has been satisfied fully and that the decree-holder must be made accountable for waste committed by him resulting in damages, the executing Court, in order to avoid multiplicity of proceedings and to finally determine all questions between the parties, decide the questions in execution itself and not remit the judgment-debtor to an independent fresh proceeding. Both justice and equity demand in such a case that all accounts between the parties should be settled on the execution side itself. Both the assessment of profits and giving credit to the judgment-debtor as well as the claim for damages on account of waste must properly be heard and disposed of by the executing Court. The amounts payable by the decree-holder must be given credit to and execution should be allowed only for the balance, if any, found due to the decree-holder on taking accounts. As the amounts become ascertainable only by order of Court, O. 21, R. 2, C. P. Code, and the 90 days limitation for certification of payment or adjustment out of Court has no application. AIR (Vol 38) 1951 Trav. Co. 185 (DB).

——S. 122.

——S. 122 — Inherent powers — When to be invoked — Remedy of party when there is specific remedy under Code.

It is well-established that the inherent jurisdiction of a Court must be exercised only if the Code does not contain any specific provision which would meet the necessities of the case. When there is such a provision, the latter has to be followed and resorted to and the inherent jurisdiction should not be invoked. Where an applicant has his remedy provided elsewhere in the Code and has neglected to avail him-

self of it, the Court cannot make use of the special provisions of S. 122 and exercise its inherent powers. AIR (Vol 37) 1950 TC 100 (FB).

——O. 2, R. 2.

——O. 2, R. 2 — Applicability — Execution proceedings.

Order 2, R. 2, C. P. Code, do not apply to proceedings in execution of a decree. AIR (V 38) 1951 Trav-Co 75 : 1950 KLT 133 (DB).

——O. 12, R. 6.

——O. 12, R. 6 — Applicability — Judgment on admissions — Partition suit — Plaintiff making offer in plaint to surrender property to defendant on terms — Defendant expressing willingness to accept offer and complying with terms — Power of Court to pass judgment on admission.

On clear and unequivocal admissions of parties, if it is plain that any party is entitled to a particular order or judgment, O. 12, R. 6, C, P. Code, would enable the party to obtain such judgment or order at once upon a motion in that behalf. Where on an agreement embodied in a prior partition deed between the parties, the plaintiffs in a suit for partition are prepared to surrender their shares in an item of property included in the suit to the defendant on terms, and the defendant readily consents to the offer made in the plaint in that respect in unequivocal terms and complies with the terms stipulated there is no legal obstacle to the Court making an order or judgment on such admissions of parties, and declaring the exclusive title of the defendant to that item of property. Such a judgment would be one made on admission of parties. The Court is justified in proceeding on such admissions in the pleadings promptly at the first hearing of the suit, and it does not lie in the mouth of the parties making the admission to say that the Court has acted hastily in making the order or judgment on the ground that they intended later to amend their pleadings by withdrawing the clear admissions in the pleadings. AIR (Vol 37) 1950 TC 58 (FB).

——O. 21, R. 2.

——O. 21, R. 2 — Applicability — Enquiry into claim for accounts of profits made by decree-holder in possession pending application to set aside sale — Claim to damages for waste — Adjustment of decree in respect of amounts due on that account — Limitation — 90 days rule — If applies. See AIR (V 38) 1951 Trav-Co 185.

——O. 25, R. 1.

——O. 25, R. 1 — Applicability — Conditions — Power of Courts to order security for costs in cases not falling under rule.

Before requiring the plaintiff in a suit to furnish security for costs, two conditions have to be satisfied, namely, (1) that the plaintiff resides outside Cochin, and (2) that he has not sufficient immovable property within the State : Where the case does not fall under the rule, the Court's power to take security from a plaintiff is, if at all, only when the plaintiff on record has no real interest in the subject-matter of the suit and is not the real plaintiff but a mere name-lender to another in whose interest the suit is really brought by the nominal plaintiff on record. AIR (Vol 37) 1950 TC 100 (FB).

——O. 25, R. 1 — Order for security — Grounds for — Poverty of plaintiff — Instigation and financial help by stranger — Sufficiency.

Mere poverty of the plaintiff in a suit is no ground for requiring him to furnish security for costs under O. 25, R. 1, C. P. Code. Nor would instigation and financial help by a stranger be sufficient to subject the plaintiff to furnish security for the defendant's costs, in cases not strictly falling under the rule. AIR (Vol 37) 1950 TC 100 (FB).

——O. 37, R. 9.

——O. 37, R. 9 — Applicability — Conditions of — Order for attachment before judgment — Remedy of party aggrieved — Application for raising under inherent powers — Competency — Power of Court — C. P. Code, S. 122.

The condition precedent to the applicability of R. 9 of O. 37, C. P. Code, is that the defendant should furnish security in order that the attachment may be raised; and if it is not furnished the attachment cannot be raised.

Nor can the Court raise the attachment without security being furnished under its inherent powers; inherent jurisdiction can be exercised only when there is no other specified provision in the Code available as a remedy. Where there is an available remedy by way of appeal against the order of attachment before judgment, but it is not availed of, the Court will not exercise its inherent powers. AIR (Vol 37) 1950 TC 100 (FB).

COCHIN CIVIL PROCEDURE CODE (REGULATION 1 of 1079, M. E.).

——S. 104.

——S. 104 — Ex parte decree against minors not properly represented — Application to set aside — Application to appoint guardian after decree.

Section 104, Cochin Civil P. C., is applicable to the case of an ex parte decree passed against a minor who is not properly represented in the suit and the remedy provided by the section is available also to a minor defendant aggrieved by an ex parte decree passed in such circumstances.

When a guardian ad litem has once been appointed, his appointment enures for the whole of the litigation. The appointment is for the purposes of the entire lis which means the lis in all its remifications and during the whole period it should subsist in any form. The Court before which the lis may be in any form at any particular time has seisin of the lis for the time being and ipso facto has also the power to remove the guardian ad litem for the time being and appoint another in his place. (1933) 142 Ind Cas 433 (Cochin) (DB).

——S. 222.

——Ss. 222, 474, 603 — Cochin Courts — Power to attach debt due by person residing permanently in British India.

The Courts of the Cochin State have jurisdiction to attach before judgment a debt due by a person permanently residing in British territory. (1933) 143 Ind Cas 529 (Cochin) (FB).

——S. 251.

——S. 251 — Legal representative, decree against — Existence of assets of deceased — Whether necessary for passing decree against legal representative.

A suit against the legal representative of a deceased person should not be dismissed on the mere ground that the defendants are not in possession of any portion of the estate left by the deceased. Existence of assets is not a condition precedent to the passing of the decree itself.

The question as to proof of assets left by the deceased arises in execution and not necessarily in the suit itself. (1933) 143 Ind Cas 611 (Cochin) (DB).

——S. 312.

——S. 312—Application to set aside sale—Auction-purchaser impleaded after expiry of period of limitation.

Where once an application to set aside an execution sale has been made within the period of limitation no question of limitation arises by reason of the fact that the auction-purchaser was added as a respondent only after the expiry of the period of limitation for making the application.

In the very nature of things applications of this kind do not necessarily connote the idea of an opponent or of a counter-petitioner. (1933) 143 Ind Cas 552 (Cochin) (FB).

——S. 328.

See, Civil P. C. (1908), O. 21, R. 97.

——S. 331.

——S. 331 — Security bond under S. 331, by judgment-debtor — Suit on — Plaintiff in order to overcome the bar of limitation seeking to exclude the period taken by plaintiff to get the bond assigned in his favour on ground that he should be taken to have been prosecuting with due diligence another civil proceeding in a competent Court against the defendant under S. 15, Limitation Regulation:

Held, that S. 15 was not applicable. (1933) 142 Ind Cas 23 (Cochin) (DB).

——S. 584.

——S. 584 — Claim for damages — Dismissal of — Appeal — Modification of decree — Review — Award of interest pendente lite — Ground not raised in appeal memo or argument — Review, if can be allowed.

Where the trial Court decreed a claim for damages as against the defendant to the extent of a certain amount with interest thereon at 6 per cent. per annum after date of suit till realisation but the Chief Court modified the decree by reducing the principal amount and confirming the trial Court's decree in other respects, and the defendant applied for review:

Held, that such award of interest pendente lite upon a claim for unliquidated damages was wrong but as the ground was not taken in the appeal memo nor raised in the argument, it did not constitute any mistake or error on the part of the Court or one apparent on the face of the record.

Held, also, that in the circumstances, the ground on which review was sought did not constitute any other sufficient reason.

Section 584, Cochin Civil P. C., does not contemplate that party litigant who loses upon a point has only to show that there was a prima facie tenable or arguable defence or objection which he could have taken, but did not take, in regard to that matter, and he will be entitled to have the suit, appeal or other proceedings as the case may be, re-opened. (1933) 144 Ind Cas 60 (Cochin).

——S. 584 — Review — Grounds for — Inherent want of jurisdiction of tribunal.

The inherent want of jurisdiction of the tribunal trying a case is a good ground for review under S. 584, Cochin Civil P. C. (1933) 144 Ind Cas 181 (Cochin).

COCHIN COMPANIES REGULATION (II of 1088).

——S. 3.

——Ss. 3, 4 — Association registered under Cochin Regulation II of 1088 — Original intention not to carry on business for gain — Profits accruing from subsidiary provisions — Registration, if necessary — Mortgage — Money advanced coming from out of proceeds of illegal kuri — Mortgage, if gets tainted with illegality.

Where the substantial purpose of an association is not to carry on business for gain, the fact that gain may accrue incidentally or may arise from merely subsidiary provisions, does not make registration necessary.

In such cases, the primary and original object of the association has to be looked into and no regard should be paid to the circumstances that developed later on.

Where the money which was advanced to the executants of a mortgage came from out of the proceeds of a kuri, which, being in the nature of a lottery was illegal, and it was contended that the taint of illegality attached to the mortgage:

Held, that the illegality arising out of the kuri applied only to such matters as were connected with or as arose out of the contract by which the relationship of starter and subscriber was started and could not extend further and affect matters quite outside that contract.

Held, further, that the action on the mortgage was not founded on the kuri and was wholly collateral to it and hence the mortgage should be upheld. (1933) 142 Ind Cas 92 (Cochin) (DB).

COCHIN COURT-FEES (AMENDMENT) ACT (14 of 1122).

——S. 4.

——Sections 4, Sub-s. (v), 9 — Suit for redemption of usufructuary mortgage — Mortgagor seeking to recover surplus profits also — Court-fee payable.

Where a suit is for redemption of a usufructuary mortgage and the mortgagor seeks to recover not only the corpus of the property, but also surplus profits which accrued therefrom and which were realised by the mortgagee in excess of what was due to him, the suit should still be deemed to be one for the recovery of the mortgaged property within the meaning of Cl. 9, S. 7, Court Fees Act (corresponding to S. 4, Sub-s. (v), Cl. 9, Cochin Court Fees Regulation) and the proper court-fee payable by the plaintiff is on the principal amount secured by the mortgage bond and not also on the amount of the surplus profits sought to be recovered. (1933) 143 Ind Cas 885 (Cochin) (DB).

COCHIN INSOLVENCY REGULATION (7 of 1098 M. E.).

—An endorsee for collection is not a creditor within the meaning of the Regulation and is not, therefore, competent to prove in insolvency. (1933) 142 Ind Cas 802 (Cochin) (DB).

COCHIN LIMITATION REGULATION.

——S. 4.

——Ss. 4, 15 — Suit on security bond of surety executed in Court — Time for obtaining assignment of bond — Whether can be excluded in computing limitation — Exhaustiveness of the Regulation — Exemptions not covered by Regulation — Whether can be imported to relieve party from limitation bar — Cochin Civil Procedure Code, S. 331.

Where in a suit on a security bond, executed in Court by the surety of a judgment-debtor under S. 331, Civil P. C., the plaintiff in order to overcome the bar of limitation, sought to exclude the period taken by the plaintiff to get the bond assigned in his favour on the ground that he should be taken to have been prosecuting with due diligence another civil proceeding in a competent Court against the defendant under S. 15, Limitation Regulation:

Held, that S. 15 was not applicable to the case inasmuch as the application to the Court for getting the bond assigned was not a proceeding founded upon the same cause of action as that for the

suit instituted on the bond itself and that the other condition required by the section, that the Court should be unable to entertain it, could not be applied to the case at all.

Held, also that it was not impossible for the party to bring suit in time.

The Limitation Regulation is an exhaustive Code governing the Law of Limitation and the cases in which a running of limitation can be suspended are contained in the sections of the Regulation itself. It will be dangerous to lay down generally that there is some principle outside the Limitation Act under which limitation can be suspended.

Exemptions not covered by the provisions of the Regulation should not be imported to relieve a party from the bar of limitation. Nor can any equitable ground for suspension of a cause of action be added to the provisions of the Regulation.

The principle that when the law creates limitation and the party is disabled to conform to that limitation without any default in him and he has no remedy over, the law will ordinarily excuse him, cannot prevail against the express provision of S. 4 of the Regulation. (1933) 142 Ind Cas 23 (Cochin) (DB).

COCHIN NEGOTIABLE INSTRUMENTS ACT (9 of 1097 M. E.).

——S. 134.

——S. 134 — Construction — "Essential matters" — Limitation for suit in Cochin on promissory note, executed outside — Cochin Limitation Act, S. 12.

The term "essential matters" in S. 138, Cochin Negotiable Instruments Act, cannot be read as including the period of limitation to enforce the obligation. S. 12, Cochin Limitation Act, which provides that suits in Cochin on contracts entered into outside Cochin are subject to the rules prescribed by the Act has to be taken into account. It is also a well-settled principle of private international law that the rules of procedure are determined by lex fori, i.e., the law of the place where the action is brought. Limitation for a suit in Cochin is governed by the Cochin law and not the law of the foreign country where the instrument was executed. 1950 KLT 54 (DB).

COCHIN TENANCY ACT (15 OF 1113) — (AS AMENDED BY ACT 6 of 1115).

——S. 18, Proviso — Applicability — Agreement of compensation — What amounts to.

The proviso to S. 18 of the Cochin Tenancy Act save registered agreements settling the amount of compensation from the operation of S. 18 which provides that no contract made after a specified date shall take away the right of a tenant to claim compensation for improvements. Where by an agreement executed after the crucial date, the tenant undertakes in unequivocal terms to remove the buildings erected by him in case of eviction, the improvements having been effected before the agreement, the agreement must be held to be an agreement settling the amount of compensation within the meaning of the proviso to S. 18. 16 Coch 5: 20 Coch 247: 27 Coch 48, Diss. AIR (V 37) 1950 TC 29.

COCHIN TRANSFER OF PROPERTY ACT (17 of 1111).

——S. 6 — Mesne profits — Assignment — Validity — "Mere right to sue".

A right to mesne profits, independent of any right in the property in respect of which the profits are claimed, is a mere right to sue and cannot be transferred, because a claim to recover mesne profits is only one sounding in damages. But if a sale of land is accompanied by an assignment of mesne profits already accrued due, such an assignment would not be invalid. AIR (Vol 38) 1951 Trav-Co 180 (DB).

——S. 54.

——S. 54 — Applicability — Part performance — Essentials — Mortgagor and Mortgagee — Agreement for extinguishment of mortgage — Transfer of part of mortgaged property absolutely to mortgagee and release by mortgagor of part of mortgaged property in satisfaction of mortgage — Subsequent suit by mortgagor for redemption — Plea of part performance — Right of mortgagee.

Where an agreement is entered into between a mortgagor and a mortgagee for extinguishment of the mortgagee by the mortgagor transferring to the mortgagee part of the mortgaged property absolutely and the mortgagee takes possession of that part as owner and surrenders his mortgage right over the remaining property in favour of the mortgagor, in full satisfaction of the mortgage debt, all the essential elements of the doctrine of part-performance as embodied in S. 54, Transfer of Property Act, are satisfied and the mortgagee can plead such agreement in defence to a suit by the mortgagor brought against him subsequently on the allegation that the mortgage is still subsisting because the agreement between the parties has not been registered. In such a case there has been part performance of the contract entered into by parties, and the fact that agreement was not registered would not entitle the mortgagor to go back upon the contract and seek to redeem the mortgage which has been extinguished by the arrangement between the parties which has been acted upon by them. AIR (Vol 37) 1950 TC 81 (DB).

——S. 62.

——S. 62 — Right to redeem — Co-mortgagor or purchaser of part of mortgaged property — Right of.

A part owner or purchaser of the equity of redemption is no doubt entitled to redeem the whole mortgage, but he is not entitled to redeem his share only. AIR (Vol 37) 1950 TC 33 (DB).

——S. 88.

——S. 88 — Deposit under — Nature of — Deposit of mortgage amount at time of applying under S. 88 or when filing redemption suit — Characteristics of — Crediting order of Court — Necessity before it becomes mortgagee's money — Redemption price deposited in Court after decree — Distinction — Attachability in execution of decree against mortgagor.

Having regard to the rights and liabilities of the parties to a redemption decree, the redemption price fixed by the decree, when deposited, should be deemed to have become money belonging to the mortgagee, and clearly ear-marked for payment to him. The decree-holder mortgagor, on deposit, becomes entitled in law not only to recover possession of the mortgaged property, but also to hold the mortgagee-defendant liable to mesne profits thereafter, if he is kept out of possession after such deposit. The mortgagor-decree-holder cannot, thereafter, except with the consent of the mortgagee, seek to withdraw the amount from Court otherwise deal with it and he has no disposing power over it. It cannot therefore be treated as money lying to his (mortgagor-decree-holder's) credit, and cannot be deemed to be assets available for attachment by his creditors.

A deposit of mortgage money made along with an application under S. 83, Transfer of Property Act, or when filing a suit for redemption, however, stands on a different footing from a deposit of the redemption price fixed by the Court in its

redemption decree. A deposit of the former kind, having regard to its very nature, has to be acquiesced in or agreed to by the mortgagee before the money deposited could be said to become his. On the other hand in the case of a deposit of mortgage money, being the redemption price fixed by the decree, in execution, the mortgagee-defendant has no option, because when the deposit is complete, it is a valid payment into Court on his account, ear-marked for payment to him, and it is binding on him. It is not an amount either realised in execution or paid into Court on account of a decree-debt. No crediting order by Court, is necessary to make the amount "ear-marked" for payment to the mortgagee; nor is any notice of deposit necessary to the mortgagee. It cannot therefore be attached in execution of a decree against the mortgagor-decree-holder. 1950 KLT 538 (DB).

CO-DEFENDANTS.
See (1) Civil P. C., S. 11.
(2) O. 41, R. 22.

CODICIL.
See (1) Succession Act, Ss. 59 to 62.
(2) Will — Construction.

CODIFICATION.
See Interpretation of Statutes.

COERCION.
See (1) Contract Act, S. 16.
(2) Pardanashin lady.
(3) Specific Relief Act, S. 28.
(4) Will — Construction.

CO-EXECUTORS.
See (1) Executors.
(2) Prob. and Admn. Act.
(3) Succession Act S. 311.

COGNIZABLE OFFENCE.
See Criminal P. C., S. 4 (1) (f).

CO-HABITATION.
See (1) Contract Act, S. 23.
(2) Evidence Act, S. 112.
(3) Husband and wife.
(4) Muhammadan Law — Marriage.
(5) Penal Code, Ss. 493 to 498.

CO-HEIR.
See (1) Contract Act, Ss. 43-45.
(2) Co-sharer.
(3) Muhammadan Law.

COIN.
——Counterfeiting of.
See Penal Code, Ss. 231 to 243.

COINAGE ACT (3 of 1906).
——S. 11 — (As amended by Act 36 of 1920) — Exchange rate.

In a suit on a judgment of the High Court in England the rate of exchange to be adopted should be the rate prevailing at the date of the judgment. AIR (Vol 13) 1926 Bom 516: 95 Ind Cas 552: 28 Bom LR 515 (DB).

CO-LESSOR.
See (1) Co-sharer.
(2) Deed — Construction — Lease.
(3) Lessor and Lessee.
(4) T. P. Act, S. 108.

COLLATERAL.
——Agreement.
See (1) Contract Act, Ss. 30, 58 and 62.
(2) Evidence Act, Ss. 92, 96.
(3) Registration Act, S. 49.

COLLECTION.
——Charges.
See (1) Contract Act, S. 219.
(2) Principal and Agent.

——Papers.
See Evidence Act S. 35.

——Profits.
See Co-sharer.

COLLECTOR.
See Civil P. C., Ss. 68—72, 92 and Sch. III,

——Receiver.
See Civil P. C., O. 40, R. 5.

COLLISION.
See (1) Admiralty.
(2) Admiralty Courts Act, 1861.
(3) Shipping.
(4) Tort.

COLLUSION.
See (1) Benami.
(2) Companies Act, S. 231.
(3) Penal Code, Ss. 421—424.
(4) Presidency Towns Insolvency Act, S. 55.
(5) Provincial Insolvency Act, S. 53.
(6) T. P. Act, S. 53.

COLONIZATION OF GOVERNMENT LANDS (PUNJAB) ACT (V of 1912).
See Punjab Colonization of Government Lands Act (V of 1912).

COLOURABLE.
——Imitation.
See (1) Copyright.
(2) Copyright Act, S. 2.
(3) Penal Code, Ss. 482 to 489.
(4) Trade Mark.
(5) Trade Marks Act, 1940.

——Transaction.
See (1) Benami.
(2) Companies Act, S. 231.
(3) Penal Code, Ss. 421—424.
(4) Presidency Towns Insolvency Act, S. 55.
(5) Provincial Insolvency Act, S. 53.
(6) T. P. Act, S. 53.

COMBINES INVESTIGATION ACT (CANADA) 1927.
——Clause 26 — If ultra vires.

Section 498, Criminal Code (Canada) and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "The Criminal Law including the procedure in Criminal matters."

The Combines Investigation Act, 1927, Cl. 26 is not ultra vires of the Parliament of Canada either

in whole or in part. AIR (V 18) 1931 PC 94 : 32 Cr LJ 899 : 132 Ind Cas 593.

COMMENSALITY.
See Hindu Law — Joint Family — Partition.

COMMERCIAL INTERCOURSE WITH ENEMIES ORDINANCE (VI of 1914).

——The ordinance is not retrospective, and to establish an offence under it the court can look to such acts only as took place after its passing. AIR (Vol 3) 1916 Cal 431: 42 Cal 1094: 19 CWN 1239: 17 Cr LJ 113: 33 Ind Cas 289 (FB).

——S. 3

——S. 3 — Jurisdiction of Court — Obtaining, meaning of.

The accused, a Br. subject in Madras, ordered certain goods from Germany before the war, and the goods were received in London by his agent after the outbreak of the war, but before the passing of the 'Ordinance'. The agent sent the goods to the accused after the date of the Ordinance. Held, Per curiam, that the offence of 'obtaining' was complete in England, if at all, and Br. Indian Courts had no jurisdiction to try the same. Per Wallis C. J. That the goods were ordered before the war though received after the Ordinance, and therefore there was no 'obtaining' of the goods after the war. Per Wallis C. J. (Coutts Trotter, J. Dubitante). 'Obtaining' in the proclamation is used in its ordinary sense and includes procuring or ordering the goods from an enemy as well as taking delivery of them on arrival and if the goods had been ordered before the date of the Ordinance, it is no offence to take delivery of them after that date as a person cannot be charged with obtaining goods from himself or of obtaining them twice. Once a person is charged with an offence under the Ordinance, the High Court will not convert the charge into one under Common Law as it stood before the Ordinance. The Ordinance VI of 1914 is not retrospective and does not penalise acts done before its date of operation. AIR (Vol 4) 1917 Mad 937: 40 Mad 34: 17 Cr LJ 321: 31 MLJ 178: 20 MLT 180: (1916) 2 MWN 161: 4 LW 82: 35 Ind Cas 497 (DB).

COMMISSION.
See (1) Civil P. C., O. 26.
(2) Contract Act, S. 219.
(3) Principal and Agent.

——Agent.
See (1) Contract Act Ss. 182 and 219.
(2) Principal and Agent.

——For examination of witnesses.
See Civil P. C., O. 26.

——To executor.
See (1) Muhammadan Law — Will.
(2) Will — Construction.

——To trustees.
See Trusts Act, Ss. 32, 33.

COMMISSIONER.
See Civil P. C., O. 26.

COMMISSIONS.
See C. P. Code, O. 26.

COMMITMENT.
See Cr. P. Code, Ss. 213-215.

COMMITMENT TO SESSIONS COURT.
See Criminal P. C., Ss. 206, 220.

COMMON.
--Ancestor.
See (1) Custom.
(2) Hindu Law.

——Carriers.
See (1) Carriers.
(2) Carriers Act, S. 2.
(3) Common Carriers Act, 1886.
(4) Contract Act, Ss. 91, 151.
(5) Railways Act.
(6) Sale of Goods Act, S. 39.
(7) Shipping.

——Employment.
See (1) Master and Servant.
(2) Principal and Agent.

——Intent or object.
See Penal Code, Ss. 34 and 141, S. 120-A.

——Land.
See (1) Adverse possession.
(2) Co-sharer.
(3) Deed — Construction — Lease.
(4) Family arrangements.
(5) Landlord and Tenant.

——Law.
See (1) Equity.
(2) Precedents.

——Manager.
See (1) Adverse possession.
(2) Bengal Tenancy Act Ss. 93, 100.
(3) Co-sharer.

COMMUNAL CONSIDERATION
See Criminal P. C., S. 517.

COMMUNAL RIGHTS.
See (1) Civil P. C., O. 1, R. 8.
(2) Custom — General.

COMMUNICATION.
See Contract Act, S. 2.

COMMUNITY.
See (1) Adverse possession.
(2) Custom — Punjab.

COMMUTATION.
——Rent.
See (1) Deed — Construction — Lease.
(2) Landlord and Tenant.
(3) Local Tenancy Acts.
(4) Madras Estates Land Act, Ss. 40 and 41.

——Of sentence.
See Criminal P. C., S. 402.

CO-MORTGAGEES.
See (1) Civil P. C., O. 34, R. 1.
(2) Contract Act, Ss. 38 and 45.
(3) Mortgage.
(4) T. P. Act, S. 60.

CO-MORTGAGOR.
See T. P. Act, 1882, Ss. 95, 101.

Comparative Table of the Companies Acts of 1882 and 1913.

Act VI of 1882	Act VII of 1913	Act VI of 1882	Act VII of 1913	Act VI of 1882	Act VII of 1913
1 ...	1	64 ...	72	129 ...	163
2 ...	290	65 ...	73	130 ...	228
3 ...	2 (3) (6) (8)	66 ...	74	131 ...	166
4 ...	4	67 ...	88	132 ...	166
5 ...		68 ...	120, 123, 124, 125	133 ...	168
6 ...	5	69 ...	136 Sub-S. 1	134 ...	169, 175
7 ...	5, 70		to 4	135 ...	170
8 ...	6	70 ...	87	136 ...	171
9 ...	7	71 ...	87	137 ...	172
10 ...	8	72 ...	89	138 ...	173
11 ...	9, 21	73 ...	147	139 ...	156
12 ...	10, 50	74 ...	76,131,(1) (2) (4)	140 ...	174, 239
13 ...	55		132, 134	141 ...	175, 178
14 ...	57	75 ...	77	142 ...	176
15 ...	56, 57, 60, 66	76 ...	20, 71	143 ...	177, 178
16 ...	58	77 ...	81	144 ...	179
17 ...	59	78 ...	79	145 ...	180
18 ...	61	79 ...	82	146 ...	181
19 ...	62, 63	80 ...	82	147 ...	184
20 ...	63	81 ...	90	148 ...	184
21 ...	62	82 ...	138	149 ...	185
22 ...	64	83 ...	139	150 ...	186
23 ...	50	84 ...	140	151 ...	187
24 ...	50	85 ...	141	152 ...	188
25 ...	50	86 ...	142	153 ...	189
26 ...	26	87 ...	143	154 ...	160
27 ...	49	88 ...	93, 94, 95, 96, 97	155 ...	190
28 ...	104	89 ...	148	156 ...	191
29 ...	34	90 ...	149	157 ...	192
30 ...	43	91 ...	150	158 ...	193
31 ...	44	92 ...	83, 86	159 ...	194
32 ...	45	93 ...	280	160 ...	194
33 ...	46	94 ...		161 ...	194
34 ...	47	95 ...	151	162 ...	195
35 ...		96 ...	152	163 ...	195
36 ...	11 (1) (2) (4) (5) (6)	97 ...		164 ...	197
		98 ...		165 ...	198
37 ...	17	99 ...		166 ...	199
37, Para 2 ...	19	100 ...		167 ...	200
38 ...	18	101 ...		168 ...	201
39, Para 1 ...	19	102 ...		169 ...	202
39, Paras 2 &3	21	103 ...		170 ...	
40 ...	22, 249	104 ...		171 ...	
41 ...	23	105 ...		172 ...	245
41, Para 2 ...	24	106 ...		173 ...	203
42 ...	25	107 ...		174 ...	204
43 ...	11 (1) (2) (4) (5) (6)	108 ...		175 ...	205, 227
		109 ...		176 ...	206
44 ...	28	110 ...		177 ...	207
45 ...	30	111 ...		178 ...	156, 158, 159 207
46 ...	35	112 ...		179 ...	211
47 ...	31, 48	113 ...		180 ...	212
48 ...	32	114 ...		181 ...	212
49 ...	32	115 ...		182 ...	215
50 ...	32	116 ...		183 ...	216
51 ...	51	117 ...		184 ...	210
52 ...	52	118 ...		185 ...	
53 ...	33	119 ...		186 ...	217
54 ...	29	120 ...		187 ...	217
55 ...	36	121 ...		188 ...	218
56 ...	37	122 ...		189 ...	219
57 ...	53	123 ...		190 ...	220
58 ...	38	124 ...	158	191 ...	221
59 ...	39	125 ...	159, 161	192 ...	222
60 ...	40	126 ...	160	193 ...	223, 239
61 ...	156	127 ...	161	194 ...	224
62 ...	157	128 ...	162 (1) (3) (4) (5) (6)	195 ...	225
63 ...	72				

Comparative Table of the Companies Acts of 1882 and 1913—*(contd.)*

Act VI of 1882	Act VII of 1913	Act VI of 1882	Act VII of 1913	Act VI of 1882	Act VII of 1913
196 ...	226	220 ...	248	244 ...	272
197 ...	227	221 ...	20, 250	245 ...	273
198 ...	240	222 ...	251	246 ...	274
199 ...	242	223 ...	252	247 ...	275
200 ...	241	224 ...	253	248 ...	276
201 ...	234	225 ...	253	249 ...	55
202 ...	234	226 ...	254	250 ...	284
203 ...	153	227 ...	255	251 ...	285
204 ...	213	228 ...	256	252 ...	278
205 ...	214	229 ...		253 ...	
206 ...		230 ...	257	254 ...	246
207 ...		231 ...	258	255 ...	288
208 ...		232 ...	259	256 ...	289
209 ...		233 ...	260	37, Para 2 ...	19
210 ...		234 ...	261	39, Para 1	19
211 ...		235 ...	262	39, Paras 2 & 3	21
212 ...	232	236 ...		41, Para 2 ...	24
213 ...	231	237 ...	263	73A ...	107
214 ...	235	238 ...	264	73B ...	127
215 ...	236	239 ...	265	131, Para 2 ...	167
216 ...	237	240 ...	266	134, Para 1 ...	169
217 ...	238	241 ...	268	134, Clause 2 ...	
218 ...	164	242 ...	269	200A ...	230
219 ...	165	243 ...	270, 271	220 (F) ...	286

COMPANIES ACT (6 of 1882).

(Cases under this Act have been taken under corresponding provisions of Companies Act 7 of 1913. — Ed).

COMPANIES ACT (7 of 1913).

——S. 1.

——S. 1 — Construction — Reference to English case law — Permissibility.

The Company law is not a part of the indigenous law of India. It has come from England. It is, therefore, permissible in construing sections of the Indian statute to refer to the English case law on the subject. (1950) 54 CWN 832 (DB).

——S. 1 — Construction.

The Companies Act must be regarded as an Act merely legislating for or regulating certain rights recognized under the common law in England. AIR (V 15) 1928 Mad 571 : 111 Ind Cas 225 : 1928 MWN 442 : 28 MLW 932 (DB).

——S. 2.

——S. 2 (1), Cl. (2) — Corporation — Powers of — Corporation having right to own land has power to alienate it.

A corporation is the creature of statute. It will have only those powers which have been expressly conferred on it by the statute which has created it, and also all such other powers which may be necessary for effectively carrying out the purpose for which it was created, and also all such powers as may be incidental and necessary to the exercise of the powers expressly conferred on it. A corporation which has been given the right to own land would necessarily have the power to alienate it for any interest it may deem fit, unless restrained therefrom either expressly or by implication, provided, however, such alienation be in the ordinary mode of conducting its business or operations. AIR (V 33) 1946 Cal 416 (DB).

——S. 2 (1), Cl. (2) — Company incorporated under Act of Parliament and Association incorporated under Royal Charter — Distinction.

The distinction between a company incorporated under an Act of Parliament and an association incorporated under a Royal Charter is that the former can do such acts only as are authorised directly or indirectly by the statute creating it; the latter (speaking, generally) can do everything that an ordinary individual can do.

Hence even though a corporation incorporated by a Royal Charter may have exceeded its powers in entering into a contract though it may entail forfeiture the transaction, would nevertheless be valid. AIR (V 30) 1943 Mad 111 : 55 MLW 653 : 16 RM 206 : 208 Ind Cas 270.

——S. 2 (1), Cl. (2) — Joint stock company, distinct entity.

Under the law, joint stock company is a distinct entity, and although all the shares may be practically controlled by one person in law a company is a distinct entity and it is not permissible or relevant to inquire whether the directors belonged to the same family or whether it is as compendiously described, a "one man company". AIR (V 23) 1936 Bom 62 : 37 Bom LR 978 : 60 Bom 326 : 161 Ind Cas 126 (DB).

——Ss. 2 (1), Cl. (3), 3 — "Court" means High Court in the Punjab.

Under the Companies Act, the High Court is the Court which has jurisdiction to wind up a company registered under it and having its registered office anywhere in the Punjab. AIR (V 29) 1942 Lah 74 : 44 PLR 1 : ILR (1942) Lah 800 : 199 Ind Cas 381 (DB).

——S. 2 (1), Cl. (4) and Cl. 13 (c) — Indicia to determine instrument a debenture indicated.

In determining what is or is not a debenture within S. 2 (1) the Court is not bound to hold that an instrument is a debenture because it is called a debenture by the company issuing it, nor to hold that it is not a debenture because it is not so called by the company. The Court must look at the substance of the instrument itself, and without the assistance of any precise legal definition, form the best opinion it can whether the instrument is or is not a debenture.

A document which either creates a debt or ac-

knowledges it and is one of a series may be dealt with as a debenture. A creation of a charge over the assets of the company issuing the debenture, though usual, is not an essential requisite of a debenture. There may be a mortgage debenture or a simple debenture which does not create any charge on any of the assets of the company. AIR (V 33) 1946 Bom 18 : 47 Bom LR 660 : 223 Ind Cas 110 (DB).

——Ss. 2 (1), Cl. (9) and 87 — Manager, meaning of.

Unless a person is in charge of the entire business of a company, he cannot be deemed to be a manager thereof. A mere branch manager does not come within S. 87 of the Companies Act. AIR (V 5) 1918 Lah 170 : 47 PR Cr (1917) : 19 Cr LJ 215 : 43 Ind Cas 791 (DB).

——S. 2 (1), Cl. 11 — Auditors liability — Auditors appointed at general meeting but not mentioned as officers in the Articles of Association — Not entitled to indemnity.

Article 118 of the Company's Articles of Association which dealt with the conduct of company's business provided that officers of the Company would be entitled to an indemnity out of the funds of the Company except in regard to their own wilful acts or defaults. Owing to the overdrawings and irregularities of the Managing Agent and the determined policy of auditors to get through their work easily and deliberate abstention on their part to examine documents the Company had to wind up compulsorily. The Official Liquidators sued the auditors to make good the loss. It was contended that the auditors were officers of the Company and were entitled to indemnity under Art 118. The auditors were in fact appointed at the general meeting of the share-holders of the Company but were not mentioned in the articles as officers.

Held, that the auditors could not claim to be officers of the Company within the purview of Art. 118 of the Articles of Association. AIR (Vol 16) 1929 All 326 : 121 Ind Cas 693.

——Ss. 2 (1), Cl. (13) (c) and 134 (4)—Applicability—Private company—Issue of prize bonds with seal of company and bearing consecutive numbers — If debentures — Failure to file balance sheet and profit and loss account — Offence. See AIR (V 33) 1946 Bom 18 : ILR (1945) Bom 863 : 223 Ind Cas 110 : 47 Cr LJ 361.

——S. 2 (1), Cl. (14) — If a document falling within the definition of a prospectus in S. 2 (14) of the Companies Act, contains mis-statements, the directors of the Company would be liable to pay compensation under S. 100 of the Act to all who subscribe for shares on the faith of the prospectus for the loss they may sustain by reason of any mis-statement contained therein. AIR (V 21) 1934 Mad 641 : 67 MLJ 437 : 40 MLW 519 : (1934) MWN 1277 : 152 Ind Cas 703.

——S. 2-A.

——Ss. 2-A (as amended), 277 and 72 — Company having registered office in Pakistan — If becomes Indian Company for all purposes — Notice given to Registrar under S. 72 — Effect of.

Reading S. 2-A, Companies Act, as amended by the Independence (Adaptation of Central Acts and Ordinance) Order of 1948, and S. 277, a Company the registered office whereof is in Pakistan does not become a company incorporated in India for all purposes except for the limited purpose of S. 277. Even if it is an Indian Company for a period of six months, by the mere giving of notice to the Registrar under S. 72 of the Act that the address of the Company's registered office has been changed from one part of a town in India to another, it cannot become an Indian Company for all purposes. A notice given under S. 72 can neither make a foreign Company nor confer on a foreign company the statute of an Indian Company The object is only for the purpose of service being effected on the Company for certain purposes. AIR (V 37) 1950 EP 188 (DB).

——S. 3.

1. **Applicability and scope.**
2. **"High Court".**
3. **Section 3(1), Proviso.**
4. **Section 3(2).**
5. **Section 3(3).**
6. **Court's power to interfere with internal management.**

See N. 1.

1. Applicability and scope.

——S. 3 — Internal management — Interference by Court.

In case of joint stock companies, the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. AIR (Vol 26) 1939 Rang 417: 186 Ind Cas 431.

——S. 3 — Scope — Whether it means that High Court is the only Court to try as a Court of first instance offence due to breaches of provisions in Companies Act.

The jurisdiction of the High Court referred to in S. 3 is obviously the jurisdiction exercised by virtue of the specific provisions of the Act and not a jurisdiction which may be invoked where merely a criminal offence is declared. It is very difficult to say that S. 3 has specifically mentioned that the High Court should be the Court which should as a Court of first instance try persons who have been guilty of an offence committed on account of breaches of the provisions of the sections of the Act, e.g., contravention of the provisions of S. 85. AIR (Vol 23) 1936 All 830: (1936) ALJ 1105: 1936 AWR (HC) 964: 38 Cr LJ 111: ILR (1937) All 220: 166 Ind Cas 53 (FB).

——S. 3 — Jurisdiction of Company Judge to enforce provisions of Act.

The Courts referred to in S. 3 have jurisdiction to pass orders for the enforcement of the statutory obligations of a company and for giving redress to a person aggrieved by an illegal omission on the part of a company. A Company Judge has, therefore, jurisdiction to order a company to deliver a copy of the register of the members of the copy to a share-holder of the company. AIR (Vol 23) 1936 All 568: (1936) ALJ 748: 1936 AWR (HC) 465: 58 All 988: 164 Ind Cas 387 (DB).

——S. 3 — Internal management — Court, when can interfere — Interpretation of clause in memorandum, whether internal management — Single member, if can maintain suit for interpretation — Company, in such suit, must be impleaded as defendant.

The board rule is that in all matters of internal management of a company the company itself is the best judge of its affairs and the Court should not interfere. But where the main point involved is the interpretation of a certain clause in the Memorandum of Association relating to the application of the assets of the company, such a question is not a matter of mere internal management. Under these circumstances, a single member of the company can maintain a suit for a declaration as to the true construction of the article in question and the company cannot be excused from being impleaded in such action. AIR (Vol 22) 1935 Lah 792: 160 Ind Cas 24 (DB).

——S. 3 — Internal management of company — Court, power of interference.

The Court does not generally interfere with the internal management of the affairs of a company and, if the majority of the share-holders consider that a particular contract of employment should be terminated, the Court would not, as a rule, consider the matter at the instance of a minority of share-holders. AIR (Vol 21) 1934 Bom 427: 36 Bom LR 907: 59 Bom 218: 156 Ind Cas 80 (DB).

——S. 3 — Court's power to interfere in internal management — Majority, if can remedy irregularities.

The Court has no jurisdiction to interfere with the internal management of companies acting within their own powers, and, secondly, to redress a wrong done to the company, the action must 'prima facie' be brought by the company itself. Even where a minority of share-holders are alleged to have been overborne by the vote of a majority the plaintiffs cannot complain of acts which are valid if done with the approval of the majority of the share-holders or are capable of being confirmed by the majority, mere irregularity or informality which can be remedied by the majority being insufficient. AIR (Vol 21) 1934 Bom 243: 36 Bom LR 483: 151 Ind Cas 1082.

——S. 3 — Power of Court to interfere for forcing company to conduct business according to rules.

The Court does not interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of could be set right at any moment. AIR (Vol 21) 1934 Bom 243: 36 Bom LR 483: 151 Ind Cas 1082.

2. "High Court".

——Ss. 3 and 166 — Application by Government for winding up of company based on arrears of income-tax due by it — Jurisdiction of High Court — Quantum of tax disputed by company — Appeals against orders of assessment pending — Proper order to be passed on application.

Per Harries, C. J.:— The High Court has jurisdiction under the Companies Act to consider claims by the Government in winding up and that being so, is has jurisdiction to entertain a petition by Government based on arrears of income-tax due to wind up a company. S. 226 of the Government of India Act does not bar the jurisdiction of the High Court to wind up a company at the instance of the Government which claims a debt in the nature of revenue from a company. But the High Court cannot go into the question whether or not the total assessment in respect of taxes made by the Income-tax authorities is justified as that would involve a decision relating to the actual assessment of revenues which is clearly barred by S. 226 of the Government of India Act.

But where it is not established that the debt alleged to be due to the Government in respect of the taxes is legally due and it is a hotly disputed debt, and the company is disputing the quantum of tax assessed in further proceedings and the orders of assessment determining the tax are subject to further consideration in proceedings by way of appeal, an order for winding up should not be made but the application for winding up should be adjourned for a reasonable time to await the results of the pending appeals.

Per Chatterjee, J.:— S. 226 of the Government of India Act is not a bar to the maintainability of an application on behalf of the Dominion of India for the winding up of a company on the ground of its inability to pay the arrears of income-tax due by it. Such an application is maintainable, even if the company is disputing the quantum of the tax assessed in further proceedings. But as the High Court in ordering the winding up of a company is exercising original jurisdiction, it has no jurisdiction to say that the assessment made by the revenue authorities are inflated or wrong or improper or that the taxes sought to be realised are not due. Where there is a 'bona fide' dispute as to the existence or quantum of the alleged debts, the only way in which justice may be done is to keep the application for winding up on the file and to refuse to pass any final order thereon unless and until there is a determination of the assessment proceedings and until the adjudication by the proper forum determines what is the real debt justly due to the Dominion of India in respect of the tax. (1950) 54 CWN 514 (DB).

——S. 3 — Ajmer Regulation I of 1877, S. 23.

The Chief Commissioner of Ajmer and Merwara is the High Court for the purposes of the Companies Act for places within its jurisdiction and not the Allahabad High Court. AIR (Vol 13) 1926 All 649: 48 All 709: 24 ALJ 768: 96 Ind Cas 753.

——S. 3 — Moffussil Companies.

Applications under the Companies Act relating to companies doing business in the moffussil should be made in the Original Side of the High Court. AIR (Vol 12) 1925 Cal 626: 29 CWN 403: 41 CLJ 191: 52 Cal 586: 86 Ind Cas 833 (DB).

——S. 3 — The expression 'High Court' in the Act of 1928 is intended to include all the sides of the High Courts and is as equally applicable to High Courts having original civil jurisdiction as to High Courts which have no Original Side. AIR (Vol 12) 1925 Cal 606: 29 CWN 404: 86 Ind Cas 910 (DB).

——S. 3 — Applications under the Companies Act relating to Companies doing business in the mofussil should be made in the Original Side of High Court. AIR (Vol 12) 1925 Cal 606: 29 CWN 404: 86 Ind Cas 910 (DB).

3. Section 3 (1), Proviso.

——S. 3 — Jurisdiction of Company Court — Application to enforce a right not provided in the Act — Maintainability — Inherent jurisdiction of Company Court to grant relief — Company Court, if has exclusive jurisdiction in all such matters.

The applicant, alleging himself to be the newly elected Secretary and Treasurer of a Company applied to the Company Judge of the High Court to direct the ex-secretary to deliver possession of the properties of the Company to him and to restrain the ex-secretary by an injunction from proceeding with a suit in the District Munsiff's Court, Ellore, challenging the validity of the election of the applicant. On an objection to the maintainability of such an application,

Held, that there was no provision in the Companies Act conferring any special rights in a Secretary in regard to the possession of the property of the Company, and as the inherent jurisdiction of the Court could be invoked only to enforce compliance of special statutory obligations, the application was not maintainable.

Held, further, that there is no provision in the Companies Act which gives the Company Court exclusive jurisdiction in all Company matters. In fact many of the special remedies provided by the Act are equally enforceable in the other Courts by suits. AIR (Vol 34) 1947 Mad 322: (1947) 1 MLJ 75: ILR (1947) Mad 546: 60 LW 90: 1947 Comp. C 63.

——S. 3 — "Court" — Meaning of — Disputes between Board of Directors and managing agents — Suits regarding Jurisdiction — Civil Court.

It is obvious from the terms of S. 3, Companies Act, that the Court referred to therein is the Court which has the power to deal with such matters as are expressly covered by the Act itself, e.g., winding up and the like matters, and has no reference to proceedings other than those under the Act. Hence

suits in respect of disputes between the Board of Directors and the managing agents regarding the powers of the latter are cognizable not by the District Court under S. 3, but by the ordinary Civil Courts. AIR (Vol 34) 1947 Sind 31: 1946 Comp. C. 204: 227 Ind Cas 33.

——**S. 3 — Power under proviso to S. 3 conferred on District Court — Original jurisdiction of that Court, if exclusive — Revisional jurisdiction of High Court, if ousted.**

The District Judge empowered by the Local Govt. under proviso to S. 3, Companies Act, has exclusive original jurisdiction to decide all matters arising under the Companies Act, with reference to companies, the registered offices of which are within his District. But the exclusive original jurisdiction conferred on the District Court can in no way oust the revisional jurisdiction that is conferred on the High Court by S. 115, Civil P. C. unless that jurisdiction is either expressly or impliedly ousted by the Companies Act or the District Court while exercising jurisdiction under that Act is not Subordinate to the High Court within the meaning of S. 115. There is nothing in the Companies Act, either expressly or impliedly ousting the revisional jurisdiction of the High Court. In the absence of such a provision, the limits of the revisional jurisdiction of the High Court must be ascertained by reference to S. 115, Civil P. C. AIR (Vol 22) 1935 All 310: (1935) ALJ 527: 57 All 810: 1935 AWR (HC) 559: 156 Ind Cas 1088.

4. Section 3(2).

——**S. 3 — Registered.**

Office of company situate within jurisdiction of District Judge — District Judge has power to pass orders in liquidation proceedings — Contributories living outside British India are amenable to jurisdiction of District Judge. AIR (Vol 21) 1934 Lah 362: 15 Lah 302: 147 Ind Cas 739.

5. Section 3 (3).

——**S. 3 — Applicability.**

Clause 3 can have no application when objection to jurisdiction is taken at the very commencement and at the proper time; AIR 1927 Pat 182, Foll. AIR (Vol 17) 1930 Mad 74: 57 MLJ 723: 53 Mad 147: 1929 MWN 879: 30 MLW 849 (DB).

6. Court's power to interfere with internal management.

See Note 1.

——S. 4.

1. **Applicability and scope.**
2. **Association.**
3. **Carrying on business.**
4. **Contravention of, Sub-s. (5).**
5. **Gain.**
6. **Illegal company, association or partnership.**
7. **Joint family trade, or business (sub-s. 3).**
8. **Partnership.**
9. **Person.**

1. Applicability and scope.

——**S. 4 — Scope — Number of original members, subsequently exceeding maximum — Association becomes illegal if not registered.**

Section 4, on its true construction, governs not only the first formation of the company, association or partnership, but rules its continuance. An association formed for trading may be perfectly legal at its formation, if the original members be not more than ten in number in the case of a banking business and twenty in other businesses, but if the number increases later on and exceeds the maximum allowable, the association becomes an illegal one, if no registration is effected. Similarly even a company, association or partnership formed before the Companies Act, would come within S. 4 (2) and would be rendered illegal if after the Companies Act came into force, there have been several changes caused by deaths giving rise at every time to a new partnership. AIR (Vol 26) 1939 Cal 187: 69 CLJ 151: ILR (1938) 2 Cal 368: 181 Ind Cas 717 (DB).

——**S. 4 — Association governed by S. 4 — Member's beneficial interest in property.**

The members of a partnership or company or association hit by S. 4, can have beneficial interest in property. AIR (Vol 26) 1939 Cal 187: ILR (1938) 2 Cal 368: 69 CLJ 151: 181 Ind Cas 717 (DB).

——**S. 4 (2) — Scope — Existence.**

In order to constitute an association within the meaning of S. 4, the existence of the legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary.

But where the object is to form a company, it does not and there is no need to show the existence of a legal relation between the persons forming the company. AIR (Vol 26) 1939 Rang 273: 40 Cr LJ 799(2): 183 Ind Cas 497.

——S. 4 — Section 4 of the Companies Act is mandatory and lays down 'inter alia' that no partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business other than banking unless it is registered as a company under that Act. An company, partnership, or association formed in violation of the provisions of S. 4 is an 'illegal' body and its existence cannot, therefore, be recognised by law. AIR (Vol 21) 1934 Lah 882: 36 PLR 149: 16 Lah 574: 154 Ind Cas 156 (DB).

——S. 4 — A company may be formed for several objects, and if one of the objects be the acquisition of gain, and the members constituting it number more than twenty the mere fact that the members of the company either singly or jointly purpose to dispose of the gain on some charitable object will not exclude the company from falling within the purview of S. 4. AIR (Vol 17) 1930 All 186: 1930 ALJ 337: 122 Ind Cas 401 (DB).

——**S. 4 — Native States.**

Where a business is conducted in a Native State and it is not shown that the company formed for the purpose of carrying on business would be illegal according to the law prevalent in that State, the company or the members forming it do not commit an illegal act. AIR (Vol 17) 1930 Bom 5: 53 Bom 652: 31 Bom LR 1187: 121 Ind Cas 581 (DB).

——**S. 4 — Registration.**

An unregistered company of nine share-holders does not require registration for its valid existence. AIR (Vol 12) 1925 Mad 233: 20 MLW 430: 1924 MWN 828: 84 Ind Cas 118.

——**S. 4 — (S. 4 (1882)) — Registration not compulsory.**

For the application of S. 4 all the members must be interested in the business either by themselves or by their agents. So where the defendant obtained a licence from the Government for catching elephants and many others joined in the business but the business was carried on by the defendant alone without interference from others, although they were entitled to profits, it was held that defendant was not an agent and that the business being carried on by defendant alone, the case did not come under S. 4 and did not require registration and the suit was maintainable against defendant for accounts. (1909) 13 CWN 638: 1 Ind Cas 655 (DB).

2. Association.

——S. 4 (2) — A trade association is not unlawful merely because it has not been registered in conformity with the provisions of S. 4 (2), Com-

panies Act. AIR (Vol 18) 1931 All 83 : 1931 ALJ 84: 53 All 316: 136 Ind Cas 84 (DB).

——**S. 4 — Purpose of association.**

In determining the purpose of the association, the primary and original object of the association has to be looked into and no regard should be paid to the circumstances that developed later on and so if a perfectly legal association be formed and if later on, some of the members of the association should, commit a breach of trust that fact should not render the original association an illegal one. 122 Ind Cas 401: 1930 ALJ 337: AIR (Vol 17) 1930 All 186 (DB).

——**S. 4 — 'Association' — Meaning of — Chit fund.**

To constitute an association, it is necessary that there should be more than twenty persons so associated as to create a legal relation, giving rise to joint and mutual rights and obligations. A chit fund creates no legal relation between the subscribers inter se but only as between the manager and the subscriber. It is not an association within S. 4 and the manager can sue and be sued though the chit fund is not registered under the Companies Act. 11 Bur LT 255: 50 Ind Cas 513: AIR (Vol 6) 1919 LB 102.

——**S. 4— (S. 4 (1882))—Association of firms— Registration if necessary — Person — Meaning of.**

An association of several firms consisting of more than twenty persons formed with the object of acquiring gain is essentially within the perview of S. 4 and requires registration. The word 'persons' in S. 4 denotes individuals and does not include bodies of individuals whether corporate or not, since any such extended definition would be repugnant to the subject of contract. 10 NLR 98: 26 Ind Cas 613: AIR (Vol 1) 1914 Nag 26.

——**S. 4 — Unregistered association — Rights inter se.**

When a compulsory registrable association is not registered, the members cannot sue inter se in respect of any matter connected with the association. (1911) 8 ALJ 32: 9 Ind Cas 25.

——**S. 4 — "Association" — Test (case under Act of 1882).**

To constitute an association within the meaning of S. 4 of the Companies Act, the existence of a legal relation between more than twenty persons giving rise to joint rights and obligations or mutual rights and duties is absolutely necessary.

Held, also that in the case before their Lordships there was no association within the meaning of S. 4 of the Companies Act. (1906) 16 MLJ 385: 29 Mad 477 (483) : 1 MLT 237 (FB).

——**S. 4 (case under Act of 1882) — Association for profits — Association of more than twenty persons — Agreement of Association — Construction.**

At the time of starting a kuri or chit fund, an agreement was entered into between the nine defendants and the other subscribers to the chit. The instrument, while giving the defendants, the right to conduct or manage the affairs of the chit, reserved to the body of subscribers, who were more than twenty in number, the right in various ways to control the defendants and otherwise showed that the defendants were only the agents of the subscribers.

Held, that the association was of more than twenty persons and required registration. (1901) 11 MLJ 130 (131).

3. Carrying on business.

——**S. 4 (2) — Unregistered company started for carrying on business for gain — Money collected from subscribers — Subscribers become shareholders.**

Where a person, with the object of carrying on business for the acquisition of gain, starts an unregistered company and collects money from its subscribers who number more than twenty, then as soon as the money is collected, the bargain is clinched and turned into an actual contract by acceptance and the subscribers become the shareholders as such as they must be deemed to have paid the money for the very object of the company and the mere fact that share certificates are not issued does not make them any less share-holders and hence the case comes under sub-s. (2) of S. 4. AIR (Vol 26) 1939 Rang 273: 40 Cr LJ 799 (2): 183 Ind Cas 497.

——**S. 4 (2) — "Any other business", meaning of.**

The words 'any other business' show that what the Legislature contemplated is something which must be business in the same sense in which banking is, although impliedly, described as business. (1936) 60 Bom 800: 38 Bom LR 408.

——**S. 4 — "Association" — "Carrying on" business — Company of more than 20 persons and not registered, legality of — Suit by third party against such association.**

Section 4, requires that the association should be 'carrying' on a business. The expression 'carrying on business' implies some continuous control of the business by the association.

The parties who were the proprietors of wool factories entered into a pooling contract by virtue of which they agreed to work the factories in a certain manner and to share the total profits in certain proportions. The contract was for a period of 5 years. Defendant No. 1 was to work his factory for the first 2½ years and defendant No. 3 for the next 2½ years. The plaintiff and defendant No. 2 had the option of working their factories or not as they pleased, but if they worked the factories, they were bound to share profits with the other parties to the contract according to the terms thereof. The parties who worked their factories, were bound to submit their accounts of the earnings to the other parties:

Held, that the parties to the contract did not constitute any partnership or association & were not carrying on any business jointly within S. 4.

Section 4 of the Companies Act is mandatory and lays down inter alia that no partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business other than banking unless it is registered as a company under that Act. Any company, partnership, or association formed in violation of the provisions of S. 4 is an 'illegal' body and its existence cannot, therefore, be recognised by law.

Although a suit by a third party against the members of an illegal association is maintainable in certain circumstances, it would not be maintainable if the plaintiff knew of the illegal character of the association and was himself a particeps criminis. AIR (Vol 21) 1934 Lah 882 : 36 PLR 149: 16 Lah 574: 154 Ind Cas 156 (DB).

4. Contravention of sub-s. (5)

——**S. 4 (2), (5) — Company — Offence in contravention of section.**

Where a company of more than 20 persons formed in 1922-23 (when the punitive S. 4 (5), did not exist) is unregistered, the members thereof, though they cannot be punished for originally forming themselves into such a company in contravention of S. 4 (2), can be punished under S. 4 (5), (which was enacted in 1936) for continuing to be members of such company. AIR (Vol 29) 1942

Mad 283 : (1942) 1 MLJ 230: 1942 MWN 121: 43 Cr LJ 785: 202 Ind Cas 28.

——**S. 4 — Complaint by private person — Cognizability — Criminal Procedure Code, S. 190 — Applicability.**

As there are no provisions to the contrary in the Companies Act, taking cognizance of an offence under this Act must be governed, as in the cases of an offence under the I. P. C., by S. 190 of the Criminal P. C., and one of the methods of taking cognizance of an offence is by receiving a complaint of the facts which constitute subject of an offence without any restriction with regard to the person who may lay a complaint.

Notifications of Government No. 518 dated June 6, 1916 and G. O. Ms. No. 3070 dated August 23, 1932, published in the Fort St. George Gazette which permits the Registrar or the Assistant Registrar to institute prosecutions under the Act for defaults on the part of companies or persons in furnishing returns, documents or notice or for any other non-compliance with the provisions of the Act does not purport to restrict the Magistrate in the exercise of his powers under S. 190, Criminal P. C. AIR (Vol 29) 1942 Mad 283 : (1942) 1 MLJ 230: 1942 MWN 121: 43 Cr LJ 785: 202 Ind Cas 28.

——**Ss. 4 (5), 283 — Offences under Ss. 4 (5) and 283 — Investigation — Trial by Magistrate.**

It is true that the offences under Ss. 4 (5) and 283, Companies Act, are non-cognizable and cannot be investigated under Chap. XIV, Criminal P. C. But the mere fact that the offences were wrongly investigated and sent up by the Police is no obstacle to their being tried by the Magistrate. AIR (Vol 26) 1939 Rang 273 : 40 Cr LJ 799 (2): 183 Ind Cas 497.

——**S. 4 — Unregistered association — Suit against — Cause of action — Cause of action accrues from payment and is not continuous.**

An unregistered business association of more than 20 persons was formed in contravention of S. 4 of the Companies Act of 1882 — About 20 years later, the heirs of one of the members brought a suit for a declaration that the partnership was illegal and for the recovery of the share of the capital contributed by their ancestor. They alleged that they had been pressing the other partners to get the partnership registered but that they had refused to do so.

Held, that the cause of action for return of the money accrued as soon as the money was paid and there was no continuing cause of action in plaintiff's favour. 64 Ind Cas 447: 19 ALJ 836: AIR (Vol 8) 1921 All 73 (DB).

5. Gain.

——**S. 4 — Scope — 'Gain', meaning of — Society of more than twenty persons formed to help Chinese indigents — Money-lending business done by society.**

A Society of more than 20 members was formed for providing shelter for Chinese and for aiding them in temporary financial troubles. The members agreed to pay one or more annas per day to form a fund out of which any Chinese person whether a member of the association or not, could get a loan at two per cent. per mensem in time of the difficulty.

The contribution was to continue for three years, and at the end of three years, the amount contributed was to be returned to the members and the interest accrued thereon by lending in the above manner was to be spent in charity:

Held, that the Society was formed inter alia for the purpose of carrying on a money-lending business that had for its object the acquisition of gain by individual members of the Society, that it fell within the purview of S. 4, and being unregistered, was not entitled to institute suits for the recovery of moneys lent by it.

Section 4, contemplates a company which is formed to acquire something or in which the individual members are to acquire something, as distinguished from a company formed for spending something, and in which the individual members are simply to give something away or to spend something, and not to gain anything. The word 'gain' in the said section is not limited to pecuniary gain or commercial profits. AIR (Vol 19) 1932 Rang 167: 10 Rang 490: 140 Ind Cas 467.

6. Illegal company, association or partnership.

——**S. 4 — Although a suit by a third party against the members of an illegal association is maintainable in certain circumstances, it would not be maintainable if the plaintiff knew of the illegal character of the association and was himself a particeps criminis.** AIR (Vol 21) 1934 Lah 882: 36 PLR 149: 16 Lah 574: 154 Ind Cas 156 (DB).

——**S. 4 — Where the total number of persons constituting four unregistered firms, carrying on business, consisted of 22 persons, such a partnership would be illegal, having regard to the provisions of** S. 4, Sub-s. (2). 34 CWN 1107: AIR (Vol 17) 1930 PC 300: 59 MLJ 435.

——**S. 4 — Where an association is illegal by reason of the fact that though it consists of more than 20 members it is not registered, its character of illegality cannot be cured by subsequent reduction in number. It retains that character until registration or dissolution. Subsequent registration cures the previous omission to register.** 120 Ind Cas 902: 7 Rang 540: AIR (Vol 17) 1930 Rang 21 (DB).

——**S. 4 — Suit against illegal association — Member — When entitled to the return of the subscription.**

An association formed for carrying on rice business and consisting of more than 20 persons must get itself registered and if it does not, it is an illegal association. If members of such illegal association bring a suit for declaring the respective shares of their association and directing that they be repaid their shares after reconverting the buildings and other property of the association into which the subscription money is changed, into cash and after payment of debts and liabilities, their suit is maintainable and they are entitled to the return of their subscription money after conversion of the property into money as prayed. English case law considered. 120 Ind Cas 902: 7 Rang 540: AIR (Vol 17) 1930 Rang 21 (DB).

——**S. 4 — A partition suit by one partner against the remaining partners of an illegal partnership is not maintainable.** 100 Ind Cas 50: 49 All 319: 25 ALJ 146: AIR (Vol 14) 1927 All 487 (DB).

——**S. 4 — Suit by a member — Decree for partition of assets — If can be passed.**

Per Sulaiman, J.— It cannot be said that properties, which have been acquired out of moneys contributed by a group of persons who have formed themselves into an association not recognized by law, do not vest in the persons who have contributed the amounts, and any member of the association can claim partition of the assets of such an association, but he must ask for actual partition of the existing and nothing more.

He cannot, for instance, ask for an account to be taken and contributions ordered against supposed share-holders and contributories. The reliefs granted to the plaintiffs can only be such reliefs

as can be granted in a simple suit for partition of property moveable or immoveable.

Per Mukerji and Walsh JJ.— A decree for partition cannot be passed as it amounts to the same thing as dissolution of partnership. 48 All 735: 24 ALJ 777: 97 Ind Cas 90: AIR (Vol 13) 1926 All 591 (DB).

——S. 4 — Dissolution of illegal associations — Association of more than 20 persons — Suit for dissolution by a member — Declaration can be granted that Association is illegal — No relief for dissolution or accounts can be granted.

Per Sulaiman J.— If a member is anxious to relieve himself from all further liabilities he should be allowed to come to Court and obtain a declaration that the Association is illegal. Under certain circumstances he may even ask for some kind of injunction restraining the other members from proclaiming that he is associated with them. But a Court cannot assist the plaintiff in getting accounts made, so that he may have his full share of the profits made by the illegal Association, nor can the Court order winding up. 48 All 735: 24 ALJ 777: 97 Ind Cas 90: AIR (Vol 13) 1926 All 591 (DB).

7. Joint family trade or business (sub-s. 3).

——S. 4 — Applicability — Joint family business.

A trading association, which is synonymous with the term "a trading company" or "a trading society," to be within S. 4, must also be one formed on the basis of contract between its members.

A joint family business concern, however, which by its nature descends from father to son, in which interests are acquired by the succeeding generations not by an act of party but by the law of inheritance, is not an association of persons in this sense, and does not, therefore, come within the scope of S. 4.

If the members of the family who have interest in such a business concern exceed 10 or 20 as the case may be, regard being had to the nature of the business, there is accordingly no necessity of registration under the Companies Act. AIR (Vol 26) 1939 Cal 187: ILR (1933) 2 Cal 368: 69 Cal LJ 151: 181 Ind Cas 717 (DB).

——S. 4 (3) — Joint Hindu family.

A Hindu undivided family is a different person altogether from a company, its rights, obligations, privilege & constitution are altogether different from those of a company. AIR (Vol 24) 1937 Lah 830: ILR (1937) Lah 325: 39 PLR 934: 172 Ind Cas 821 (DB).

——S. 4 — Joint family — Absence of agreement of partnership between members — Agreement of partnership by family with stranger — Members of family, if sub-partners — Persons in S. 4 meaning of.

If the various individual members of one or more joint families form an agreement of partnership amongst themselves, then, each individual member must be reckoned a person for the purposes of S. 4.

If however, there has been no agreement of partnership but there is merely a family partnership created by the operation of law, so that the individual members are governed by the principles of Hindu Law and not by the Contract Act, then the individual members are merely sub-partners in any agreement made on behalf of the family and the joint family consisting of these members should be reckoned as one person for the purposes of S. 4 of the Companies Act. AIR (V 21) 1934 Nag 45 : 30 NLR 219: 148 Ind Cas 694.

8. Partnership.

——S. 4 — "Sub-partners" — Whether partners.

Sub-partners are not members of a firm and the existence of a sub-partner does not affect the number of members of a firm for the purposes of S. 4. AIR (Vol 23) 1936 Bom 246: 38 Bom LR 486: 163 Ind Cas 579.

——S. 4 (2) — Partnership — Association — Pool arrangement.

The pool arrangement is not a partnership and that even if it were an association it does not fall under the section where the object of the association is to stifle competition amongst the owners of certain rival concerns. (1936) 60 Bom 800 : 38 Bom LR 408.

——S. 4 (2) — Syndicate formed by four firms — Number of individuals exceeding twenty — Registration, necessity of — 'Partnership business' under S. 4 (2), if constituted — Contract by syndicate with three of the firms — Suit for damages — Maintainability of.

Four different firms consisting of more than twenty individuals entered into a partnership and formed themselves into a syndicate. This was not registered under the Companies Act.

This syndicate entered into a contract with three of the firms, the document providing that the smaller firms should have the option either to buy or to sell 2,000 bales contracted for to the partnership as a whole, the buying price from the association being fixed at Rs. 17 per bundle, there being forty bundles in a bale, and the selling price at Rs. 15 per bundle.

There was a condition that the larger firm was not to sell any bales till the two thousand bales covered by this contract had been sold. The syndicate sued the three firms for damages for faiure to take delivery of some of the bales;

Held, (1) that it was clear from the terms of the agreement that the transaction was not a single venture but was a partnership business within the meaning of S. 4 (2):

Held, (2) that being unregistered and being composed of more than twenty individuals, it was an illegal association which could not, therefore, maintain a suit. AIR (Vol 21) 1934 Bom 361 : 36 Bom LR 786 : 152 Ind Cas 580 (DB).

——S. 4 — Suit for dissolution of partnership and for taking accounts after preliminary decree dissolving the partnership and directing accounts to be taken passed by consent — Plaintiff applying under S. 151, Civil P. C., for vacating decree on ground that partnership between parties was illegal as being unregistered and in contravention of S. 4:

Held that the only remedy was by way of a suit to set aside the decree on ground of fraud. AIR (Vol 20) 1933 Sind 29: 26 SLR 395: 141 Ind Cas 290.

——S. 4 — Partner of an unregistered but compulsorily registerable firm under the Companies Act cannot sue even for dissolution of partnership. 92 Ind Cas 640: AIR (Vol 13) 1926 Nag 241.

9. Person.

——S. 4 — "Persons" whether include registered companies.

Obiter.— It is doubtful whether registered companies cannot be held to be "persons" within the meaning of S. 4, as a registered company is a corporation, and for most legal purposes, can be held to be a person. AIR (Vol 23) 1936 Oudh 56 : 1935 OWN (CC) 1211: 11 Luck 567: 159 Ind Cas 121.

——S. 4 — "Person" — Meaning — Syndicate of ten — Question whether body consist of more than twenty persons one of fact.

The word "person" has not been defined in the Companies Act. It may be that the word com-

prises a number of individuals, such as a Hindu joint family. The question whether a syndicate of ten persons was really composed of more than twenty persons is a question of fact to be decided on the evidence and not on a mere allegation. 126 Ind Cas 305 : 32 Bom LR 389: AIR (Vol 17) 1930 Bom 431 (DB).

——S. 4 — He is to be counted as one member.

Where a person lends his name to a partnership contract, he is a "person" constituting the total number of partners. Behind his back there may be a joint Hindu family or he may be representing a firm consisting of himself and several other members. 95 Ind Cas 152: 48 All 395: 24 ALJ 413: AIR (Vol 13) 1926 All 337 (DB).

——S. 4 — "Person".

The word 'person' can be used to include a number of persons such as joint Hindu family or a varying number of beneficiaries who may from time to time become interested in the trust property. Thus a person figuring in a different capacity in the constitution of a company is to be treated as one member. 78 Ind Cas 441: 22 ALJ 487: 5 LRA Civ 235: 46 All 509: AIR (Vol 11) 1924 All 414 (DB).

——S. 4 — The word "person" in S. 4 denotes individuals and does not include unregistered bodies of individuals. To say that persons forming unregistered companies should be taken as units for the purpose of S. 4 would be to defeat the intention of the Act. 99 Ind Cas 640: 50 Mad 175: 24 MLW 752 : AIR (Vol 14) 1927 Mad 123 : 51 MLJ 667 (DB).

——S. 5.

——S. 5 — Lawful purpose — Investment trust — Gambling in differences on stock exchange.

A company in the nature of an investment trust has the power to buy shares and to sell them again, should it be deemed advisable to do so, but by no stretch of imagination can it be said that gambling in differences in the stock exchange is the legitimate business for an investment trust. AIR (Vol 31) 1944 Mad 536 : (1944) 2 MLJ 85 : 1944 MWN 544 : ILR (1945) Mad 107 (DB).

——S. 5 — Memorandum of Association — Contents of — Articles of Association, reference to — When permissible.

Except in respect of such matters as must by statute be provided for by the memorandum of a company, it is not to be regarded as the dominant document but is to be read in conjunction with the articles of association and in such cases the two documents must be read together at all events so far as may be necessary to explain any ambiguity appearing in the terms of the memorandum, or to supplement it upon any matter as to which it is silent. AIR (V 21) 1934 PC 89 : 65 MLJ 785 : 38 MLW 957 : 148 Ind Cas 654 (PC).

——Ss. 5, 17 — Memorandum and articles of association — Interpretation — Power to issue preference shares as part of original capital — Express power in memorandum — Absence of such power in articles — Validity of issue — Articles — Construction — Directors' power to issue preference shares — "Terms and Conditions," meaning of.

Where the memorandum of association of a company gave power to the company in express terms to issue preference shares as part of the original capital, but in the Articles of Association there was no express provision for issuing preference shares as part of the original capital, though there was express provision as regards any future issue of new shares and the directors issued preference shares as part of its original capital :

Held, that under such circumstances, in the absence of any article clearly restricting the company in that respect, the company was entitled to exercise the powers expressly conferred on it by the memorandum and to issue preference shares as part of the original capital.

While the memorandum must state the amount of capital, divided into shares of a certain fixed amount, provision as to the character of the shares and rights to be attached to them is more properly made by the Article of Association, which may be altered from time to time by special resolution of the company. If equality of the shareholders is expressly provided in the memorandum, that cannot be modified by the Articles of Association. If nothing is said in the memorandum, the Article of Association may provide for the issue of the authorised capital in the form of preference shares; if the articles do not so provide, or do provide for equality inter socios, the power to issue preference shares may be obtained by alteration of the articles. If the memorandum prescribe the classes of shares into which the capital is to be divided and the rights to be attached to such shares respectively, the company has no power to alter that provision by special resolution.

Where the Articles of Association provided that the shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions as the directors think fit :

Held, that the powers conferred on the directors by the Articles of Association included also the power to control the character of the shares and to issue preference shares. AIR (V 20) 1933 PC 39 : 37 MLW 373 : 64 MLJ 277 : (1933) ALJ 405 : 141 Ind Cas 526.

——S. 5 — Presumption.

Where a company is duly incorporated under the Indian Companies Act, the Court should start with the presumption that it is a separate entity from any individual although that individual may practically hold all the shares, but it would not necessarily follow that every alleged transaction between such individual and the company would be valid or that it would represent a real transaction, and S. 92 of the Evidence Act would not prevent Court from enquiring into the truth of the transactions but the onus will be on the Crown. AIR (V 14) 1927 Bom 371 : 29 Bom LR 447 : 102 Ind Cas 49: 51 Bom 372 (DB).

——S. 5 — One man company.

Where a Company is formed by an assessee purely and simply as a means of avoiding super-tax, all the shares herein are owned by the assessee except 3 held by his subordinates and the company ostensibly receives the dividends and interest and hand them over to the assessee as pretended loans the court is entitled to go into the question as to whether the so-called one man company is really a genuine company at all or merely the assessee himself disguised under the legal entity of a limited liability company. AIR (V 14) 1927 Bom 371 : 102 Ind Cas 49 : 51 Bom 372 : 29 Bom LR 447 (DB).

——Ss. 5, 23, 70 and 156 — Suit for wages.

A suit for salary or wages from a company lies against the company and not against its Secretary or the Managing Director. (1913) 43 PWR 1913: 190 PLR 1913: 19 Ind Cas 595.

——S. 5 — Lawful purpose — Proprietors of zamindari forming company — Legality.

It is not opposed to public policy for the proprietors of Zamindari, who were numerous and whose interests were minute, to form themselves into a company if the means adopted for the management of property are beneficial. (1912) 16 CWN 297: 13 Ind Cas 673 (DB).

——S. 6.

——Ss. 6 and 24 — **Memorandum of Association mentioning shares taken by subscriber — Certificate of registration — Effect of — Subscriber, if permitted to prove the contrary.**

Where in the case of a company limited by shares the Memorandum of Association gives the names of the subscribers and opposite each name mentions the number of shares taken by the subscriber as required by S. 6 (3) of the Companies Act, and a certificate of registration is given by the Registrar in respect of that company, the certificate is under S. 24 of the Act conclusive evidence of the fact that each subscriber wrote opposite his name the number of shares he took. The subscriber cannot, therefore, he permitted to prove the contrary. AIR (V 35) 1948 Oudh 197: 23 Luck 210 : 1948 OWN 172.

——S. 6 — **Memorandum of Association — Shipping company — Objects in Memorandum of Association — Acquisition of "personal estate and effects" — Investment of company's money — Bullion purchased and deposited with bank for safe custody — Transaction, nature and validity of.**

A shipping company incorporated under the Companies Act 1913, had in its memorandum of object the following clauses. Clause 3 (g) (3) provided "to acquire and deal with the property following : Plant, machinery, personal estate and effects". Clause 3 (h) (7) provided "to perform or do all or any of the following operations, acts or things: To lend money with or without security, and to invest money of the company in such manner (other than in the shares of this company) as the directors think fit. The company by its directors thought of buying gold and silver. Accordingly they bought the same and kept the same with the Imperial Bank of India, for safe custody. One of the share-holders sued for a declaration that company's action was ultra vires:

Held, that the company's action was intra vires and came within Cl. 3 (g) (3).

(Per Stone, C. J. ; Kania, J. contra).— The action was not an investment within Cl. 3 (h) (7). AIR (V 31) 1944 Bom 131: 46 Bom LR 145: ILR (1944) Bom 247: 214 Ind Cas 205 (DB).

——Ss. 6, 12 — **Scope of — Insertion of place name in memorandum of association — Alteration of place name — Validity.**

The company's memorandum must state the province in which the office of the proposed company must be situate, but once that province has been declared, there is no valid reason why the company should not fix its office anywhere it likes within that province, and change it from time to time, on giving notice.

The insertion of the place name in the memorandum of association of the company does not make it an unalterable condition of the company's constitution and provided the alteration of the place name has been made in the manner provided by the Act, such alteration is valid and binding on the company. AIR (V 24) 1937 Cal 81 : 63 Cal 773 : 167 Ind Cas 689.

——S. 6 — **Interpretation — Memorandum of Association — Interpretation of 'objects clause' — Directors' discretion to approve kind of security as regards investment.**

Among other objects of the company, as stated in the Memorandum of Association, was the object embodied in Cl. 3 (d) of the Memorandum of Association which ran as follows: "To advance money at interest on the security of land, houses, machinery and other property situated in India and to invest money not immediately required upon such securities and bank deposits as may be from time to time determined":

Held, on interpretation that a member of the company was entitled to a declaration that advances of money in the nature of loans shall only be made on the security of land, houses, machinery and other property situated in India but that, so far as the investment of money not immediately required was concerned, the directors had complete discretion in the matter of approving the kind of security offered. AIR (V 22) 1935 Lah 792 : 160 Ind Cas 24 (DB).

——S. 6 — **Memorandum of Association.**

The memorandum of association of a company does not constitute a contract between the company and a third party who may be named therein. AIR (V 21) 1934 Bom 427: 36 Bom LR 907: 59 Bom 218: 156 Ind Cas 80 (DB).

——S. 6 — **Memorandum of Association — Construction — General principles — Antecedent transaction, relevancy of — Trading company — Object of memorandum — Presumption of power to do all ordinary transactions of trade.**

The memorandum of association of a company like any other document must be read fairly and its import derived from a reasonable interpretation of the language which it employs. There is no specially rigid canon of construction to be applied to it.

The purpose of the memorandum is to enable share-holders, creditors and those who deal with the company to know what is its permitted range of enterprise and for this information they are entitled to rely on the constituent documents of the company. The intention of the framers of the memorandum must be gathered from the language in which they have chosen to express it and not from the antecedent transactions of the company to which the share-holders, creditors and others have no access and which they have no means of knowing.

So where the memorandum of association of a company stated it to be one of its objects to carry on the business of manufacturers of and dealers in salt, soda, iodine and other products and that this it may do in any part of the world:

Held, that the business included in ordinary mercantile parlance, the sale of salt to purchasers abroad, though there was no express mention of exportation.

Powers are not required to be and ought not to be specified in the memorandum. In the case of a trading company, the Act intends that the memorandum should define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade.

In the case of a trading and commercial company, prima facie one would expect it to have among its permitted objects all the ordinary transactions of trade, domestic and foreign, in the commodities in which it is established to deal. AIR (V 18) 1931 PC 182: 35 MLW 373: (1931) A LJ 561: 62 MLJ 163: 134 Ind Cas 333.

——S. 10.

——Ss. 10, 12 — Alteration of memorandum.

A prize chit in which those who get the benefit of the drawings get a prize, and the benefit which they get from the drawings gives them different advantages from the persons whose names or numbers are not drawn, amounts to a lottery, and the Court will not grant permission to alter the memorandum of association of a company so as to include within its object the conduct of such prize chits. AIR (V 21) 1934 Mad 482: (1934) MWN 318: 40 MLW 56: 67 MLJ 445: 57 Mad 844: 152 Ind Cas 440.

——S. 10 — Alteration.

General meeting is not a condition precedent to make a proposal to alter Memorandum or Articles. AIR (V 15) 1928 Bom 80: 108 Ind Cas 465: 30 Bom LR 197.

——S. 10 — It is not necessary for the company to take proceedings to alter the Memorandum and the Articles before the Court can sanction a scheme involving alteration of Memorandum or Articles of the company. AIR (V 15) 1928 Bom 80 : 108 Ind Cas 465 : 30 Bom LR 197.

——S. 10 — Revocation of appointment — Court is not bound to confirm special resolution revoking appointment of Agent and Secretary.

One of the clauses in the Memorandum of association of a company was as follows:— "T. R. Venkataraman Ayyar has been appointed agent, principal secretary and director to the Bank and given the powers to enter on the responsibility of this Bank, into any agreement or transaction with the registered Banks in the following places and other places and with business and industrial concerns of local traders with a view to Bank's earning commission or profits". The company by a special resolution altered the clause by revoking the appointment of the said Venkataramana Aiyar and applied to the Court for confirmation of the special resolution under S. 12.

Held, that the clause was not one relating to the objects of the company alterable under S. 12 (1) (a) nor one relating to detail of management but was a clause embodying a very important condition, within the meaning of the term in S. 10.

Held, further that even if the clause could be construed as referring to the objects, the Court had a discretion in confirming it which it ought to exercise having regard to the interests, of various persons concerned and that in the present case, the alteration was of a character, which the Court ought not to confirm. AIR (V 11) 1924 Mad 126: 74 Ind Cas 966: 18 MLW 304: 1923 MWN 568 (DB).

——S. 11.

——S. 11 — Name registered — Effect.

Under the company law, both English and Indian, a company by registering its name gains a monopoly of the use of that name. Even if the company is not registered, the Court will restrain the registration under the Act of a projected new company which is intended to carry on the same business as the unregistered company and to bear a name so similar to that of the unregistered company as to be calculated to deceive the public. AIR (V 29) 1942 Bom 241 : 44 Bom LR 505 : 203 Ind Cas 632 (DB).

——S. 12.

——S. 12 — Transfer of registered office of company from Dominion of India to Pakistan — Power of Court to sanction — Government of India Act, S. 46 (1).

The Companies Act applies only to the Dominion of India, and when S. 12 (1) of the Act speaks of a change of the place of the registered office of a company from "one province to another", it can only mean from one province situate in the Dominion of India to another province so situate. The word "province" must be construed to mean a province as defined by the General Clauses Act read with the Constitution Act now in force in the provinces within the Dominion of India. A Court in the Dominion of India has, therefore, no power to sanction the transfer of a registered office of a company situate in a province within that Dominion to a province in Pakistan, where the special resolution of the company seeking such transfer is passed after the partition of India. AIR (V 36) 1949 Nag 290: 1949 NLJ 237: ILR (1949) Nag 237: 1949 Comp. C. 241 (DB).

——S. 12 — Sanction of Court — Alteration in memorandum of association.

The provision in the memorandum of the company relating to the appointment of a managing agent is merely a detail of management for the purpose of carrying on the business of the company, and a company is entitled to regulate that detail in such manner as it likes without going to a Court for its sanction. The fact that the provision relating to the appointment of managing agent is inserted among objects of the company makes no difference. AIR (V 31) 1944 Bom 76: 45 Bom LR 1075: 214 Ind Cas 42.

——S. 12 — Preferential rights — Modification of.

Where the memorandum of association of a company confers certain preferential rights upon a particular class of shares, the rights become unalterably attached and cannot be modified unless under the provisions for modification of the memorandum of association provided for by any of the sections of the Companies Act. AIR (V 26) 1929 Bom 38: 110 Ind Cas 649: 30 Bom LR 598.

——S. 17.

——S. 17 — Articles of Association — Construction.

The Articles of Association of a bank provided that the executor or administrator of a deceased member shall be the only person recognised by the company as having any title to his share and the company is not bound to recognise the executor or administrator unless he shall have obtained probate or letters of administration, or other legal representation from a duly constituted Court in British India:

Held, that a succession certificate was "other legal representation" within the meaning of the Articles of Association. AIR (Vol 30) 1943 Mad 743: (1943) 2 MLJ 201: 213 Ind Cas 334.

——S. 17 — Articles of Association — Removal of directors — Rule for removal of directors ultra vires.

A rule for the removal of a director framed by the directors of a company under one of its Articles of Association which is procedural only is 'ultra vires'. When the removal of a director was already provided for in one of the articles which required an extraordinary resolution of the company, the directors must act in accordance with that article and cannot rely upon the rule which is 'ultra vires' in support of the removal of a director. AIR (Vol 29) 1942 Mad 737 (1): 55 MLW 532 (1): (1942) 2 MLJ 307: ILR (1943) Mad 291: 204 Ind Cas 557.

——S. 17 — Bank — Articles of Association declaring director's office to be ipso facto vacated if he became incapable of acting — Incapacity, meaning of.

Where an article of Association of a bank declares that the office of a director shall ipso facto be vacated "if he resigns, or for any other reason becomes incapable of acting as a director", the article contemplates resignation or some incapa-

city such as illness, long absence, imprisonment, insanity or any other incapacity. Director's indebtedness to the bank cannot be said to be such an incapacity and is, therefore no ground for his removal. AIR (Vol 29) 1942 Mad 737 (1) : 55 MLW 532 (1) : (1942) 2 MLJ 307 : ILR (1943) Mad 291 : 204 Ind Cas 557.

——**S. 17 — Articles of Association — Articles vesting discretion in directors to refuse to register transfer of share — Directors exercising discretion, if bound to give reasons — Suspicion of mala fides — Remedy of share-holders.**

Where the Articles of Association of a company provides that the directors may in their discretion, refuse to register the transfer of any share to any person whom it shall in their opinion, be undesirable in the interest of the company to admit to membership, and the directors in their discretion refuse to register certain transfers, because they consider the transferee to be "unsuitable for admission as member in the interest of the company" there is no obligation whatever upon them to go any further and to give their actual reasons for having come to that conclusion. Nor, are they to be exposed to suspicion of mala fide by reason merely of the fact that they have chosen to withhold their reasons. The fact that the majority of the share-holders are willing to recognize the transfer is absolutely immaterial. It is true that the Articles of Association is not intended to enable directors to act "arbitrarily or "wantonly." But if a share-holder challenges the undoubted right of directors in a case like this to use their discretion, the burden lies heavily on that share-holder to allege with particularity and to prove such mala fide on the part of the directors as amount to arbitrary and wanton conduct. If the share-holders are dissatisfied with what directors do, their remedy is to remove them in the manner provided by the articles. But so long as a board of directors exists and particular powers are vested in it by the articles, then they are entitled to exercise those powers without interference by the share-holders and it is irrelevant whether the share holders approve of what the directors have done or not. AIR (Vol 28) 1941 All 360 : 1941 AWR (HC) 260 : (1941) ALJ 483 : ILR (1941) All 671 : 197 Ind Cas 860.

——**S. 17 — A company guaranteeing losses incurred by P on behalf of B company — C owner of A company and director of B — C bound to communicate to A company his knowledge of losses incurred by B company — P could sue both companies — A company's account merely in name of B company — P can sue A only.**

Where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies and the knowledge which he has acquired as officer of the one company will not be imputed to the other company, unless he has some duty imposed upon him to communicate his knowledge to the company sought to be affected by the notice and some duty imposed upon him by that company to receive the notice.

Where, therefore, A company guarantees the losses incurred by P on behalf of B company and C is the owner of A company and director of B company, C is bound to communicate to A company his knowledge of the losses incurred by B company.

P can sue both the companies if B company was the principal debtor and A company was the guarantor. But if it was merely the account of A company in the name of the B company, P can sue A alone.

One limited company cannot stand guarantee for the contracts of another limited company without an express power given to the company either in so many words or to be inferred from the general language used. AIR (Vol 28) 1941 Bom 108 : ILR (1941) Bom 273 : 43 Bom LR 53 : 196 Ind Cas 732 (DB).

——**S. 17 — Articles of Association — Persons consenting to become share holders on condition of their suggestions being included in memorandum and articles — Despite non-fulfilment of conditions, usual application for shares and for becoming share-holders signed — Proper time for objecting to become share-holder.**

Where persons consented to become share-holders on condition that their suggestions were included in the memorandum and articles of association, but subsequently it was found that the memorandum and articles of association were different to the draft memorandum and articles of association which had been shown to them and did not embody their suggestions and despite this, they signed the usual application for shares and became share-holders :

Held, that it was not open to them subsequently to object to their being share-holders on the ground of the condition as to alteration of the memorandum and articles of association, not having been fulfilled. The proper time to object was at the time of incorporation of the company. AIR (Vol 28) 1941 Cal 143 : ILR (1940) 2 Cal 175 : 45 CWN 879 : 194 Ind Cas 59.

——**S. 17 — Articles of Association of Insurance Company — Articles 148 and 151 — Construction — Board of directors co-opting six persons as directors until general meeting — At general meeting only two directors re-elected — Co-opted directors held elected by virtue of notional adjournments and notional re-appointment under Art. 148 — Vacancy created by retirement of co-opted director held same as any other.**

Article 148 of the Articles of Association of an Insurance Company provided: "If at any meeting at which an election of directors ought to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up shall be deemed to have been re-elected at the adjourned meeting." Article 151, provided ; "the directors shall have power" at any time and from time to time to elect any other person to be a director of the company either to fill a casual vacancy or as an addition to the board but that the total number of directors shall not at any time exceed the maximum number fixed. Any director so appointed shall hold office only until the next following ordinary general meeting of the company at which he shall retire but shall be eligible for re-election." The board of directors co-opted six persons as directors who were under Art. 151 to hold office only until the next following ordinary general meeting at which they were to retire but could be re-elected. At the ordinary general meeting that followed only two out of the retiring directors were re-elected but nothing was said about the six co-opted directors and no election in their place was either mooted or effected :

Held, that the vacancy created by the retirement of a co-opted director was precisely the same as that created by the retirement of the share-holders' directors and consequently Art. 148 applied to co-opted directors.

Held, also that the provision of Art. 148 not being mandatory, the six co-opted directors must be deemed to have been re-elected within the mean-

ing of Art. 148 by virtue of a notional adjourned meeting and a notional re-appointment. AIR (V 28) 1941 Cal 136 : ILR (1940) 1 Cal 560 : 195 Ind Cas 376.

——S. 17 — Gratuity — **Payment of gratuity to ex-servant not prohibited by articles — General Body, if can sanction it.**

The payment of gratuity to an ex-servant is a matter only relating to the administration and management of the affairs of a company and so long as the General Body acts within the ambit of the Articles of Association, any act done by them in regard to the management of the company will be intra vires and not ultra vires. Even though the by-laws did not provide for payment of a gratuity because under the rules, the Board of Management could not grant it, still it is always open to the General Body to sanction a gratuity which an officer according to the sense of the meeting of the General Body deserved. The fact that the board of management is delegated the power to frame by-laws does not take away the power of the General Body to sanction any payment of gratuity in exceptional cases which have not been provided for by the by-laws as trained by the board of management. The power is always vested in the General Body and by the mere fact of delegation, it cannot be taken away. AIR (Vol 27) 1940 Mad 928 : 52 MLW 417 : (1940) 2 MLJ 488 : 1940 MWN 1004 : 193 Ind Cas 89.

——S. 17 — **Articles of Association — Construction — Preferential dividend, not 'debts' — Distribution of surplus assets.**

The Articles of Association of a Company provided "if the company shall be wound up, the surplus assets shall be applied in the first place, in re-paying to the holders of the preference shares the amount paid up thereon and the residue shall belong to the holders of the ordinary shares" :

Held, that the arrears of preferential dividends could not be treated as "debts" and therefore to be paid out of the assets of the company before the "surplus assets" were ascertained.

A provision in the articles as to how dividends are to be distributed while the company is a going-concern does not per se govern or affect the distribution of surplus assets in a winding up. AIR (Vol 26) 1939 Cal 126 : ILR (1938) 2 Cal 533 : 179 Ind Cas 733.

——S. 17 — **Forfeiture of shares.**

Provisions of forfeiture of shares in Articles of Association are enforceable. (1936) 63 Cal 531.

——S. 17 — **Articles of Association — Interpretation.**

A clause in the memorandum which is not incorporated amongst the objects of the company and does not purport to impose any obligation of service upon the agents but merely provides what remuneration the agents shall receive and merely imposes on the company an obligation as to management, is not a vital part of the constitution of the Company. AIR (Vol 21) 1934 Bom 427 : 36 Bom LR 907 : 59 Bom 218 : 156 Ind Cas 80 (DB).

——S. 17 — **Interpretation — Provisions in articles for execution of deeds by Secretary, Managing Director and Working Director — Mortgage executed by Secretary and Working Director alone — Validity — Rule in Royal British Bank v. Tarquand, applicability of — Constructive notice of articles.**

The Articles of Association of a company provided that 'all deeds' hundis, cheques certificates and other instruments shall be signed by the Managing Director, the Secretary and the Working Director on behalf of the company'. A mortgage deed was executed by the Secretary and the Working Director alone :

Held, that the mortgage deed was invalid and the mere fact that the Managing Director had been dismissed and his services were no longer available to the company could not make execution by the remaining officers any the more valid :

Held, further, that a person dealing with a company must be deemed to have notice of the Articles of Association of the company he is dealing with and the mortgagee was not, therefore, entitled to rely on the principle laid down in Royal British Bank v. Tarquand even though he might have acted in good faith and the money might have been applied to the purposes of the company. AIR (Vol 21) 1934 Mad 579 : 40 MLW 366 : (1934) MWN 252 : 67 MLJ 327 : 151 Ind Cas 932.

——S. 17 — **Meetings — Articles, effect of.**

Quaere. — It is very doubtful if a meeting valid under the substantive law could be invalidated by an Article of Association. AIR (V 27) 1940 Sind 87 : 190 Ind Cas 551.

——S. 17 — **Articles of Association, nature of.**

There is nothing in the Companies Act which requires that Articles of Association must be rigid and may not in themselves provide for varying sets of circumstances. AIR (Vol 27) 1940 Sind 87 : 190 Ind Cas 551.

—S. 18.

—S. 18 — **Articles of Association — Presumption of incorporation of Table A.**

In view of the provisions of S. 18, in the case of a company limited by shares in the absence of proof to the contrary, it must be taken that Table A of the Companies Act has been incorporated in the Articles of Association. AIR (Vol 18) 1931 Pat 44 : 10 Pat 249 : 12 PLT 215 : 130 Ind Cas 534.

——S. 18 — **Table A, Arts. 24 to 26 — Forfeiture of shares — Mere notice of forfeiture is not enough — Subsequent resolution is necessary.**

A notice by the directors of a company requesting payment of a call by the shareholders within six weeks from the date of service of the notice, failing which the shares held by them will be forfeited as provided by the Act, has not by its own force the effect of forfeiting the shares of those who fail to pay the call. Something more is necessary, viz., a subsequent resolution of the directors that the shares of the defaulting shareholders be forfeited.

A declared intention to forfeit not carried into effect or not duly confirmed is no forfeiture at all. Still, if there is power to forfeit and a declared intention to forfeit and the shares intended to be forfeited are treated by the company and the shareholder as forfeited, the company will be precluded from afterwards insisting that no forfeiture ever took place and the shareholder will not be liable to be treated as a contributory. The ordinary rule is that there is no binding forfeiture unless it be declared by the directors and a mere notice of forfeiture does not excuse from payment of class. English case law referred. AIR (Vol 18) 1931 Pat 44 : 10 Pat 249 : 12 PLT 215 : 130 Ind Cas 534.

——S. 20.

—S. 20 — **One article of association providing that number of directors shall be not less than three nor more than four — Another article providing that company may in general meeting increase or reduce number of directors — Power of company to increase maximum number in general meeting.**

Article 109 of the Articles of Association of a company provided that the number of directors shall be not less than three nor more than four. There were no qualifying words like 'until otherwise determined by a general meeting". Art. 126 provided that the company in a general meeting may, from time to time, increase or reduce the number of di-

rectors. A question arose as to the power of the company to increase the number beyond the permitted maximum by an ordinary resolution.

Held: Per Derbyshire, C. J.— The two articles in question must be read together, and they must be read and operated in such a way as not to contravene the provisions of S. 20 of the Companies Act. Reading the two articles together the company may in general meeting from time to time increase the number of its directors from three to four or reduce the number of its directors from four to three by an ordinary resolution. But if it is desired to increase the number of directors beyond four then that is an alteration of the articles and must be done by a special resolution. An ordinary resolution increasing the number of directors beyond four is contrary to the provisions of Ss. 20 and 21 of the Companies Act and therefore is invalid.

Per Gentle, J. — Art. 126 does not relate to an increase in the maximum number of directors but to an increase in the actual number within the permitted maximum and that article has not to be read with Art. 109. Assuming the words in Art. 126 are to be read with those in Art. 109, they do not empower the company to alter the maximum number of directors by an ordinary resolution, but a special resolution. pursuant to S. 20 (1) of the Companies Act, is required for that purpose. (1946) 50 CWN 310 (DB).

——Ss. 20, 20-A — Alteration in Articles, including new clause — Retrospective effect — Effect on members.

Section 20 empowers a company to alter or to add to its Articles, and when altered the new article is as valid as if it had found place in the original article. Section 20-A, which lays down that alterations are not binding on members who have not consented thereto, is limited to two things. (1) requiring a share-holder to take or subscribe for more shares than the number held by him at the date of the alteration, and (2) increasing his liability to contribute to the share capital of, or otherwise pay money to the company. As none of these results follows from the alteration of articles by inclusion of a forfeiture clause, such clause will govern even the shares allotted before its inclusion. (1946) 1946 NLJ 128.

——S. 20 — Articles of Association — Right of company to alter them.

A company cannot deprive itself of the statutory power to alter its Articles of Association either by statement in the articles or by a contract that they shall not be altered. The only limit that is placed on the generality of the terms contained in S. 20 is that the section cannot be used to press or defraud a minority of shareholders or so as to violate any statutory provision or principle of law, but the power like other powers must be exercised fairly and according to law.

A contract between an association and its member was entered into, not for payment of a definite sum but for a sum which had to be ascertained on the basis of the number of claims arising when the member's claim matured. Before the member's claim matured. the contract became unenforceable except as provided by Proviso 2 to S. 52 (1), Insurance Act. The association by convening meetings of its members unanimously passed resolutions making the necessary amendments in the Articles of Association. The member, on the maturity of his claim, contended that he was governed by the articles of the association as they existed on the date of his enrolment and that the association had no power to alter the articles so as to affect his interest :

Held, that as the association which was registered under the Companies Act of 1913 had power to alter their articles in good faith for the benefit of the association as a whole, the alteration was binding on the member particularly when he had notice of the meeting and had said nothing against the irregularity of resolutions passed. AIR (Vol 32) 1945 Nag 187: 1945 NLJ 249: ILR (1945) Nag 599.

——S. 20 — Articles of Association — Alteration in articles — Procedure.

The provisions of the articles of a company form part of the contract between a member or a share-holder and the company and one party to a contract cannot add terms to the contract without the knowledge or consent of the other party. Hence any alteration in the articles cannot in any way be binding upon the member from whom notice of the meeting at which the alteration was made was withheld. AIR (Vol 28) 1941 Mad 354: (1940) 2 MLJ 721: 52 MLW 741: 1940 MWN 1173: 195 Ind Cas 265.

——Ss. 20, 81 — Amendment of articles — No notice under S. 81 — Amendment is ultra vires and invalid.

According to S. 20, the articles cannot be amended except by a special resolution passed at an extraordinary meeting, and due notice of the proposed resolution has to be given; under S. 81, where no such notice is given, the amendment of the articles in invalid and ultra vires. AIR (Vol 27) 1940 Lah 243: 190 Ind Cas 819.

——Ss. 20, 26 — Alteration of articles — Procedure — High Court wrongly confirming alteration without its being first approved by the Local Government — Whether can cancel confirmation.

Where a company registered under S. 26, Companies Act, desires to alter its Memorandum of Association, the proper course for the company is to apply in the first instance to the Local Govt. for the approval of the proposed alterations and, if the Local Govt., approves them "as being consistent with the continuation of the license", then the High Court can entertain the application of the company for the confirmation of the alterations. But where the High Court wrongly confirms the alteration without its being first approved by the Local Govt., the High Court can cancel its wrong order because it is its duty to recall and cancel its invalid order if no right has accrued to any person in consequence of the illegal order. AIR (Vol 24) 1937 All 432: (1936) ALJ 1129: ILR (1937) All 202: 169 Ind Cas 500.

——S. 20, Sch. I, Table A, Regn. 83 — Scope — Articles of Association — Directors — Resolution at general meeting increasing number of directors, validity of — Special resolution, necessity of.

The Articles of Association of a company provided that 'unless otherwise determined by general meeting' the number of directors shall not be less than five or more than nine. The company by a general meeting without a special resolution resolved to increase the number to sixteen :

Held. that the increase in the number of directors did not involve any alteration of the articles and that the resolution passed at the general meeting was valid.

Held, also, that such a provision implied that it was open to the share-holders to vary the number of directors therein referred to without in any way necessitating an alteration in the articles itself and that S. 20, Companies Act did not apply to such a case. AIR (Vol 20) 1933 All 344: (1933) ALJ 290: 55 All 399: 143 Ind Cas 7 (DB).

——S. 20 — Alteration of articles — Notice of meeting — Sufficiency and validity.

In determining whether a notice given by the directors of a meeting gave sufficient notice of the business to be conducted at the meeting, the nature of the articles of the company concerned, the nature of the notice given, and the nature of the business placed before the meeting, must be considered.

If the directors issue a circular in which they refer to certain important alterations, with regard to Cl. X, whereas there are equally important alterations in Cl. Y, it cannot be said that the share-holders have sufficient notice of the proposed alteration in Cl. Y.

The Plaintiff who was a share-holder in the defendant company brought a suit for declaration that certain special resolutions confirmed at two extraordinary general meetings of the company were invalid and void and for an injunction to restrain the company from acting upon them. The ground alleged was that the notice convening the meetings was insufficient. The company was incorporated in 1876. In 1927 the directors desired to recast the Articles of Association and to have a formal agreement drawn up defining the duration and the powers of the managing agents. The changes in the articles in fact increased the powers and lessened the responsibilities of the directors and servants of the company; with regard to the agreement with the managing agents an agreement for compensation was made in the event of the company being wound-up by which the agents were entitled to receive as compensation average bonous for seven years prior to the date of winding up. The managing agents were also given the power to assign or transfer the agency and the company was compelled to employ as agents their transferees or assigns.

None of the changes mentioned above was set out in the notice. On the other hand, the notice, referred only to the holding of shares in joint names, alterations in voting power, provisions for the recording of votes etc., and as regards the agreement with the managing agents, the notice only referred to Cl. 17 of the articles which mentioned the compensation to the agents. It did not state the amount of compensation or the various other powers conferred on them.

Held, that the circular was misleading and calculated to mislead the share-holders into thinking that the proposed business was of a formal nature, the meeting was not duly convened and the resolutions were invalid. AIR (Vol 18) 1931 Bom 354: 33 Bom LR 556: 133 Ind Cas 829.

——**S. 20 — What amounts to.**

The moving or passing of a resolution regulating the business of the members upon the happening of a sudden and unexpected emergency due to unusual rainfall does not amount to an amendment of the Articles of Association. AIR (Vol 17) 1930 All 661 (DB).

——**S. 29 — Terms about debentures — Power to modify terms must be exercised in the interest of a class as a whole.**

To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient even in the interests of the class of debenture-holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by S. 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the Articles of Association. There is, however, this restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle that the power given must be exercised for the purpose of benefiting the class, as a whole, and not merely individual members only. Subject to this, the power may be unrestricted. AIR (V 14) 1927 PC 62 : 101 Ind Cas 897.

——**S. 20 — Director's qualification.**

A joint stock company cannot alter the qualification for its directors by a resolution passed by an ordinary general meeting of the company providing for a different qualification. It can alter the same only by a special resolution as required by S. 20. AIR (Vol 14) 1927 Bom 609 : 105 Ind Cas 541 : 29 Bom LR 1362.

——**S. 20 — Scope — Bona fide alteration not apposed to Memorandum is permissible — Inconsistency with special contract — Contractee, even if share-holder is not bound.**

A share-holder in the company must be taken to know that one of the incidents of membership of a company is that the company may, by adopting the proper method, bona fide alter its articles in a way which may prejudicially affect his interest and provided that the alteration in the article is not inconsistent with the objects set out in the memorandum of Association, and is bona fide made in the interest of the company, the plaintiff, as a share-holder, in ordinary circumstances would be bound by such an alteration. But a special contract may be made with the Company, in the terms of or embodying one or more of the articles and if an alteration of the articles so embodied is inconsistent with the real bargain between the parties the contractee, even though he might be a share-holder in the Company will not be bound. A company cannot break its contracts by altering its articles. The company was a Life Insurance Company. The insured was allotted shares. The insured was entitled under the contract to draw from the company a certain sum on a certain date. In the meanwhile the Company altered its Articles of Association, by which such sums were made payable out of a special fund. At the time that the amount became payable to the insured, that fund was insolvent and was not in a position to clear the debt in a lump.

Held, that the effect of the alteration of the articles was that it involved a fundamental breach of a contract which the company had previously entered into with the insured and in respect of that contract the article was inapplicable. In respect of that contract although the insured was a share-holder in the company, in respect of this debt the directions would not be acting ultra vires in paying the sum out of the general assets of the company which the directors were at liberty to allocate for the purpose of liquidating this and other business claims. AIR (Vol 12) 1925 Cal 690 : 90 Ind Cas 86 : 52 Cal 239.

——**S. 20 — (1882), Ss. 8, 12 and 76 — Memorandum of articles — Special agreement between Directors and Secretary — Absence of — Effect of.**

There must be a special agreement between the Directors and the Secretary to the effect that the latter accepted office under the new articles and the court cannot infer any such agreement from the facts of the case. Anything appearing in the articles of association which does not find a place in the memorandum of association may be altered by special resolution under S. 76 of the Act. (1909). 33 Mad 36 : 5 MLT 290 : 1 Ind Cas 603 (DB).

——S 21.

——S. 21 — **Articles of company — How far constitute contract between members inter se — Whether regulate rights outside company relationship.**

By virtue of S. 21 of the Companies Act, the Articles of a company constitute a contract not only between the company and the members but also between the members inter se. But the contractual force given to the articles by the section is limited to matters arising out of the company relationship of the members as members. It does not extend beyond that and convert the articles into a contract or covenant in reference to rights entirely outside the company relationship, and does not affect or regulate the rights arising out of a commercial contract with which other members have no concern.

Accordingly an article of a company providing for reference of disputes between its members to arbitration in the manner therein specified does not constitute an agreement for arbitration between the members in relation to disputes as to rights which are entirely outside the company relationship and arise out of a commercial contract between individual members in which the other members have no interest. (1949) 53 CWN 505.

——S. 21 (1) — **Scope and effect — Articles of association — If constitute contract between membes inter se — Right of minority share-holder to sue — Company, if proper plaintiff.**

Per Gentle, J. — The articles of association of a company constitute a contract between each member with the other members to observe the provisions in the articles. It follows that when some members of a company, it may be the majority of members do not carry out the terms of that agreement which each has made with all other members to observe and carry out the provisions in the articles but they act contrary to the articles one or more of the other members has or have the right to come to the Court and ask for the agreement to be enforced against those members who have violated their obligations. In a suit by the minority share-holders concerning the affairs of the company, the company properly can, and indeed should be a plaintiff. (1946) 50 CWN 310.

——S. 21 — **Insurance company — Share-holder also policy-holder — Rights and liabilities — How determined.**

Where a share-holder of an Insurance Company is also a policy-holder, his rights and liabilities as a shareholder are quite separate and distinct from those which accrue to him in his capacity as a policy-holder. The first are governed by the Company's articles of association, the application for allotment, the share certificate and so forth, and the second, by the insurance policy. So far as the insurance aspect of the share-holder's rights are concerned, one cannot travel beyond the terms of the policy. Similarly the policy is irrelevant when considering his position as a share-holder in the company except in so far as it may be permissible to look to it for the purpose of resolving ambiguities, if any, in the prospectus, articles or share certificate. (1946) 1946 NLJ 128.

——S. 21 — **Scope — Memorandum and articles, effect of — Contract.**

Obiter — The Memorandum and Articles of Association of a company do not constitute any contract in themselves.

Even if the Memorandum and Articles of Association are held not to constitute a contract in themselves, an implied contract may be proved by the acts of the parties on the terms set out in the Articles of Association of the Company.

Where in pursuance of certain articles acted upon by the company, a share-holder was appointed managing director and acted as managing director for 11 years and he was remunerated in accordance with the terms set out in the articles, the articles constitute an implied contract between the company and the share-holder so as to entitle him to the declaration that he was the managing director of the company. AIR (Vol 29) 1942 Lah 47 : 43 PLR 619 : ILR (1943) Lah 28 : 199 Ind Cas 667 (DB).

——S. 21 — **Scope — Articles constitute contract.**

According to S. 21, the Articles of Association are binding on the company as well as on the members thereof. The Articles of Association constitute a contract inter se amongst the share-holders, and where the articles have been acted upon by the company and the members, the articles constitute an implied contract between the members and the company.

Consequently, where in pursuance of certain articles acted upon by the company, a member was appointed Managing Director of the Bank and acted for eleven years in that capacity, the articles constitute an implied contract between the members and the company, a suit for performance of which lies in a Civil Court. AIR (Vol 27) 1940 Lah 243 : 190 Ind Cas 819.

——S. 21 (2) — **"Debt", meaning of.**

It is no doubt true that money becomes a debt when it is due under the Articles of Association and Memorandum, but money does not become due merely because signatories of the Articles of Association or the Memorandum have undertaken to purchase shares and pay for them. There is a distinction between money which is due and money which is presently due and it is only money which is presently due which can be described as a debt. AIR (Vol 26) 1939 All 739 : 1939 AWR (HC) 746 : (1939) ALJ 950 : 185 Ind Cas 501.

——S. 21 (2) — **Forfeiture of shares — Signatories of Memorandum undertaking to purchase certain shares — No time for payment fixed — Shares, if can be forfeited on failure to pay before date.**

The signatories of the Memorandum and Articles of Association of a certain company undertook to purchase certain number of shares each. There was no term in the Articles of Association or Memorandum by which the signatories contracted to pay any sum on any particular date or any particular time or on demand. The signatories failed to pay the prescribed amount of their shares on or before the date fixed by the directors for payment by the members of the public subscribing for the shares, and their shares were forfeited.

Held, that the amount was not presently due from the signatories and, therefore, their shares were not liable to forfeiture. AIR (Vol 26) 1939 All 739 : 1939 AWR (HC) 746 : (1939) ALJ 950 : 185 Ind Cas 501.

——Ss. 21, 25 — **Articles of Association — Contractual liability — Right of members to inspect and take copies of minute book — Rules under Articles of Association restricting right of inspection of minute book and of taking its copies, if ultra vires — Right to take copies when implied — Member having no particular or special interest — His right to take copies — Suit for injunction restraining Association from preventing members from taking inspection and copies of minute book and for declaration — Declaration when can be granted.**

A power to regulate a right cannot be used to abrogate it, where members have under the articles a contractual right of inspection, that cannot be reduced by the power given to make rules, into a mere right to claim inspection subject to the

Committee's approval. No matter how limited the grounds for refusing inspection might be, making the right of inspection a matter of the discretion of the Committee fundamentally alters the article, for a contractual right of inspection just as a statutory right of inspection can be exercised whatever the motive or interest of the member may be.

But a contractual right of inspection does not of itself imply a right to take copies any more than a statutory right would do. In the case of a statutory right of inspection, the Court will not imply a right to take copies unless the statutory right would otherwise be of no avail, or practically useless. There must be some other circumstance to make it necessary to imply such a term. All the circumstances must be considered before any term is implied. A Court will not imply such a term unless driven to the conclusion that it must be implied, nor will it imply in wider term than is necessary.

The Plaintiffs were members of the defendant Association and under the Articles of Association, were entitled to inspect the records of the proceedings of the Committee "subject to such regulations as the Committee may from time to time deem expedient". The Committee passed certain rules by which the right of inspection was much a matter for the discretion of the Committee and no copies or notes of the minute book were allowed. Plaintiffs brought a suit for an injunction to restrain the defendant Association from preventing the plaintiff from having access to the proceeding books for the purpose of perusal and inspection and from preventing the plaintiffs from making extracts from these books and for declaration. The object of taking copies was to find out as to who was responsible for the embezzlement of certain amount and the plaintiffs had suspected that one of the members of the Committee was the real culprit and rest of the members desired to shield him.

Held, that although a contractual right of inspection did not of itself carry with it any right to take copies the plaintiffs had certain rights on this point under the Common Law and the Committee could not by rules made under the Articles deprive the plaintiffs of such rights. Therefore, the rules on those two points were ultra vires and invalid.

Held, also that S. 21, merely converted the Articles into a contract between the company and its members and must be construed to mean that the plaintiffs though given a right to inspect the minutes could only take copies of them if that were permissible under their Common Law rights, and if it was not necessary to imply any such term in this contract. But as plaintiffs had not shown any particular or special interest than the interest of the other members, he could not take copies of the minutes.

Held, also, that in such cases the claim for declaration could only be granted if a case for an injunction was established. AIR (Vol 25) 1938 Cal 89 : 42 CWN 161 : 178 Ind Cas 861.

——S. 21 — A suit by a company which is not under liquidation for recovery of arreas of allotment money and call money due on shares allotted to the defendant is cognizable by a Court of Small Causes. AIR (Vol 20) 1933 Lah 657 : 34 PLR 592 : 143 Ind Cas 723 (1).

——S. 21 (2) — Share-holder — Unpaid share capital — When can be called — Resolution of directors without notice to share-holders — Whether a valid call.

The Companies Act makes no provision for the exercise of the power to call up unpaid share capital otherwise than in accordance with the Articles of Association and the provisions of Chap. V of the Act. The mere passing of a resolution by the directors without notice of call being served on the share-holders, is no valid call, in the absence of evidence that the notice has been dispensed with by the Articles of Association. AIR (Vol 19) 1932 Cal 716: 59 Cal 1186: 36 CWN 589: 140 Ind Cas 252.

——S. 21 — Articles are contracts.

Though articles of association can neither constitute a contract between a company and an outsider, nor give any individual member special contractual rights beyond those of the members generally, yet they do in fact constitute a contract between a company and its members in respect of their ordinary rights as members. AIR (Vol 15) 1928 Bom 252 : 52 Bom 477 : 30 Bom LR 549 : 110 Ind Cas 33 (DB).

——S. 21 — Amalgamation with another company.

Limited company has statutory right to amalgamate itself with another company and no express power in the Memorandum of Association is necessary for the purpose. AIR (Vol 12) 1925 Bom 49 : 26 Bom LR 987 : 90 Ind Cas 580 (DB).

——S. 21 — Share-holder — Debtor — Charge on shares for debts.

The person owing money to a registered company who becomes a share-holder and bound by the articles of the association, becomes also bound by the provision (where it exists) in the articles by which any debt due by a share-holder to the company is made a first charge on the share. AIR (Vol 6) 1919 Mad 1161 : 22 MLT 520 : 7 LW 114 : (1918) MWN 51 : 43 Ind Cas 508. (DB).

——S. 21 — Company — Contract with a Company— Memorandum and Articles of Association — Commission contract — Contract with promoters.

The Memorandum and Articles of Association of a Company embody only the social contract, that is, a contract between the share-holders inter se and possibly between the share-holders, and the directors, and do not constitute any contract between the Company and its promoters. (1908) 10 Bom LR 141 (143) : 3 MLT 197 (DB).

——S. 22.

——S. 22 — Registration of Life Insurance Company — Effect.

Where a company has been registered under the Companies Act, it is subject to all the provisions of the Act and where it carries on life insurance business, it is in addition subject to the provisions of the Life Insurance Companies Act of 1912. AIR (Vol 21) 1934 Cal 63 (64) : 37 CWN 1159 : 35 Cr LJ 492 : 147 Ind Cas 848.

——Ss. 22, 82 — Alteration of articles — Registration — Alteration to carry on illegal business — Power of Registrar to refuse registration.

Where a company passed a special resolution altering its Articles of Association so as to enable it to carry on the business of another company which had been compulsorily wound up as constituting a lottery, and to grant interest bearing loans by lot, and the Assistant Registrar of Joint Stock Companies refused to register the resolution :

Held, that in registering the alteration of articles under S. 82, the Assistant Registrar had a discretion similar to that which he has under S. 22 in registering the Memorandum and Articles of Association and he acted rightly in refusing to register the resolution. AIR (Vol 20) 1933 Mad 129 (129) : 63 MLJ 917 : 36 MLW 942 : 141 Ind Cas 177 (2..

——S. 22 — Articles of Association — Person dealing with company.

A person dealing with the company must take the articles to be such as appear at the office of the Registrar of Companies to be in force. If the directors propose to do something in excess of their powers thereunder' he is not entitled to assume that their powers have been extended by a special resolution, for such a resolution, if passed, would be registered. AIR (Vol 14) 1927 Cal 299 : 45 CLJ 96 : 100 Ind Cas 875 (DB).

——S. 23.

——S. 23 — Company's legal entity and its rights and rights of individual share-holders must be distinguished — Misuse of powers by directors for their own advantage — Whether has no effect on company.

The distinction should be clearly marked, observed and maintained between an incorporated company's legal entity and its actions, assets, rights and liabilities on the one hand, and the individual share-holders and their actions, assets, rights, and liabilities on the other hand.

Where the directors of a company misuse their powers as directors to their own advantage, their action, as against the company, will be of no effect and the Court will not inquire whether the company derived any benefit from such transactions. AIR (Vol 24) 1937 PC 279 : 170 Ind Cas 545.

——S. 23 — Suit — Share-holder — Right to sue — Proper plaintiff.

It is clear law that in order to redress a wrong done to the company, the action should prima facie be brought by the company itself. The will of the majority of the share-holders is ordinarily the will of the company for this purpose. Where the acts complained of can be ratified by the majority, there is nothing for which the company can sue. The rule that it is the company which must decide whether the litigation should be undertaken, ought, therefore, to be limited to cases where the act complained of is ratifiable. If the majority of its shares are controlled by those against whom the relief is sought, the complaining share-holders may sue on their own names, but must show that the acts complained of are of a fraudulent character or beyond the powers of the company . It is not necessary, as a matter of law, formally to ascertain the views of the majority before proceeding, but nevertheless, if no reason is given for the corporation not being consulted before litigation is undertaken, it must be clearly alleged, and made to appear, that the transaction is fraudulent or ultra vires. AIR (Vol 24) 1937 Cal 645 (646, 647) : 41 CWN 1137 : ILR (1938) 1 Cal 90 : 173 Ind Cas 622 (DB).

——S. 23 — Suit — Chief Officer authorising Secretary to file suit — Suit by Secretary proper.

Where the Chief Officer of a company, under the power given to him by the Articles of Association appoints a Secretary for the management of the affairs of the company and gives to him the power for filing and defending suits for and on behalf of the company and such Secretary, in one of the suits filed by him on behalf of the company describes himself as Secretary of the company, the suit is properly instituted. AIR (Vol 24) 1937 Lah 751 : 39 PLR 173 : 175 Ind Cas 894.

——S. 23 — Companies, status of.

Companies incorporated under the Companies Act are separate legal entities. AIR (Vol 20) 1933 Pat 196 : 14 PLT 149 : 12 Pat 216 : 146 Ind Cas 56 (DB).

——S. 23 — Company and firm — Distinction.

Under S. 23, from the date of registration a corporate body distinct from the members composing it comes into existence as legal entity. Under S. 239, Contract Act, the persons who have entered into a partnership with one another are called collectively "a firm" and though suit may be brought by or against firm in the name of the firm, the general doctrine that there is no such thing as a firm known to the law remains in force. AIR (Vol 18) 1931 Bom 178 : 38 Bom LR 111 : 130 Ind Cas 598 (DB).

——S. 23 — Verification of pleadings.

Provisions of O. 29, R. 1, Civil P. C., are permissive and do not exclude the operation of O. 6, R. 14, Civil P. C., in a proper case to a company. AIR (Vol 18) 1931 Sind 178 : 26 SLR 58 : 134 Ind Cas 1170 (DB).

——S. 24.

——S. 24 (1) — Applicability — Company registered under Part VIII.

Section 24 (1), Companies Act, applies proprio vigore to companies registered under Part VIII of the Act, and a certificate of incorporation is conclusive evidence that all the requirements of the Act in respect of registration have been complied with and that the association is a company authorised to be registered and duly registered under the Act. (1947) ILR (1947) 2 Cal 1.

——S. 24 — Incorporation — Effect on agreements before incorporation.

An agreement entered into by the promoters of a company before incorporation of the company cannot be enforced by the company even though the company has, after its incorporation, adopted and ratified it. AIR (Vol 33) 1946 Cal 23 : ILR (1944) 2 Cal 101.

——S. 24 — Presumption.

Under S. 24, Companies Act, the memorandum of association and the prospectus must be deemed to have been properly signed, registered and presented to the Registrar, and that no evidence can be admitted to the contrary. Under S. 30 a person shall be deemed to have agreed to become a member of the company on his subscribing to the memorandum and on its registration is properly entered as a member. He cannot plead that he subscribed the memorandum subject to any reservation. (1928) 108 Ind Cas 451 : 26 ALJ 347.

——S. 24 — (1882), S. 6 and 41 — Finality of — Matters preceding to registration — Compliance with.

A certificate of incorporation of a company under the Companies Act (VI of 1882) is conclusive as to the fact of incorporation and that all the previous requisites of the Act in respect of registration have been complied with. The statutory condition that the memorandum of association must be signed by seven persons is as much a condition of registration as any other requisition to be found in the Act which is preliminary to registration. 40 Cal 1 : 39 IA 237 : 16 CWN 937 : 23 MLJ 215 : 16 CLJ 642 : 14 Bom LR 1211 : 12 MLT 449 : 5 Bur LT 211 : (1912) MWN 1097 : 10 ALJ 486 : 6 LBR 119 : 16 Ind Cas 70 (PC).

——S. 26.

——Ss. 26, 48 — Income Tax Act — Association incorporated not for earning profits and declaring dividends — Reliefs under S. 48, whether available — Such association whether exempted from income-tax.

An association incorporated under S. 26, as an Association limited by guarantee not existing for earning profits and prohibited under the law from declaring any dividends to its members, and to

which no relief under S. 48, Income Tax Act, is available, is not exempted from being assessed to income-tax. AIR (Vol 23) 1936 All 764 (767) : (1936) ALJ 1085 : 1936 AWR 664 : 58 All 1003 : 166 Ind Cas 38 (DB).

——S. 28.

——S. 28 — Shares — Transfer — Discretionary power of directors to refuse transfer — Interference by Civil Court.

The right of share-holder to transfer his shares in a company is absolute but it can be restricted by contract, which has to be found in the Articles of Association. Even in a case where the power to refuse registration of transfer of shares is conferred on the directors of a company in absolute terms, the refusal must not be arbitrary. Provided they act in a bona fide manner, the directors are not bound to give any reason. But if they give reasons, the Court can examine them, but it will not overrule the decision of the directors merely on the ground that it would have reached a different conclusion. If the directors refuse registration on any wrong principle, their act can be rectified. When consent for the transfer of shares is withheld by the directors for reasons which cannot stand scruitiny, and no objection is raised of a personal kind against him on whom the shares have developed by operation of law, to recognise a power in the directors to refuse the transfer is to countenance an abuse of powers vested in them for the due and efficient management of the company. AIR (V 30) 1943 Mad 743 : (1943) 2 MLJ 201: 213 Ind Cas 334.

——S. 28 — Shares Transfer and transmission, distinction between — Transmission — Lien effect on.

Transfer and transmission of shares in a company are quite distinct from each other. The former is based upon the act of parties; the latter is the result of the operation of law. In the case of a transmission of shares they continue to be subject to the original liabilities, and if there was any lien on the shares for any sums due, the lien would subsist, notwithstanding the devolution of the shares. AIR (Vol 30) 1943 Mad 743: (1943) 2 MLJ 201: 213 Ind Cas 334.

——S. 28, Sch. I, Table A, Art. 24 — Shares — Forfeiture — Condition necessary.

In the case of forfeiture of the shares of a share-holder by the company, a strict adherence to the provisions of the contract between the company and the share-holders is necessary and no forfeiture of property can be made unless every condition precedent has been strictly and literally complied with, a very little inaccuracy being as fatal as the greatest. AIR (Vol 29) 1942 Cal 516: 45 CWN 1075: ILR (1942) 1 Cal 132: 203 Ind Cas 469.

——S. 28, Sch. I, Table A, Art. 24 — Shares — Forfeiture — Necessary conditions.

The failure of the directors to appoint or fix in the resolution the place at which and the persons to whom the call money is to be paid renders the resolution and the notices of calls invalid and ultra vires and there can be no forfeiture of the shares for non-payment of the calls.

A notice requiring payment in respect of calls and allotment money is bad if it requires payment of too large a sum and of sums which are not due and, a forfeiture based upon the failure to pay the allotment money is bad, invalid and ultra vires. AIR (V 29) 1942 Cal 516 : ILR (1942) 1 Cal 132 : 45 CWN 1075 : 203 Ind Cas 469.

——Ss. 28, 34 — Transfer of shares in blank—Death of original transferor — Transferee can fill in the necessary particulars.

Whether it be a matter of agency or authority or contract, the transferee in cases of transfers of shares in blank has the right to fill in the necessary particulars including his own name as transferee and the date of the transfer. After the death of the original transferor, the instrument will be complete after filling the particulars and transferee will be entitled to have his name registered as the holder of the shares in the company's registers. AIR (V 29) 1942 Cal 461: ILR (1942) 1 Cal 122: 45 CWN 1109: 201 Ind Cas 778.

——S. 28 — Transfer of share — Local situation.

The general rule is that the local situation of a share is the place where the share can be transferred on the register of the company. AIR (Vol 26) 1939 Bom 447: ILR (1939) Bom 611: 41 Bom LR 934: 185 Ind Cas 870. (DB).

——S. 28 — Purchase of shares—Conditional purchase—Condition broken — Share-holders' remedy — Acquiescence — Laches.

A person purchased some shares on condition of his being appointed Chairman of the Local Board. He was allotted shares and appointed Chairman but subsequently he was dismissed and thus there was a breach of the condition. But he acquiesced in the position and he continued to remain a share-holder by authorising the company to sell the shares in his behalf, by sending money for the Govt. stamp duty on a transfer:

Held, that the remedy for the breach of the condition by his dismissal was by an action for damages and not in getting his name removed from register of share-holders;

Held, also that he could not get his name removed from the register of share-holders having acquiesced in the position of a share-holder. That even assuming that he was entitled to repudiate the contract to take shares and have his name removed from the register of share-holders, the fact that he lay idle for seven years and took no steps whatever to have his name removed from the register barred any claim of his to have this done. Where there is a right of repudiation, there must also be active steps taken to rectify the share register. AIR (V 23) 1936 Lah 700 : 38 PLR 931 : 17 Lah 793 : 166 Ind Cas 406 (DB).

——S. 28 — Lien on shares of members for debts due from them—Pledge of shares to third party with notice to company — Effect — Pledge by Managing Director — Notice to company, if to be presumed — Pledge after liquidation without permission of Court —Validity.

A company has a lien upon the shares of its members for debts owing by the members to itself. If however a member pledges his shares to some third party as a security for a loan, and the company has notices of the transaction, the company loses its lien for all debts owing by that member to the company subsequent to the knowledge of the company of the transaction. When the Managing Director of the company having all the powers of the Board of Directors pledges his shares though in his private capacity, the company shall be deemed to have knowledge of the transaction. If the pledging transaction is carried on after the company has gone into liquidation and without

obtaining permission of the Court, it is void AIR (V 20) 1933 All 607 : (1933) ALJ 1322 : 55 All 810 : 146 Ind Cas 801

——**S. 28 — Restrictions on transfer — Shares are prima facie transferable.**

But there is no law which precludes the share-holders from contracting for value that they shall each submit to any reasonable restriction which they choose to agree to. A restriction which precludes a share-holder altogether from transferring may be invalid, but a restriction which does no more than give a right of pre-emption is valid. AIR (V 15) 1928 PC 291: 30 Bom LR 1329: 5 OWN 871: 111 Ind Cas 337.

——**S. 28 — Transfer of shares — Necessity for registration.**

To say that the registration of the transferee's name is no part of the contract between the transferor and the transferee, is not the same thing as saying that sale can take place even without registration. AIR (Vol 15) 1928 All 481 : 50 All 695 : 26 ALJ 627 : 115 Ind Cas 616.

——**S. 28 — Court sale — Transferability of shares.**

In the absence of anything in the Articles of Association for bidding the same, a sale by Court of shares held by a member has the effect of transferring the shares to the purchaser; If the contention should be that on a sale by the Court the shares do not pass to the purchaser, the burden is on those who put forward such contention to establish the same by reference to some provision in the memorandum or Articles of Association of the company. AIR (V 15) 1928 Mad 571 : 1928 MWN 42 : 28 MLW 932: 111 Ind Cas 225.

——S. 28 — A transfer of a share cannot take effect without the sanction of the Company. AIR (Vol 14) 1927 Lah 797 : 101 Ind Cas 568 (DB).

——**S.29**

——**Ss. 29, 33 — Benami purchase of shares—Power of Court to recognise trust.**

Though, under Ss. 29 and 33, a registered company is not bound to recognise trust in respect of its shares, it would not prevent the Court from considering the rights of parties and the propriety of dealings made by the company after notice of the trust given by the beneficiary. AIR (Vol 18) 1931 Bom 269 : 33 Bom LR 250 : 133 Ind Cas 241 (DB).

——**S. 30.**

—S. 30 (2)—"Member"—Who is —Membership—Conditions precedent to — Agreement to take shares —Sufficiency.

Every person who comes under the category of members under S. 30 (2) of the Companies Act is one who agrees to become a member of a company and one whose name is entered in its register of members. The section contemplates two things: an agreement and an entry in the register. An agreement alone does not create the status of membership. It is a condition precedent to acquiring such status of membership that the share-holder's name should be entered on the register. A person cannot be a member under S. 30 (2) unless and until, even though he has agreed to became a member, of a company, his name is entered in the register of members in the manner required by S. 31. AIR (V 37) 1950 Bom 149 : 1948 Comp. C 215 : 51 Bom LR 1012.

——**S. 30 — Subscribers of Memorandum of Association—Allotment of shares—If necessary.**

A subscriber of a memorandum of Association becomes by virtue of S. 30, Companies Act a member in respect of the member of shares subscribed by him. In the case of such subscriber, no allotment of shares is necessary nor is the entry of his name on the register of members necessary. AIR (Vol 35) 1948 Oudh 197 : 23 Luck 210 : 1948 OWN 172 (DB).

——**Ss. 30 (2) and 38 — Allotment made and persons added as members of company — Subsequent cancellation on ground of want of sanction of company in general meeting—Rights of members—Directors and members of company same — Effect.**

Where two persons applied for shares in a company at a time when the company consisted of only six members and all of them were directors and each of the applicants was allotted two shares at a meeting of five directors and their names were duly entered on the register of members of the company, the allotments must be regarded as valid and binding on the company. The directors cannot subsequently cancel the allotment on the ground of want of consent of the company at a general meeting as required by one of the Articles of Association. Though the applicants for shares must be deemed to contract on the footing of the Articles of Association they are not bound to inquire into the internal procedure, or what is called "indooor management". They are entitled to assume that the sanction of the company in the general meeting has, in fact been obtained. Addition of their names to the register of members constitute them members of the company according to S. 30 (2).

Moreover, in the circumstances, when the company consisted of only six members who were all of them directors, it would amount to two descriptions of the same body. The fact that one of the members out of the six was absent, is too technical to be considered.

The company cannot alter the register of the members by themselves. Their remedy is to apply to the Court under S. 38. AIR (Vol 33) 1946 Mad 35: (1945) 2 MLJ 432: 58 MLW 578: ILR (1945) Mad 728.

——**S. 30 (2) — Shares — Owner, who is.**

Only a person who is on the register is in the full sense of the word owner of the shares. AIR (Vol 30) 1943 Mad 111: 55 MLW 658: 208 Ind Cas 270.

——**S. 30 — Prospectus changed in material particulars before allotment — Application for shares can be revoked.**

A person is entitled to revoke his application for shares in company when before the date of the allotment, the prospectus of the company is changed in material particulars, e.g., the minimum subscription is reduced from Rs. 40,000 to Rs 10,000. AIR (V 29) 1942 Mad 656: 1942 MWN 475: 55 MLW 521: (1942) 2 MLJ 228: ILR (1943) Mad 133: 203 Ind Cas 243.

——**S. 30 — Fraud — Cases of "fraud upon the minority"— Form of suit by members in minority.**

In cases of "fraud upon the minority" if the wrongdoer has the balance of power, and, therefore, the company does not take action, there are two courses open. The minority may take the risk and boldly use the company's name. The other course, and what has been thought to be the better course, where the wrongful act is supported by the majority, is for the minority share-holders to sue in their own name or as a matter of convenience, for a share-holder to sue on behalf of himself and all the other share-holders. If

however, as generally happens and must happen logically, the wrong-doers are also share-holders, these share-holders, as a matter of course, must be excluded from the category of the plaintiffs, hence the phrase "except those who are defendants." In such cases the primary fraud must be clearly indicated. It is the gist of the action, although no doubt the pleading or the particulars may be so framed as to stress the dominance of the majority and the effectuation of the fraud through that dominance. Where a decision of the directors is attacked on the ground that it is injurious to the company the directors should be parties. Where that act of the directors so impeached has been confirmed and is still impeached on the basis that the directors have got that confirmation by controlling the majority, still those directors should be parties. AIR (Vol 28) 1941 Cal 174: 72 CLJ 458: ILR (1941) 1 Cal 30: 195 Ind Cas 36.

——S. 30 — Expulsion — Company's right to expel member.

Where a company by its resolution expels a member from membership and the articles of the company at the date of expulsion do not empower it to deprive the expelled member of his share, the resolution of expulsion has no effect, as, while the expelled member remains a share-holder, he must also remain a member. AIR (Vol 28) 1941 Mad 354: (1940) 2 MLJ 721: 52 MLW 741: (1940) MWN 1173 : 195 Ind Cas 265.

——S. 30 — Contributories — Father purchasing shares for minor sons—Father contributory—Benami transaction.

In India, the presumption in law is that if a person buys property in the name of another but with his own money, the transaction is benami and that the property in what is bought is in the person whose money was used for the transaction. So where a father with his own money puchases shares of a company for his minor sons and signs the application form on behalf of his sons, the father must be considered as owner of the shares and must be placed on the list of contributories. The same principle applies where the father purchases by transfer shares by signing his minor son's name on the transfer form as transferee through himself. AIR (Vol 26) 1939 Lah 515: 41 PLR 739: ILR (1939) Lah 299: 185 Ind Cas 176. (DB).

——S. 30 — Liability to pay — Condition necessary.

Although in the case of a person who subscribes to the memorandum of association, no separate application for shares is necessary, yet an express allotment of shares to subscriber is necessary in order to give rise to a liability to pay up the value of the shares. The liability to pay up the value of the shares does not arise where there has been no valid allotment of shares to the subscriber. AIR (Vol 26) 1939 Mad 498: (1939) 1 MLJ 534: (1939) MWN 324: 49 MLW 537: 185 Ind Cas 712.

——S. 30, Cl. (2) — Transfer of shares to person as qualification for directorship — Effect — Such person holding out that he is member — Estoppel — Liability.

Where a person has been given shares or shares have been transferred to him, as qualification for a directorship, such a transfer makes the transferee a member of the company within S. 30, cl. (2), and where such person holds out that he is a share-holder and member of the company he is estopped, when the company goes into liquidation, from denying that he is a member or a share-holder, on the ground that the transfer was a mere colourable transaction and cannot object to his name being included in list of contributories. AIR (Vol 23) 1936 Lah 480: 17 Lah 576 : 38 PLR 816 : 163 Ind Cas 670.

——S. 30 — Termination of membership.

The membership in a fund is not terminated by the mere appropriation of the share capital of a member towards the amount due by him to the fund in the absence of any forfeiture. AIR (Vol 23) 1936 Mad 97 : 161 Ind Cas 331 (1) (DB).

——S. 30 — Rights of share-holders — Suit by share-holders — Allegation of illegality — Appeal in general meeting — Exceptions to the supremacy of majority.

Where an action is brought by share-holders, the plaintiffs should distinctly allege the illegality of the act complained of and the impossibility of getting the company to impeach its validity. Mere irregularities committed by the directors cannot give a cause of action to share-holders and entitle them to challenge the validity of the resolutions passed, and the aggrieved share-holders must appeal to the company. This supremacy of the majority is subject to certain exceptions. These come into play (1) where the act complained of is ultra vires the Company; (2) where the act complained of is a fraud on the minority; (3) where there is an absolute necessity to waive the rule in order that there may not be a denial of justice. AIR (Vol 21) 1934 Bom 243: 36 Bom LR 483: 151 Ind Cas 1082.

——Ss. 30, 156 — Signatories to Memorandum — Membership from date of incorporation — Liability —Allotment not made due to default of first directors —Liability, if can be avoided on this ground.

The signatories to the Memorandum of Association of the Company become the first members of the company as from the date of incorporation mentioned in the Registrar's certificate. They are deemed to have agreed to become members of the company and on its registration are to be entered as members in its register of members. But neither this entry nor the allotment of shares is a condition precedent. Each subscriber at once by subscribing irrevocably agrees to take from the company the number of shares placed opposite his signature unless all its share capital has been allotted to other persons. The fact that no shares are allotted to him and that he has ceased to be treated as a member for a considerable time does not relieve him from liability.

The first directors of a company are bound to see if allotment is made. They cannot avoid their liability to pay for the shares by pleading their own default or negligence in not making the allotment of shares to themselves. AIR (Vol 21) 1934 Sind 39: 149 Ind Cas 869.

——S. 30 — Subscriber to memorandum, whether member of Company.

Where a subscriber to the Memorandum of Association of a company fails to pay anything towards the shares it is not necessary to bring a suit for specific performance against him to compel him to take the shares he has agreed to take. By merely subscribing to the memorandum he becomes a member of the company and on his death, his heirs can be placed in the list of contributories in a winding up. AIR

(Vol 20) 1933 All 334: (1933) ALJ 233: 55 All 417: 1 AWR 587: 143 Ind Cas 762 (DB).

——S. 30 — Omission of name in register.

Every subscriber to the memorandum of association becomes a member ipso facto. From the mere omission of the entry of the names of the subscribers to the memorandum in the share register of members it does not follow that the subscribers to the memorandum are not to be deemed to have agreed to become members. The first portion of the first paragraph of S. 30 lays down a rule of substantive law and the second portion lays down a rule of procedure. The subsequent portion does not govern the earlier portion. AIR (Vol 13) 1926 All 550: 48 All 580: 24 ALJ 691: 95 Ind Cas 927.

——S. 30 — (1882), S. 45 — Shareholder — Minor Capacity — Rights and liabilities.

A minor may be a member of a limited company. A shareholder who was a minor at the date of allotment of shares but after attaining majority received dividends and raised no objection to his name being included in the register of members, is estopped from denying as between himself and the company's representatives that he is a shareholder. A registered shareholder has a vested interest in the property of the company and may be liable to pay calls in the future. Being a person entitled to contest the company's affairs, he is bound to bear the burden attached to it. AIR (Vol 1) 1914 Bom 128 (2): 39 Bom 331: 16 Bom LR 730: 27 Ind Cas 335 (DB).

——S. 30 — 'Member' — Shares applied for on conditions — Conditions not fulfilled — Applicant's position.

Where a person subscribed for a share but did not pay the value because the company was not started, he was not a member of the company but was only a creditor. (1913) 35 All 538: 11 ALJ 924: 21 Ind Cas 915. (DB).

—S. 30 — S. 45 of 1882 Act —Memorandum — Articles —Memorandum of association — Signature Surrender — Liquidation — Contributory of the Company.

The applicant signed the memorandum of association of a company and took 40 shares in the company in 1896. In December of the same year one M, the son of the agent of the Company, and himself a director finding that the applicant was unable to pay calls respecting his shares, made entries in the company's book of account purporting to cancel liability in respect of the shares. The transaction was never sanctioned by any meeting of the directors of the company and, when the error of the proceeding was discovered in 1901, the applicant was entered as a member on the company's register of members and notice was sent to him. The company subsequently went into liquidation, and the liquidators held the applicant liable as a contributory of the company.

Held, that the applicant was rightly placed as a contributory of the company, and that the liquidators were not bound by the transaction of 1896. (1905) 7 Bom LR 291 (292).

—S. 31.

—S. 31—Register of share-holders — Person cognizant of his name in register —Laches — Ratification — Loss of right.

When a person knows that his name is included in the register of share-holders of a company and stands by and allows his name to remain, he is holding out to the public that he is a share-holder and thereby he loses the right to have his name removed. If any person whose name is included in the register becomes aware that circumstances are such that if proceedings are brought against the company he would succeed in having his name removed and the register rectified he must do so promptly. He must not stand by and wait and then at a later stage, with knowledge he has been held out to the public as a share holder of the company, seek to have his name removed. It makes no difference in principle where he had applied for shares to be allotted to him by the company expecting to have his name in the share register for that number of shares as allotted and where he is included as transferee, if he had assented to his name being included amongst the share-holders. AIR (Vol 26) 1939 Mad 803: 49 MLW 431: (1939) MWN 666: (1939) 2 MLJ 122: 189 Ind Cas 309.

—S. 31 — Register of share-holders conclusive nature of — Person entered as share-holder treated as such and acting as such — Whether can deny himself the position to protect himself from liability.

The register of share-holders in a company is not absolutely conclusive. But it is necessary not only from the point of view of the law but as a matter of policy to see that it is as conclusive as it can be made consistently with a proper interpretation of the Companies Act. The contesting share-holder is as much estopped from going against the register and disowning liability, as the company would be estopped from questioning his title when once he was put upon the register. When he has been treated as a share-holder and has acted as such, he cannot go back and deny his position. AIR (Vol 23) 1936 Bom 24: 37 Bom LR 904: 60 Bom 297: 160 Ind Cas 638

—S. 31 — Register of members.

When transfer of shares in a company must be effected by a change in the register, the place where the register is to be kept according to law determine the locality of the shares. AIR (Vol 17) 1930 PC 10: 122 Ind Cas 309: 31 MLW 188.

—S. 31 Corporation— Member of the Corporation —Common Law right of member to inspect books of the Corporation — Presidency Banks Act XI of 1876 — Bank of Bombay — Share-holder — Suit by share-holders against the Bank to enforce inspection of the register of share-holders — Allegations of irregularities in the management of the Bank in the election of its Board of Directors and in the advancing of money to Directors — Object of inspection to communicate with other shareholders — Nature of the suit—Issue of Writ of Mandamus, principles of, regulating the right under statute—Common Law right—Absolute right of inspection—Qualified or limited right of inspection.

At common law, members of Corporation have no absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. The privilege of inspection is confined to cases where the member of Corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or subject. Taylor on Evidence, Vol 2, para 1495 approved and foll.

On the application of a member, the King's Bench Division will, in general, grant a rule for a limited inspection of the documents of the corporation, if

it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question pending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The respondent was a holder of one share in the Bank of Bombay. He claimed a right to inspect the register of the shareholders, as absolute and qualified as is that conferred on the shareholders of joint Stock Companies in England by S. 32 of the Companies Act, 1862 or in India by S. 31 of the Indian Companies Act 1866 and S. 55 of the Indian Companies Act, 1882. The appellant refused to recognize that absolute and unqualified right, or to comply with the claim based upon it, but in their letter which conveyed that refusal they informed the respondent that they would be pleased to furnish him with the list he asked for if he would satisfy them that he required it for use in his own interests as a shareholder. In the statement of claim the respondent, for the first time, endeavoured explicitly to base his right and title to inspect copy, and take extracts from, the register on some definite matters in which he himself was interested. He alleged therein that he had observed irregularities in the management of the Bank, in the election of its Board of Directors, in the advancing of large sums of money to its Directors, and in other matters, and that he desired an inspection of the register to enable him to communicate with the other share-holders, and, if possible, obtain their assent to certain resolutions for the better management of the affairs of the Bank and removal of some of the Directors, which he intended to propose at the next general meeting of the share-holders. Held, that the suit was in truth, in its nature, though not in its form, somewhat of the character of an application for a writ of mandamus and the principles regulating the issue of that prerogative writ should apply to a great extent to the granting of the relief prayed for in a suit like the present suit. Mandamus would not be allowed to issue unless the applicant showed clearly that he had the specific legal right to enforce which he asked for the interference of the Court, that he had claimed to exercise that right and none other, and that his claim, had been refused. A writ of mandamus for inspection of registers would not be issued if the object of the applicant is merely to see "if by possibility the company's affairs may be better administered than he thinks they are" and not any definite right or object of special interest to the applicant as distinguished from that of his fellow-members. Held also, that there was no statute conferring on the members of the Bank of Bombay a right to inspect, copy or take extracts from the register of its share-holders or any other document belonging to it, and the only right the respondent could have, therefore, against the Bank in reference to such matters, was that which at Common Law belonged to every member of a corporation. Held, further, that the respondent was not in law entitled to the extended right to which the decree of the Court of appeal declared him to be entitled, and that the limited and qualified right contended for at the trial was never put forward or insisted on before action was brought, ordinary claim based upon it ever refused (1908) 8 MLJ 355: 5 ALJ 453: 10 Bom LR 636: 12 CWN 825: 8 CLJ 103: 32 B 466 (476, 477, 478): 35 IA 130 (PC).

——S. 31—Member, death of — Notice — Rumour.

Notice of the death of a member should be given by a formal communication of the fact to the company by some one authorised to make it as in some way representing the accused. A mere rumour reaching the ears of an official or actual information by one in no way interested in the matter would not cause the company to have knowledge of the fact. (1902) 4 Bom LR 215. (220).

——S. 32.

——S. 32 (2) (g) and Sch. III, Form E—Forfeiture of shares—If limited to non-payment of calls. See ILR (1945) 2 Cal 105: AIR (Vol 36) 1949 Cal 360.

——Ss. 32 and 134 — Prosecution under — Complaint of Registrar—Necessity.

There is nothing in the Companies Act to suggest that the complaint of the Registrar of joint stock companies is necessary before a prosecution of a Company or of a direction can be entertained. AIR (Vol 35) 1948 Cal 42: 229 IC 109: 1947 Comp C. 93: 48 Cr. LJ 236.

——Ss. 32 and 134—Non-compliance with —Liability of directors—"Knowingly and wilfully"—Presumption of knowledge of legal duties — Fraud or dishonesty—If to be proved — Technical character of default — If ground for nominal sentence.

It is clearly the duty of all the directors of a company to see that the particular returns, the list and the summary under S. 32 and the copies of the balance-sheet and profit and loss account are submitted under S. 134 of the Companies Act. It is not open to any director to plead that he had no real control of the affairs or that he was a mere figurehead and that he did not wilfully permit the default. The law presumes that the directors know their duties, and if they make no attempt to see that those duties are carried out, the Court is justified in holding that the directors wilfully and knowingly permit the company to fail to carry out those duties. The fact that owing to their previous default it was impossible for the directors to comply with the requirements of the statute would not absolve them from liability. It is not necessary that there should be fraud or dishonesty on the part of the directors before they can be made liable under these sections. Nor can it be said that because the default is of a technical nature only a nominal sentence is called for. AIR (Vol 35) 1948 Cal 42: 229 Ind Cas 109: 1947 Comp. C. 93: 48 Cr. LJ 236.

—S. 32 — Conviction — Necessary finding.

In the absence of a finding that the conduct of the accused amounted to knowingly or wilfully authorising or permitting the default his conviction under S. 32 cannot be sustained. AIR (Vol 29) 1942 Cal 225: 74 CLJ 367: 45 CWN 1130: 43 Cr LJ 466: 199 Ind Cas 94.

—S. 32 — Conviction of director under S. 76 — Conviction under S. 32 to be dropped. AIR (Vol 29) 1942 Cal 225: 74 CLJ 367: 45 CWN 1130: 43 Cr. LJ 466: 199 Ind Cas 94.

—S. 32 (5) — "Knowingly" and "wilfully", meaning of.

The words "knowingly" and "wilfully" are used in S. 32, with reference only to the officers of the company and not to the company itself. The company is always liable where the return is not sent in; but the officers of the company are liable only if they knowingly or wilfully authorise or permit the default. AIR (Vol 29) 1942 Mad 75: 54

MLW 726: (1941) 2 MLJ 487: 1941 MWN 846: 43 Cr LJ 138: 197 Ind Cas 265.

——Ss. 32, 77 (10), 134 (4) — Conviction of officer of company under — Essentials to be proved—Proof of authorisation, if necessary.

In order that a conviction under Ss. 32 (4), 77 (6) and 134 (4), of an officer of the company may be sustained the only thing the prosecution has to prove is that that particular officer knowingly and wilfully authorised or permitted these defaults. The sections speak also of authorization of those defaults, but it is not necessary to prove that, as the offence is also complete, if the officer of the company knew of the defaults and permitted the defaults. AIR (Vol 23) 1936 Cal 237: 37 Cr LJ 552: 39 CWN 1152: 162 Ind Cas 282.

——S. 32 (4) — Conviction, when legal charge for inconsistent returns—Necessity of proving correctness of previous returns.

An officer of a company cannot be convicted under S. 32 (4), unless it is found that he knowingly and wilfully authorised or permitted the default.

Where in a charge under S. 32 (4), the lower Court found that certain entries did not agree with the figures in papers filed previously and there was no evidence that the previous returns were correct:

Held, that the whole charge failed in the absence of evidence of the correctness of the previous returns. AIR (Vol 19) 1932 Mad 497 (498): 35 MLW 661: 33 Cr. LJ 589: (1932) MWN 1157: 138 Ind Cas 317.

——S. 32— Conviction for default —Default should be intentional and not merely inadvertent.

The words "knowingly" and "wilfully" in S. 32 connote an intentional default. Where the evidence on record does not prove that the directors knowingly or wilfully authorized or permitted the company to make a default in filing with the Registrar of the Joint Stock Companies a copy of the list of shareholders and of the summary described in S. 32, the default is merely inadvertent and not intentional and the accused should not be convicted. AIR (Vol 16) 1929 Lah 836: 122 Ind Cas 88: 10 Lah 521: 1929 Cr. C. 564: 30 PLR 715.

——S. 32—(1882), Ss. 48 and 50— Liability Manager.

Person who acts as Director or Manager of a company cannot refuse in answer to a penalty that he was legally a Director or Manager. The obligation of a company and its directors and managers to forward to the Registrar, the summary and list specified in S. 48 of the Company's Act does not come to an end on the date on which by default. on their part the penalty begins to accrue. Under the Punjab Government Notification No. 3, dated the 23rd February, 1910, the Registrar of the Joint Stock Company can authorize any person to institute complaints of offences. Therefore a complaint instituted against the accused by a clerk acting under the instructions of the Registrar, is good in law. AIR (Vol 3) 1916 Lah 397: 14 PR Cr. 1916: 17 Cr LJ 242: 38 PWR Cr. 1916: 34 Ind Cas 962.

——S. 32 — (1882), Ss. 48 and 50 — Officers of company resigning their posts, but not the directorships —Liability.

The fact that the Managing Director and Chief Secretary of a Company who were prosecuted for an offence under S. 48 and convicted under S. 50 resigned their posts as such, before prosecution was started but not their directorships, will not absolve them from liability. AIR (Vol 1) 1914 Lah 125: 164 PLR 1914: 17 PR Cr. 1914: 38 PWR Cr. 1914: 15 Cr. LJ 300 (2): 23 Ind Cas 508 (2).

——S. 33.

——S. 33 — Share — Equitable assignment—Trust.

A share in a joint stock company is capable of equitable assignment and can, therefore, be a subject of a trust. Section 33 recognises such a trust. (1943) 45 Bom LR 46.

—S. 33 — Wife benamidar share-holder—Suit by company for call against husband.

A company is not entitled to make both the husband and the wife liable for the call money due in respect of the shares even if the wife is a mere benamidar for the husband in respect of the shares. The remedy of the company is against the wife alone whose name is entered in the register of members kept by the company. AIR (Vol 30) 1943 Cal 440 (441): 47 CWN 486: 209 Ind Cas 317.

—S. 33 — Benami purchase of shares—Court is competent to recognise trust. AIR (Vol 18) 1931 Bom 269 (271): 33 Bom LR 250: 133 Ind Cas 241 (DB).

——S. 34.

—S. 34—Transfer of shares—Procedure.

Before a share-holder on the register of the company can get himself removed and another person can come in his stead, both must conform to the regulations of the company. AIR (Vol 30) 1943 Mad 111: 55 MLW 653: 208 Ind Cas 270.

——S. 34 — Transfer of shares—Validity.

When a person who is on the register purports to transfer his share, what he transfers includes the right to get on the register of share-holders and to become a member in his stead. The transfer, therefore must be operative to divest him of this right of his and vest it in the transferee. If he effects a sale which in law is void because it is in favour of a person who is under a legal incapacity to purchase, he does not cease to be the legal owner and he remains on the register and so long as he is there, he is subject to the liabilities attaching to his membership. AIR (Vol 30) 1943 Mad 111: 55 MLW 653: 208 Ind Cas 270.

——S. 34 — Instrument— Transfer without instrument — Legality.

An article of a company conferring power on the directors to transfer shares in spite of the absence of an instrument of transfer, is 'ultra vires'. AIR (Vol 28) 1941 Mad 354: 52 MLW 741: (1940) MWN 1173: (1940) 2 MLJ 721: 195 IC 265.

—S. 34 — Transfer of share — Validity.

An irregularity in a meeting of directors convened for confirmation of transfer of share, for want of notice does not invalidate a transfer duly made. It is enough that at the date of the winding up, there was upon the register a transferee who was legally liable to the company in respect of the shares. AIR (Vol 23) 1936 Bom 24: 37 Bom LR 904: 60 Bom 297: 160 Ind Cas 638.

——S. 34 — Transfer of share—Liability of transferor how long subsists.

Where under one of the Articles of Association of a company the transferor shall be deemed to

remain the holder of the shares which he has transferred under the instrument of transfer until the name of the transferee is entered in the register in respect thereof, a man who executes a transfer of shares remains liable unless and until there is on the list a transferee who is legally liable to the company. Until the transferee's name is entered in the register, the dividends on the shares are also payable to the transferor, for he is deemed to be the holder of the shares until the entry is made. AIR (Vol 23) 1936 Bom 24: 37 Bom LR 904: 60 Bom 297: 160 Ind Cas 638.

——S. 34 — Transfer of shares—Delay in according sanction—Payment of dividend.

There is no authority for the proposition that a slight delay in according sanction to a transfer of shares would justify a payment of dividends to a person not yet entered as a member on the books of the company or that such a delay would make the company liable to an action for damages. AIR (Vol 23) 1936 Lah 207: 38 PLR 742: 159 Ind Cas 766.

——S. 34 — Transfer of shares—Necessary documents properly executed and presented—Company, if can refuse to register on ground of instructions from transferor that he was made to part with shares by misrepresentation.

Where certain shares of a company were transferred and necessary documents properly executed and presented to the company as required by their articles but they refused registration stating that they had been instructed by the transferor that he had been made to part with the shares by misrepresentation:

Held, that the directors were not purporting to act under the powers given to them by the Articles, powers to be exercised in the interest of the company but at the instance of the transferor who had actually signed a request for the transfer and that the shares should be registered in the name of the transferee. AIR (Vol 22) 1935 Lah 123: 37 PLR 24: 152 Ind Cas 1005 (1).

——S. 34—Transfer of shares—Refusal to recognise transfer—Plea that refusal was not bona fide—Burden of proof.

Where by its Articles of Association a company reserves to itself the right of refusing to recognise a transfer of shares if it appears to be against the interest of the company, and an action is brought against the company in respect of non-registration of a transfer, the burden is on the plaintiff to prove that the refusal to recognise the transfer was not bona fide and valid. AIR (Vol 22) 1935 Mad 784: (1935) MWN 798: 69 MLJ 239: 42 MLW 405: 158 Ind Cas 601.

——S. 34 — Transfer of shares— Article giving powers to Company to refuse to recognise transfer made when share-holder is indebted to Company—Interpretation.

The Articles of Association of a Company gave the Company a first lien upon all shares other than fully paid up shares, for moneys due or payable by the share-holder on any account whatever to the Company. The Articles also gave power to the Board of Directors to refuse to register or acknowledge any transfer of shares whilst the share-holder executing the transfer was indebted to the Company on any account whatsoever.

A holder of fully paid-up shares created an equitabe mortgage over his shares in favour of a Bank, while he was indebted to the Company:

Held, that the Article which gave the Company power to refuse to register transfers did not give the Company any right to refuse to register a transfer of shares unless the Company had a lien on those shares, and as the Company had under the Article no lien in respect of fully paid shares, it was not entitled to set up the transferor's indebtedness to it in priority to the claim of the Bank and the Bank were entitled to have the transfer to them registered and their claim to the shares recognised. AIR (Vol 21) 1934 Mad 476: (1934) MWN 554: 40 MLW 99: 67 MLJ 599: 57 Mad 955: 150 Ind Cas 591 (DB).

——S. 34 — Effect of transfer.

Plaintiff sold some shares of a Bank to defendant, but did not take the purchase-money. A deed of transfer was duly executed and signed by the parties and was made over to the defendant to enable him to have his name registered in the books of the Bank in place of transferor. Later on the Bank failed and went into liquidation before the transferee had presented his deed of transfer to the Bank and thus the shares continued to stand in the name of transferor, as before. Held, that the contract was complete on the day that the deed of transfer was signed by both parties and that by virtue of that the defendant stepped into the shoes of the transferor and became an owner of the shares in the company in his place, with all the advantages and disadvantages attached to that status. AIR (Vol 11) 1924 Lah 173: 71 Ind Cas 814 (DB).

——S. 34 — Transfer of shares.

An instrument of transfer of shares of a Company must, both under English and Indian law, be executed by the transferor and the transferee in the form prescribed, and even so it is in the discretion of the Company to recognise or not a transfer whether the same is private or by Court auction. AIR (Vol 10) 1923 Mad 241: 42 MLJ 449: 70 IC 659: 45 Mad 537: 15 MLW 470: 1922 MWN 331: 30 MLT 231 (DB).

——S. 34 — Shares — Transfer — Receipt — Payment on strength of receipt — Subsequent refusal to recognise purchaser — Estoppel

The transferor of certain shares in a company registered under the Companies Act having presented the share certificates and transfer deeds to the company for transfer to the purchaser's name the company granted a receipt stating that the application for transfer had been received and that the share certificates would be returned within a week in the name of the purchaser. On production of this receipt the purchaser paid the money. The company had also entered the name of the purchaser in their books as shareholder though the purchaser did not see it. Subsequently the Company refused to recognise the purchaser as shareholder on the ground that one of the transfer deeds, which was a link in the chain of his title, was forged. On the contention that the company was estopped by their receipt, which had been acted upon by the purchaser.

Held, that the company was not estopped.

Per Jenkins, C. J.:— There is no estoppel because the receipt is no more than a certification that the transferor has applied for transfer and does

not involve any representation as to the title of the transferor. Per Russel. J. — No estoppel arises until the share certificates are handed to the purchaser with his name duly entered thereon, and the wording of the receipts which are not signed by either the company or its chief clerk does not impart to the transaction that certainty wh.ch is necessary to found an estoppel. (1901) 3 Bom LR 846: 26 Bom 54 (71, 75) (DB).

——**S. 36.**

——**S. 36 (3) — Inspection of register — Judge's power — Mandatory injunction, grant of.**

The provision in Cl. (3) of S. 36 authorising the Court to compel immediate inspection in no way leads to the conclusion that the jurisdiction of the Court to order a copy of the register of members to be given is either expressly or impliedly barred. The provision as regards immediate inspection being ordered by the Court was presumably inserted in the Act with a view to provide for those contigencies in which the Court, for sufficient reasons, is satisfied that the purpose of the inspection will be frustrated unless immediate inspection is ordered.

Although ordinarily mandatory and perpetual injunctions can be granted only on a regular suit being filed, but injunctions to ensure compliance with the mandatory provisions of the Companies Act can be granted only by the Court having jurisdiction under that Act. A Company Judge having jurisdiction under the Act is, therefore, competent to direct a Company by a mandatory injunction to comply with the provisions of S. 36. Clause 2 of the rules framed by the Allahabad High Court under the Companies Act, indicates that ordinarily proceedings for the enforcement of the provision of the Companies Act, are to be initiated by petition presented to the Court having jurisdiction under the Act. AIR (Vol 23) 1936 All 568: (1936) ALJ 478: 58 All 988: 1936 AWR 465: 164 Ind Cas 387 (DB).

——S. 38.

1. Application for rectification.
2. Application — Parties to.
3. Appeal.
4. Court, power of.
5. Questions relating to title.

1. Application for rectification.

(a). General.
(b). Forfeiture of shares.
(c). Omission.
(d). Rectification proceedings.

(a). General.

——S. 38 — Scope — Register of members — Rectification — Procedure — Power of company to alter register, apart from S. 38. AIR (V 33) 1946 Mad 35: 224 Ind Cas 450: 1946 MWN 460.

——**S. 38 — Registration — Transfer in firm name.**

The Companies Act does not contemplate the registration of the name of a firm as the holder of its shares, but only individuals or other legal entitles. An application is therefore not maintainable when the transfer is made in the firm name of a partnership concern and not in the name of any person. AIR (V 31) 1944 Oudh 318: 1944 AWR (CC) 261: 1944 OWN (CC) 436.

——**S. 38 — Rectification of register — Share register — Removal of name — Allegation of breach of duty — Suit for damages for wrongful removal — Proper parties — Crown — Transfer of shares by legislation and Orders in Council — Claim for rectification of register — Proper procedure — Petition of right.**

G was the registered holder of certain preference and common stock of the Grand Trunk Railway Company of Canada. By orders in Council the stocks of the Grand Trunk were vested in the Minister of Finance in trust for His Majesty. Subsequently an amalgamation took place between the Canadian National Railway Company (a company incorporated in the year 1919 by Special Act of the Parliament of Canada 9 and 10 Geo. V, Ch. 13), and the Grand Trunk, as a result of which a company came into existence which also was called the Canadian National Railway Company. Under the amalgamation agreement, the Minister surrendered the stocks in question to the new company for cancellation and received from the new company one share for the value of the stock surrendered. G presented a petition claiming that the legislative enactment, Orders, in Council and agreements in connection with the transaction were void and asked for rectification of the register of the Grand Trunk Company. He also claimed damages for breach of duty in removing his name from the Grand Trunk:

Held that the first claim which, that for declaration being a claim against the Crown could only be prosecuted by petition of right and the exchequer Court of Canada alone had jurisdiction in the matter.

Held, also that as the claim for damages was not against the Crown, the action should be allowed to proceed.

To an action for damages against the defendant companies, founded upon some alleged breach of duty in removing the name of the plaintiff from the stock registers, the person whose name has been substituted on the registers for that of the plaintiff need not, indeed ought not, be joined as a defendant. The claim is not for rectification of the stock register; i. e., the relief sought is not the substitution of the plaintiff on the register as owner of stock in the place of some other person; to proceedings which seek to enforce such a claim as that, other person would be a necessary party. The claim is merely one in the nature of a claim for damages; and to an action to enforce such a claim, he is not a proper party. AIR (Vol 23) 1936 PC 212: 163 Ind Cas 547.

——S. 38 — S. 184 incorporates S. 38, under which inter alia if the name of a person is fraudulently or without sufficient cause entered in the register of members of a company, the person aggrieved or any member of the company may apply to the Court for rectification of the register — Exercise of this jurisdiction is discretionary. AIR (V 23) 1936 Bom 24: 37 Bom LR 904: 60 Bom 297: 160 Ind Cas 638.

——**S. 38 (1) — Rectification of register — Entry in register not made fraudulently or without sufficient cause.**

Where the contributory has failed to show that his name was entered in the register fraudulently or without sufficient cause under S. 38 (1) he cannot be granted an order for rectification of the share register by deleting some of the shares standing against his name. AIR (Vol 23) 1936 Bom 24: 37 Bom LR 904: 60 Bom 297: 160 Ind Cas 638.

——**Ss. 38 and 107 — Rectification of Registrar — Table A — Dividends, to be paid out of profits.**

The Directors of Company declared no dividend for several years, but purchased shares of the Suratee Co., Ltd., out of the profits and credited the shares so purchased to the reserve fund. At a meeting of the shareholders, it was resolved that the amount standing to the credit of the reserve fund be retransferred to the profit and

loss account, and a certain amount be distributed as bonous amongst share-holders. Forty-eight shares of the Suratee Bara Bazzar Company, Ltd., were transferred to one of the share-holders out of the reserve fund account but the Suratee refused to register the transfer on the ground that it was ultra vires.

Held, that the reserve fund represented undivided profits and not capital, and that the company should rectify its register of members by entering the name of the transferee in the register of members. AIR (V 6) 1919 LB 48: 11 Bur LT 156: 49 Ind Cas 288.

——S. 38 — (1882), S. 58 — **Company — Register of shareholders — Rectification — Company not guilty of default or unnecessary delay — Liquidation — Liability of transferee as contributory.**

A company went into liquidation before the transfers lodged with it for registration were approved of by the Board of Directors and the names of the transferees substituted in place of the applicant on the register of the share-holders. In the liquidation proceedings on the contention that the register should be rectified by the court.

Held, that as the applicant had not shown any absence of sufficient cause or any default or unnecessary delay on the part of the company in dealing with the transfers, his contentions could note prevail. AIR (V 2) 1915 Bom 1: 40 Bom 134: 17 Bom LR 342: 28 Ind Cas 983 (DB).

——S. 38 — **Rectification of register — Discretion.**

A person who claims to have been misled by fraud or false representation into taking shares in a company, should raise the objection without delay. The power to take summary action under S. 38 is discretionary. AIR (V 2) 1915 Lah 100: 110 PLR 1915: 249 PWR 1915: 29 Ind Cas 770 (1).

——S. 38 — (1882), S. 58 — **Transfer of shares — Articles of Association — Powers of Directors — Lien — Waiver — Reasons for refusal to register.**

The registration of a transfer of shares sanctioned by one Director of a company is not invalid. When one of the articles of association of a company declared a company's lien on all the shares of each member for his debts to the company but provided that unless otherwise agreed, the registration of a transfer of shares shall operate as waiver of the company's lien on these shares, and the company registered a certain transfer.

Held, that the company is estopped from claiming a lien on the shares transferred for debts due by the transferor and cannot refuse to register a transferee from such transferee. A refusal to register transfers should not be arbitrary, capricious or wanton. The court can and should consider the ground of refusal where these are disclosed. (1912) 5 Bur LT 271: 6 LBR 152: 18 Ind Cas 481.

——S. 38 — (S. 58 of 1882 Act) — **Suit by a share-holder — Jurisdiction — Right to vote in meetings of share-holders — Cause of action when not allowed to vote.**

At a meeting of the share-holders of a company, certain of the share-holders were, according to the decision of the majority of those present, not allowed to vote and those share-holders instituted a suit for a declaration that they were entitled to vote at the meetings of the company.

Held:— That the plaintiffs had a cause of action although their names might not have been struck off from the list of share-holders and that there was nothing in the Companies Act to exclude the jurisdiction of ordinary civil courts in such a suit. (1906) 10 CWN 906 (908) (DB).

(b). Forfeiture of shares.

——S. 38 — **Forfeiture of shares for non-payment of unpaid call money after further notice which is shorter than that required by the articles of association — Irregularity makes the forfeiture voidable at the instance of share-holder — Application for rectification of register of the company — Limitation — Limitation Act (IX of 1908), Art. 120 is applicable — Long delay in making application causing prejudice to company — Re-allotment of forfeited shares to others — Effect on right to relief — Share-holder a private limited company consisting of only two persons struck off the register under S. 247 of the Companies Act as that company had ceased to function — Notice of forfeiture addressed to, after that date — The two share-holders taking no steps to have a restoration of their company for a long time — Conduct of the share-holders in standing by if affects the company's right to question the forfeiture.**

There is a distinction between the accrual of the power of a company to forfeit shares and the exercise of that power. When there is a default in the payment of a call after notice was issued and the date fixed for payment has expired the power to forfeit is complete.

Where, as part of the exercise of that regulations of the company require a notice to be given naming a further day which is not earlier than the expiry of 14 days from the date of the notice on or before which the payment required by the notice is to be made and that in the event of non-payment of the unpaid call money before the time fixed the shares would be liable to be forfeited, but the notice is actually shorter by one day, the irregularity makes the forfeiture voidable at the instance of the share-holder.

An action under S. 38 of the Companies Act for rectification of the register does not fall within the purview of either Art. 48 or Art. 49 of the Limitation Act as such an action is not for detenue or trover though shares or other interest of a member in a company is movable property under S. 28 of the Companies Act In the absence of any specific article, the only alternative is to apply the residuary Art. 120 of the Limitation Act.

Where a period of limitation is prescribed for a suit or proceeding mere delay is no bar unless it is of such a character as to lead to an inference of abandonment of the right or unless it is established that the person against whom the action or proceeding is instituted was actually prejudiced by reason of such delay.

Where the conduct of the shareholder amounts to standing by to see whether the company would ultimately turn out sufficiently profitable to make it worthwhile to assert his claim as shareholder, he will not be entitled to relief especially where the company had parted with the forfeited shares to others on the footing the forfeiture was void and also there was a reduction in the capital with the approval of the Court.

Where such share-holder is a private limited company consisting of only two shareholders and at the date of forfeiture that company had been removed from the register under S. 247 of the Companies Act as that company had ceased to function and the two shareholders merely stood by without taking steps to restore the company and to question the validity of the forfeiture for nearly five years, that company is affected by the conduct of its share-holders. In such a case the tendency of modern decisions in England is to "lift the veil of corporate personality" and disregard the corporate form. The conduct

of the two shareholders disentitled the company to claim rectification of the register.

In any event as the forfeited shares had been re-allotted to others the property is not available and it is impossible to compel the company to deliver possession of the specific movable property. The only right in such an event of the party injured is to claim the value of the property. But in a proceeding under S. 38 of the Indian Companies Act, the Company can only be ordered to pay damages when their register is ordered to be rectified, and not otherwise.

Further, the Court cannot order rectification of the register in respect of the particular shares in the absence of the third parties (to whom they had been allotted) whose rights will be affected by the rectification. Authorities discussed. ILR (1950) Mad 339 : (1949) 19 Comp Cas 138 : 62 LW 635 : 1949 MWN 424 : (1949) 2 MLJ 38 (DB).

——S. 38, Table A, Art. 28 — Forfeiture of shares after calls have become time-barred — Suit for money due in respect of forfeited shares:

Held, that the suit was not maintainable. AIR (Vol 20) 1933 Oudh 285 : 10 OWN (CC) 447 : 8 Luck 723 : 146 Ind Cas 825 (DB).

(c) Omission.

——S. 38 (1) (a) — Omission of name, what is.

Striking out or expunging a member's name from the register is an omission of his name within the meaning of S. 38 (1) (a), Companies Act. AIR (Vol 28) 1941 Mad 354: (1940) 2 MLJ 721: 52 MLW 741: (1940) MWN 1173: 195 Ind Cas 265.

——S. 38 — The expression "omission" in S. 38 may be inapt to cover cases of refusal to register. AIR (Vol 15) 1928 Mad 571: 1928 MWN 442: 28 MLW 932: 111 Ind Cas 225 (DB).

——S. 38 — (S. 58 of 1882 Act) — Improper entry or omission in register.

Capricious and unreasonable action of directors — Rectification of register: See (1902) 12 MLJ 439: 26 M 79 (85).

(d) Rectification proceedings.

——S. 38 — Applicability and scope — Rectification of register — Burden of proof — What applicant has to prove.

Apart from S. 184 of the Companies Act under which a power of rectification of the register of members is given limited to cases where it is required in pursuance of the Act, the only section which empowers the Court to rectify the register in S. 38 of the Act. An applicant for rectification under S. 38 of the Act must establish some omission on the part of the company. It is not sufficient for him to contend or to prove that there was an omission on the part of the purchasers of the shares to get their names registered as members of the company. Nor is it sufficient to impute the knowledge with regard to the change of ownership of the shares to the Chairman of the Board of Directors of the Company or to the Secretary. Something much more has to be established before it can be held that the Company was in default in not making the necessary alterations in its register. The applicant has to bring home to the Company an omission which in law would amount to a sufficient cause within the meaning of S. 38 (a), or would amount to default or unnecessary delay within the meaning of S. 38 (b).

What the applicant has to establish is that there was fault only on the side of the Company in not registering the sharers which it ought to have done. In the case of an omission appearing by reason of the fact of a person having ceased to be a member not being entered in the register, it is necessary to show that default has been made or unnecessary delay has taken place on the part of the Company keeping the register.

In all other cases, it is enough to show that the name of some person is fraudulently, or without sufficient cause, entered in, or omitted from, the register kept by the Company. The evidence in every cause must thus be directed to the acts or omissions of the Company. AIR (Vol 37) 1950 Bom 217: 52 Bom LR 40 (DB).

——S. 38 — Members' names removed from register by directors on ground that they were illegally added — No permission to do so from Court — Removal is illegal.

The register of the members of a company is public document and there is no provision in the Companies Act which permits the directors of a company or any officer of a company to make any alteration to the register e.g., removing names of certain members on the ground that they had been improperly added to the register. The remedy of the company is to apply to the Court under S. 38 for the rectification of its register and not to take upon itself to alter the register. AIR (Vol 33) 1946 Mad 35: ILR (1945) Mad 728: (1945) 2 MLJ 432: 58 MLW 578.

——S. 38—An order to put transferee's name on the company's register is necessarily an order to take transferor's name off. An order for rectification of company's register cannot be made in an action to which the transferor is not a party. AIR (V 15) 1928 PC 291: 30 Bom LR 1329: 5 OWN 871: 111 Ind Cas 337.

——S. 38 — Suit for rectification.

The remedy of a transferee of a share is not limited to making an application to the District Court for rectification of companies' share register under S. 38, Companies Act but he has a right to bring a suit to get his name registered in respect of the shares purchased by him and where the case is a complicated one, an action should be brought. AIR (Vol 15) 1928 Mad 571: 1928 MWN 442: 28 MLW 932: 111 Ind Cas 225 (DB).

2. Application — Parties to.

——S. 38 — Application under S. 38 — Directors of company are not necessary or proper parties.

A share holder has no right to remove a director from the possession and custody of any property when he himself is claiming entry on the register of members by recourse to the provisions of S. 38. As a matter of law, the directors of a company who are in charge of the management and business of the company are not necessary or proper parties to an application made under S. 38. AIR (Vol 33) 1946 Lah 193: 48 PLR 1 (DB).

——S. 38 — Objection to removal of name — Mortgagee of the uncalled share capital can oppose.

If a share-holder applies to have his name removed from the register of members, the mortgagee of the uncalled share capital can oppose the application, Though persons are not entitled to an order ex debito justitiae, the discretion of the Court under S. 38 is unlimited and should be used according to the circumstances of each case. AIR (V 7) 1920 Cal 789 : 60 Ind Cas 946: 47 Cal 901 (DB).

3. Appeal.

——S. 38 — To an action for damages against the defendant companies, founded upon some alleged breach of duty in removing the name of the plaintiff from the stock registers, the person whose name has been substituted on the registers for that of the plaintiff need not, indeed ought not, be joined as a defendant. The claim is not for rectification of the stock register; i.e., the relief sought is not the substitution of the plaintiff on the register as owner of stock in the place of some other person; to proceedings which seek to enforce such a claim as that, that other person would be a necessary party. The claim is merely one in the nature of a claim for damages; and to an action to enforce such a claim, he is not a proper party. AIR (Vol 23) 1936 PC 212: 163 Ind Cas 547.

——S. 38 — C. P. Code, S. 100 — Conditions for right to appeal under S. 38 of the Act.

A direction by the lower court of an issue for trial involving a question of law, and a decision actually arrived at on such issue are necessary for a right to appeal under S. 38 of the Act, and the appeal from such a decision can be based on the grounds mentioned in S. 100 C. P. C. The proviso to S. 38 must be read with reference to all the clauses of the section. A purchaser of shares at an execution sale has no right to compel the transfer of the shares to his name by the company, there being no difference between a private purchaser and a purchaser at a court sale. AIR (Vol 3) 1916 Bom 147: 41 Bom 76: 18 Bom LR 982: 37 Ind Cas 666 (DB).

4. Court, power of.

(a) General.

(b) Jurisdiction.

(a) General.

——Ss. 38, 184 and 156 — Scope and effect — Rectification of register — Powers of Court — Liability as contributory of person whose name is on the register — Nature and extent of — Omission to rectify register — Effect.

The power given to the Court to rectify the register of members of a company, under S. 184, Companies Act, is limited to those cases where rectification is required in pursuance of the Act. S. 38, provides for two cases in which rectification may be made by the Court, namely.

(1) where the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members; and (2) where default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member.

It is perfectly clear that if there is no rectification of the register, then the liability of a member of the company in the event of its being wound up arises under S. 156 of the Act. That liability is not ex contractu but ex lege.

It is because the name of a person appears on the register of a Company that he becomes liable as a contributory without rectification of the register; he is a member of the Company, and as such his liability is absolute under S. 156. AIR (Vol 37) 1950 Bom 217: 52 Bom LR 40 (DB).

——S. 38 — Powers of Court — Scope of — Power to appoint receiver to manage property pending application.

The jurisdiction of the Court under S. 38 of the Companies Act is a limited one. The only relief that can be granted under this section is the one concerning rectification of the register and in some cases payment by the company of damages sustained by any party aggrieved.

The Court cannot grant any relief under this section regarding the management of the property of the company or for conducting the business of the company. It has, therefore, no jurisdiction to appoint a receiver to take over the management and business of the company and also take over possession of its property pending the decision of the application under the section.

The provisions of O. 40, R. 1 read with S. 141, C. P. Code, cannot be applied to an application made under S. 38 of the Companies Act. It is, however, not possible to endorse the view that in no case under the Companies Act except a debenture-holder's action, can a receiver be appointed to take up the business of the company and the management of its property and its attairs pending the decision of the Court in that litigation.

Several cases can be visualised when a company judge may exercise such a power under the provisions of O. 40, R. 1, read with S. 141, C. P. Code, or ex debito justitiae. AIR (Vol 33) 1946 Lah 193: 225 Ind Cas 362: 48 PLR 1 (DB).

——S. 38 — Rectification of register — Articles of Association providing that directors can decline to register without assigning reasons — Directors exercising the power capriciously or unfairly — Court's interference.

The directors of the company are not bound to disclose their reasons for rejecting a transferee provided that they had fairly considered the question at a meeting of the board; in the absence of evidence to the contrary, the Court would take for granted that they acted reasonably and bona fide.

But if there is evidence to show that the directors who have such a power have exercised it capriciously or unfairly, the Court has jurisdiction to interfere in spite of the fact that the Articles of Association provide that the directors can decline to register without assigning any reason. AIR (Vol 31) 1944 Oudh 318: 1944 AWR (CC) 261: 1944 OWN (CC) 436.

——S. 38 — Discretion — Mere delay, whether ground in itself to refuse to order rectification of register.

A mere delay in applying is not in itself a ground for refusing to order the register to be rectified under S. 38, Companies Act.

Section 38 Companies Act, gives the Court the widest discretion as to costs.

A number of shares of a certain company were transferred by the owner thereof in 1927 to some person. The transferee applied under S. 38, in 1938 for the rectification of the share register of the company by placing the transferee on the register as the owner of the shares transferred to him:

Held, after considering the affidavits and counter-affidavits of the parties that the Court should in this case exercise the jurisdiction under S. 38, in favour of the transferee, in spite of the delay and order the company to rectify its register by placing the transferee on the register as the owner of the transferred shares. AIR (Vol 26) 1939 Pat 603: 5 BR 659: 20 PLT 703: 181 Ind Cas 734.

——Ss. 38, 3 — Rectification of register — Proper authority.

Quaere. — The jurisdiction conferred on the High Court in company matters is the jurisdiction to deal with matters provided for by the Act and it is very doubtful whether an application to rectify the register for which no provision is made in the Act can properly be brought before the Judge who is dealing with company matters. AIR (Vol 24) 1937 Cal 81: 63 Cal 773: 167 Ind Cas 689.

——S. 38 — "Without sufficient cause," meaning — Articles of Association — Literal interpretation — Effect.

A member of a Company and those claiming through him are bound by the Company's Articles of Association; in any case in which the company and its directors literally and bona fide carry out the provisions of the Company's Articles of Association, it or they can never be said to be acting 'without sufficient cause.' It is a misreading of those words in S. 38, to suppose that they confer upon the Court jurisdiction to make a roving inquiry as to whether what has happened is desirable or even reasonable.

Where by the contract of membership restrictions and conditions have been imposed in the articles themselves and those restrictions and conditions are insisted upon by the company the company cannot in insisting upon them be held to act 'without sufficient cause', within the meaning of S. 38. AIR (Vol 23) 1936 Rang 52: 162 Ind Cas 127.

——S. 38 — Register — Power to rectify.

The power to order rectification of the register of a company is entirely a matter of discretion for the Court. It ought not to be exercised when the only object of the application is to save the expense of taking out Letters of Administration and of legal transfer of the shares to the applicant's name. AIR (Vol 7) 1920 LB 50: 12 Bur LT 194: 55 Ind Cas 751.

(b) Jurisdiction.

——S. 38 — Judge exercising jurisdiction under S. 38 has no jurisdiction to appoint Receiver to take over management of company — O. 40, R. 1 (i), Civil Procedure Code does not apply.

As the power of a company Judge under S. 38, Companies Act, is a limited one and that power has been conferred for granting a relief to a share-holder in his individual and personal capacity and not in his collective capacity as representing the company or as a person interested in direct management of the affairs of the company, in exercise of that power the Court has no jurisdiction to take over the administration of the affairs of the company and to entrust it to a Receiver. Provisions of O. 40, R. 1 (i), Civil P. C., cannot, therefore, be applied to applications made under S. 38 Companies Act. AIR (Vol 33) 1946 Lah 193: 48 PLR 1 (DB).

——S. 38 — Jurisdiction of Civil Court.

The jurisdiction of Civil Courts to decide questions falling within the purview of S. 38 is not excluded. AIR (Vol 15) 1928 Lah 234: 108 Ind Cas 192.

——S. 38 — (1882), S. 58 — Jurisdiction — Registration of name.

One of the articles of the association of a company provided that the transferee of a share should be a proper person to transfer the share to his name. A transferee applied for registration of his name and the agent of the company refused peremptorily to register the transferee's name and the company approved the action of the agent. The transferee applied to the Court for rectification of the company register substituting his name in place of his transferor.

Held, that the Court had jurisdiction to determine whether the transferee had a right under the articles to get his name registered and, to determine whether he was a proper person. (1912) 14 Bom LR 919: 17 Ind Cas 640 (DB).

5. Questions relating to title.

——S. 38 (3) — Procedure — Registration as share-holder.

A person cannot be registered as a share-holder of a joint stock company unless he has presented to the company the share script accompanied by a transfer form duly stamped and executed by the transferor and the transferee. AIR (Vol 32) 1945 Bom 149: ILR (1945) Bom 334: 46 Bom LR 782: 219 Ind Cas 204 (DB).

——S. 38 — Questions of title.

Under S. 38 the District Judge is not obliged to decide a question of title but if he does decide or directs an issue to be tried, appeal will lie in the manner provided by S. 100, C. P. C., AIR (Vol 9) 1922 All 258: 65 Ind Cas 291: 44 All 151: 19 ALJ 937 (DB).

——S. 40.

——S. 40 — More than year elapsing since registration as share-holder — Winding up — Share-holder becoming member under improperly stamped instrument is contributory — Instrument cannot be admitted into evidence or acted upon. It is too late to fall back upon the illegality of the transfer and to urge that the share-holder is not to be treated as a contributory. AIR (Vol 31) 1944 Pat 226: 23 Pat 18: 218 Ind Cas 202 (DB).

——S. 40 — Contributions — Father purchasing share for minor sons — Benami transaction — Father is contributory. AIR (Vol 26) 1939 Lah 515: 41 PLR 739: ILR (1939) Lah 299: 185 Ind Cas 176 (DB).

——S. 40 — Presumption — Persons entered as share-holders — Power to vote.

Section 40, provides that the register of members shall be prima facie evidence of any matters by this Act directed or authorised to be inserted therein. Where, therefore, the names of certain persons are found on the register as share-holders, it should be taken for granted that these persons are qualified as share-holders and as long as they remain on the register, they are entitled to vote on the resolution for the reduction of capital of the company. AIR (Vol 23) 1936 Cal 326: 40 CWN 661: 63 Cal 503: 165 Ind Cas 408 (DB).

——Ss. 40, 83 and 240 — Entries in document of company — Presumption of truth.

All entries in documents of a company are presumed to be true. The onus lies heavily upon those who assert to show that the entries are incorrect and had been made fraudulently or without sufficient cause. AIR (Vol 22) 1935 Lah 157.

——S. 40 — Presumption — Onus.

Where the name of a person is entered in the register of members of a company under S. 40, the onus is on him to prove that he is not a member. AIR (Vol 20) 1933 Lah 1016 (2): 35 PLR 142 (2): 147 Ind Cas 575 (1).

——S. 40 — Presumption — Entry as member in company's books.

Where a person's name is entered in the register of members of a company the entry casts onus on him to prove that he was not duly a member of the company. AIR (Vol 20) 1933 Lah 108: 33 PLR 973: 142 Ind Cas 704 (2).

——S. 40 — Allotment — Application for allotment of shares — Notice of allotment to applicant, necessity of — Winding up before giving notice — Right to recover money deposited with interest.

The mere entry of a share-holder's name in the Company's register is insufficient to establish that an allotment of shares was in fact made. An application for shares is an offer and like any other offer must not only be accepted but the acceptance must be communicated to the person making the offer. AIR (Vol 20) 1933 Mad 320: 64 MLJ 130: (1933) MWN 157: 37 MLW 808: 56 Mad 391: 141 Ind Cas 120.

——S. 40 — Evidence of membership.

The register of members is prima facie evidence of membership and the burden of proving allegations as to conditions and failure to send notice of allotment is on the person alleging. AIR (Vol 13) 1926 Lah 414: 8 LLJ 240: 27 PLR 842: 95 Ind Cas 252.

——S. 48.

——S. 48 — Forfeiture — Member cannot surrender his share and company cannot accept the surrender except as forfeiture.

The principle applicable to cases of surrender is that a surrender is good if it amounts to a forfeiture. It is not open to share-holder to surrender at will his share and it is not open to a company to accept surrender of shares unless the act of the company can be brought within the rules relating to forfeiture of shares. To hold that a company can by a resolution of its directors accept surrender of shares would be to allow a company to reduce its capital at its pleasure. AIR (Vol 15) 1928 Lah 240: 107 Ind Cas 594: 29 PLR 119.

——S. 48 — A share-holder whose shares are forfeited ceases to be a member but a share-holder who surrenders his share does not cease to be a member. AIR (Vol 15) 1928 Lah 240: 29 PLR 119: 107 Ind Cas 594.

——S. 50.

——S. 50 — Suit for declaration that defendants are not share-holders on ground of invalidity of resolution authorising allotment of new shares is not competent. Even if such a suit is competent, the absence of prayer for consequential relief brings the suit within the mischief of the proviso to S. 42, Specific Relief Act, and makes the suit bad. AIR (Vol 19) 1932 Cal 714: 36 CWN 638: 140 Ind Cas 76 (DB).

——S. 54.

——S. 54 — Memorandum of Association — Alteration, what is.

To vary the conditional rights and privileges given to various classes of shares by the memorandum does not amount to an alteration of the conditions contained in the memorandum, because one of the conditions in the memorandum is that the rights & privileges are subject to variation. To hold otherwise would be to ignore the condition in the memorandum providing for variation in the rights for the time being attaching to particular classes of shares. In order to ascertain the rights attaching to particular classes of shares, the memorandum must be read and given effect to as a whole, unless any particular provision of the same violates an express provision of the Statute, in which case that particular provision will be treated as invalid. AIR (Vol 22) 1935 All 310: (1935) ALJ 527: 1935 AWR (HC) 559: 57 All 810: 156 Ind Cas 1088 (DB).

——S. 54 — Memorandum of company — Alteration, what amounts to.

Resolution sweeping away rights and privileges of ordinary and deferred shares and leaving both with same rights does not require sanction of Court and is valid — Proposal to make these in one class involves consolidation of different classes of shares. Such consolidation modifies the condition of the memorandum. AIR (Vol 22) 1935 All 310: 1935 AWR (HC) 559: 57 All 810: (1935) ALJ 527: 156 Ind Cas 1088 (DB).

——S. 54 — Applicability — Company proposing to abolish existing classes of shares and to creat new classes of shares — S. 54 does not contemplate such a mode.

A company limited by shares incurred loss and its paid-up capital to the extent of three crores and fifty lacs was lost or was unrepresented by available assets. The company accordingly proposed to reduce and reorganise its share capital and with that view duly passed and confirmed a special resolution whereby the existing twenty lacs preference shares of Rs. 10 each were to be converted into twenty lacs ordinary shares of Rs. 10 each and the existing forty lacs ordinary shares of Rs. 10 each into forty lacs of deferred shares of Re. 1 each. The company petitioned the Court to sanction the reorganisation of the share capital under S. 54.

Held, that such scheme of reorganization was not a scheme for dividing shares into different classes but a scheme for the total abolition of the existing classes and creation of fresh classes of shares. S. 54 applies only to two modes of re-organizing share capital, namely (a) the consolidation of shares of different classes into shares of one class, and (2) the division of shares of one class into shares of different classes, and had no application to a re-organisation of this type. AIR (Vol 14) 1929 Bom 38: 110 Ind Cas 649: 30 Bom LR 598.

——S. 54 — Special privilege.

Company's capital divided into preference and ordinary shares — Memorandum of association excluding preference share-holders from participating in surplus assets in the event of winding up — Such exclusion confers special privilege on ordinary shares within proviso to S. 54 (1). AIR (Vol 16) 1929 Bom 38: 110 Ind Cas 649: 30 Bom LR 598.

——S. 54-A.

——Ss. 54-A and 55 — Forfeiture of shares otherwise than for non-payment of calls — Legality. See ILR (1945) 2 Cal 105: AIR (Vol 36) 1949 Cal 360.

——S. 55.

——S. 55 — Surrender of shares by share-holder — Permissibility.

Under the Companies Act, it is not open to a share-holder to surrender the shares held by him, or to the company to accept the surrender, unless the act of the company can be brought within the rules

relating to forfeiture of shares. A surrender of share amounts to a reduction of capital and under S. 55 of the Act the share capital of a company limited by shares can be reduced only if so authorised by its Articles, and subject to confirmation by the Court. To reduce the share capital of the company in violation of the provisions of S. 55 is illegal and cannot be recognised. AIR (Vol 35) 1948 Oudh 197: 23 Luck 210: 1948 OWN 172 (DB).

——S. 55 (1), Sch. I, Table A, Regs. 8 to 11 — Purchase of its own shares in execution of a money decree against a debtor — Validity — Provision in articles of association for lien on shares — Sale without intervention of Court — Effect.

Where a company in execution of a money decree attached and purchased its own shares held by its debtor, on August 3, 1935.

Held: The provisions of S. 55 (1) of the Companies Act (VII of 1913) and Regulation 8 of Table A applied and the sale was a nullity if the amount which was bid at the sale in execution of the decree exceeded the amount due under the decree. If the amount bid was the amount due under the decree and no more, the matter will not be free from doubt. However the judgment debt must be regarded as part of the assets of the company and the position is exactly the same as if money belonging to the company had been actually paid into Court.

But if the articles of association provide that the company will have a lien on the shares held by the person indebted to the company it could sell such shares in exercise of such lien without the intervention of the Court and title of the purchaser will not be affected by any irregularity or invalidity in the proceedings by virtue of Reg. 11 of Table A. 225 Ind Cas 224: 12 BR 579: AIR (Vol 34) 1947 Pat 40: 1947 Comp. C. 17.

——S. 55 (1), Sch. I, Table A, Regs. 8 to 11—If company can purchase shares of members in execution of its money decree against them — Provisions for lien on shares.

Where in execution of a decree obtained by a bank against its share-holder on a hand-note, the bank puts them to sale and itself purchases the shares, if the amount which is bid at the sale exceeds the amount due under the decree, the sale is a nullity under Reg. 8 of Sch. I, Table A. If the amount of bid is the amount due under the decree and no more, the judgment-debt must be regarded as part of the assets or of the funds of the company and the position is exactly the same as if money belonging to the company had been actually paid into Court. Moreover, on general principles, a company cannot become a member of itself. The sale is therefore a nullity.

But where the Articles of Association provide for a lien on the shares of debtors to the company, it could sell such shares in exercising the right of lien without intervention of Court and even where no notice was given as required by Reg. X the title of the purchaser will not be affected by any irregularity or invalidity in the proceedings in reference to the sale.

Even where the liability of a share-holder or his legal representatives under a hand-note had been converted into a liability under a decree and it was no longer possible to realize the amount by execution, nevertheless the debt itself remains, although owing to lapse of time, no steps could be taken to recover it through the Courts. As the debt remains the lien also continues. Under the contract, the company can, without a suit, sell the shares and mere lapse of time does not extinguish the lien. Where however, recourse to the Courts is necessary for enforcement of the lien then the company will be unable to obtain relief due to lapse of limitation. AIR (Vol 34) 1947 Pat 40: 225 Ind Cas 224: 12 BR 579: 1947 Comp C 17.

——Ss. 55, 56 — Scope — Court's powers under S. 56 — Matters Court can consider — Reduction, when can be confirmed.

In an application under S. 56, Companies Act the validity of the resolution cannot be questioned. The Court is only concerned to confirm the proposed reduction and not resolution. The only questions, therefore, to be considered are: 1. Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares in the Company? 2. Is the reduction fair and equitable as between the different classes of share-holders. Where the reduction is shared equally by all the share-holders who are all of one class and is designed to work justly and equitably not involving diminution of any liability in respect of an unpaid capital or payment to any share-holder of any paid-up capital and there is evidence regarding the loss of capital and non-representation of available assets there is nothing to prevent the Court from confirming such reduction.

Where along with the resolution as to reduction of capital, another resolution for the increase of capital by issue of new shares is passed and this fact is stated in the application under S. 55 with a prayer for the sanction of the new scheme of organization but the same is subsequently withdrawn, objections on behalf of the objecting share-holders, that the new share-holders would be placed in a better position than the existing and expressing same fear for the future, do not fall to be considered under S. 56, since the Court's function does not extend to the exercise of a paternal care of the share-holders of a company so as to make it interfere in the internal management of a company acting within its powers. AIR (Vol 26) 1939 Rang 417: 186 Ind Cas 431.

——Ss. 55, 81 — Reduction of share capital — Share-holders deciding by resolution to reduce capital of company — Application for sanction — Company entitled to reduce capital — Resolution not ultra vires.

On December 21, 1936, a notice was issued for the meeting of the share-holders of a private limited company to be held on December 30, 1936. The notice purported to call an ordinary general meeting of the share-holders. Amongst others, the following item was on the agenda: "(6) Definite proposal by the chairman of the company regarding the reduction of assets and capital of the company for consideration." Eight out of the nine share-holders of the company were present at this meeting. The ninth had died before the notice was issued and his legal representatives had not yet obtained a succession certificate in order to entitle them to take part in the proceedings. An objection was taken that the balance-sheet, which was also to be considered at the meeting, had not been properly circulated. As a result, the meeting was adjourned to February 21, 1937. Another notice was issued on February 6, 1937, to convene

the adjourned meeting on February 21, 1937. In this notice the meeting was designated as an extraordinary general meeting of the share-holders of the company. Practically the same agenda was repeated. The same eight share-holders were present at this meeting. One of the share-holders however, walked out soon after because he raised an objection to the balance-sheet and wanted the objection to be recorded but the chairman would not do so. The remaining share-holders continued the meeting. By a notice dated February 23, 1937, another extraordinary general meeting of the share-holders was called for on March 10, 1937. It was summoned in order to confirm the reduction of capital agreed upon by the meeting of February 21, 1937. The reductions proposed were confirmed subject to the sanction of the Court of the Judicial Commissioner. An application under S. 55, Companies Act, was presented to the Judicial Commissioner's Court for giving the required sanction. It was contended that 21 days' notice as required by S. 81 (as amended) not having been given, the meeting of February 21 was not validly held and the resolution passed there were ultra vires:

Held, (1) the meeting of December 30, 1936, was regularly called because seven days' notice was given for it and this was all that was required to be done by the law then in force (S. 81 of the old Act read with Art. 63 of the Articles of Association of the Company); (2) that the meeting of February 21, 1937, was clearly a continuation of the meeting of December 30, 1936, because the latter meeting had been validly adjourned to the former date under Art. 67 of the Articles of Association of the Company; (3) that the fact that S. 81, Companies Act, was amended in the meantime had no effect on the meeting of February 21, 1937, so far as the procedure for convening it was concerned, and (4) that the resolutions passed at the meeting of February 21, 1937, were, therefore, in order. The argument that the meeting of December 30, 1936, was summoned as an ordinary meeting and was, therefore, not one called under S. 81 of the Act had no substance in it. The agenda clearly indicated the object of the meeting and the share-holders understood full well that they had met to consider the reduction of capital. No objection was raised at the meeting on the ground that it was an ordinary meeting & not an extraordinary meeting It followed that the omission to name it as an extraordinary meeting in the notice dated December 21, 1936, had no importance at all and did not vitiate the proceedings. The meeting of March 10, 1937, would have been necessary if the old Act remained in force, but the old Act was no longer the law when the meeting of February 21, 1937, was held. Consequently the confirmatory meeting was unnecessary, and the logical result was that the decision of the meeting of February 21, 1937, became final on that very day.

Conduct of the company in the matter of lending money to share-holders criticised. AIR (Vol 25) 1938 Pesh 41: 177 Ind Cas 368.

——S. 55 — Sanction — Application for reduction of share capital — Principles governing sanction.

Where a company presents an application under S. 55, to the Court for sanction to a proposal relating to a reduction of the share capital of the company, the principles applicable are:— 1. That the company has the power to reduce its capital much more so if the power is conferred by the Articles of Association. 2. Subject to confirmation by the Court which is the safeguard of the minority, the question of reducing capital is a domestic one for the decision of the majority. 3. The company is to determine the extent, the mode and incidence of the reduction. 4. The company may reduce the share capital of all its share-holders pro rata or may reduce the shares of any individual share-holder or any class of share-holders wholly or in part. 5. That the Court has to see that interests of the minority have been protected and no unfairness has been shown to it. 6. That in doing so the Court should keep in view the consideration that the decision has been arrived at by business men who are fully cognisant of their necessities and are the best custodians of their interest and should, therefore, be slow to interfere. AIR (Vol 25) 1938 Pesh 41: 177 Ind Cas 368.

——S. 55 — Petition for reduction of capital — Proof of loss of capital — Necessity of.

It is not always essential or necessary for the Court when a petition for reduction of capital is made, to satisfy itself that there has been a reduction of capital. The only serious question with which the Court is concerned is whether or not the company had duly passed its special resolution to the effect that the capital should be reduced.

But where a reduction of capital is based on the ground that capital has been lost or unrepresented by available assets, it is always prudent to proceed on some evidence. That is a sound procedure and one which ordinarily should be acted upon. Where, in opposing the petition a person accepts the statement of the company that there had been a loss of capital as stated by the Managing Director, the Court should act upon the assumption that there is evidence of loss of capital. AIR (Vol 23) 1936 Cal 327: 40 CWN 661: 63 Cal 703: 165 Ind Cas 408 (DB).

——S. 55 — Return of capital.

Per Lord Russel of Killowen:— "A limited company not in liquidation can make no payment by way of return of capital to its share-holders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its share-holders must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus" of any other name, it still must remain a payment or division of profits." AIR (Vol 17) 1930 PC 302: 1930 ALJ 1347: 32 MLW 881 (PC).

——S. 55 — Unsanctioned reduction.

Per Allison, J. — No action resulting in the reduction of the capital of a company with limited liability should be permitted unless the reduction is effected under statutory authority or by forfeiture in strict accordance with the procedure, if any, laid down in that behalf in the articles of association. Any reduction of capital contrary to this principle is illegal and ultra vires. AIR (Vol 17) 1930 Bom 267: 54 Bom 178: 32 Bom LR 87 (DB).

——S. 55 — Where by its articles, a limited company enabled persons who had subscribed for shares of Rs. 100 to sever all connexions with the company on payment of Rs. 84.

Held, that this being a reduction of capital without the assent of the Court was opposed to the Companies Act, S. 55, and that such an article was also ultra vires of the memorandum. 120 Ind Cas 71: 52

Mad 915: 30 MLW 1049: 1929 MWN 783: AIR (Vol 16) 1929 Mad 773: 57 MLJ 814.

——S. 55 — A company can accept a surrender of shares from a share-holder only under the conditions and limitations applicable to the case of forfeiture of shares and even in such a case it will be a case of forfeiture and not of surrender. 83 Ind Cas 94: 20 MLW 74: 1924 MWN 582: AIR (Vol 11) 1924 Mad 703.

——S. 55 — Surrender of shares.

The mere fact that the articles of association of the company authorised the Board of Directors to accept surrender of shares cannot validate the surrender if it did not take place in circumstances which would have justified forfeiture. (1928) 110 Ind Cas 421 (Lah).

——S. 55 — (1882), S. 249 — Companies Act (1886) — Buying in shares.

Neither S. 249 of the new Act, nor the old Act prevent buying in of shares nor do they expressly empower the company to do so. Hence a provision in the articles that a share-holder should give notice to Directors of his intention to sell his share is ultra vires. (1912) 14 Bom LR 521: 16 Ind Cas 49.

——S. 55 — Corporation — Member of the Corporation — Common Law right of member to inspect books of the Corporation — Presidency Banks Act (XI of 1876) — Bank of Bombay — Share-holder — Suit by share-holders against the Bank to enforce inspections of the register of share-holders —— Allegations of irregularities in the management of the Bank in the election of its Board of Directors and in the advancing of money to Directors — Object of inspection to communicate with other shareholders — Nature of the suit — Issue of Writ of Mandamus, principles of, regulating the right under statute — Common Law right — Absolute right of inspection — Qualified or limited right of inspection.

At Common Law, members of a Corporation have no absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. The privilege of inspection is confined to cases where the member of a Corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or subject. Taylor on Evidence, Vol. 2, para 1495, approved and followed. On the application of a member, the King's Bench Division will, in general, grant a rule for a limited inspection of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question pending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The respondent was a holder of one share in the Bank of Bombay. He claimed a right to inspect the register of the share-holders of the Bank, and to be supplied with a list of such share-holders, as absolute and unqualified as is that conferred on the shareholders of Joint Stock Companies in England by S. 32 of the Companies Act, 1862 or in India by S. 31 of the Indian Companies Act, 1866, and S. 55 of the Indian Companies Act, 1882. The appellant refused to recognize that absolute and unqualified right, or to comply with the claim based upon it, but in their letter which conveyed that refusal, they informed the respondent that they would be pleased to furnish him with the list he asked for if he would satisfy them that he required it for use in his own interests as a share-holder. In the statement of claim the respondent, for the first time, endeavoured explicity to base his right and title to inspect copy, and take extracts from, the register on some definite matters in which he himself was interested. He alleged therein that he had observed irregularities in the management of the Bank, in the election of its Board of Directors, in the advancing of large sums of money to its Directors and in other matters, and that he desired an inspection of the register to enable him to communicate with the other share-holders, and, if possible, obtain their assent to certain resolutions for the better management of the affairs of the Bank and the removal of some of the Directors, which he intended to propose at the next general meeting of the share-holders.

Held, that the suit was in truth, in its nature, though not in its form, somewhat of the character of an application for a writ of mandamus and the principles regulating the issue of that prerogative writ should apply to a great extent to the granting of the relief prayed for in a suit like the present suit. Mandamus would not be allowed to issue unless the applicant showed clearly that he had the specific legal right to enforce which he asked for the interference of the court, that he had claimed to exercise that right and none other, and that his claim had been refused. A writ of mandamus for inspection of registers would not be issued if the object of the applicant is merely to see "if by possibility the company's affairs may be better administered than he thinks they are" and not any definite right or object of special interest to the applicant as distinguished from that of his fellow-members.

Held also, that there was no statute conferring on the members of the Bank of Bombay a right to inspect, copy, or take extracts from the register of its share-holders or any other document belonging to it, and the only right the respondent could have, therefore, against the Bank in reference to such matters, was that which at Common Law belonged to every member of a corporation.

Held further, that the respondent was not in law entitled to the extended right to which the decree of the court of appeal declared him to be entitled, and that the limited and qualified right contended for at the trial was never put forward, or insisted on, before action was brought, or any claim based upon it ever refused. (1908) 8 MLJ 355: 5 ALJ 453: 10 Bom LR 636: 12 CWN 825: 8 CLJ 103: 32 B 466 (476, 478): 35 IA 130 (PC).

——S. 59.

——S. 59 — Under the English Law, a 'share' is regarded as a chose-in-action. But in India a 'share' is not a chose-in-action. AIR (Vol 30) 1943 Mad 74: 55 MLW 428: (1942) 2 MLJ 120: 1942 MWN 450: ILR (1943) Mad 115: 205 Ind Cas 210 (DB).

——S. 67.

——S. 67 — Decree directing Company to furnish accounts — Transfer in the meanwhile to a Limited Company — Effect of decree on Limited Company:

Where a decree directs a company to furnish accounts, and the company in the meanwhile transfers its business to a limited company the latter company is not bound by the decree, as it is a distinct legal person, and the decree does not operate beyond the date of such transfer. (1904) 7 Bom LR 107: 29 B 107 (124, 125) (DB).

——S. 70.

——S. 70 — Company entered into contract with A and supplied goods — B received and utilised goods — Suit and decree against A for price — Decree unsatisfied — Another suit against both making B liable for price — S. 70, does not apply — Liability of A and B whether joint and several — Suit against B not barred.

A company entered into a contract with A and supplied goods. B received and utilized the goods. The company filed a suit for the price against A alone and got a decree which could not be executed. It was found that A entered into the contract on behalf of B. The company thereupon brought another suit making B liable for the price alleging that B was so liable under S. 70, Contract Act:

Held, that S. 70, has no application to the case.

Held, further that the liability of A and B was joint and several and the fact that a decree had been obtained against A did not bar the subsequent suit against B. (1936) 163 Ind Cas 331: 62 Cal 612: 39 CWN 461 (DB).

——S. 70 — Debt contracted for necessaries by person partially entitled — Binding nature of debt on person really entitled.

In the absence of fraud or collusion, charges incurred by a person who was claiming the estate wholly for himself though really entitled only to a portion of it (according to a decree of the High Court under appeal) while in charge of the estate and necessary for the maintenance of the establishment and management of the estate as they stood at the date of the death of the previous holder are binding upon persons really entitled to the estate. (1903) 17 MLJ 484 (485) (DB).

——S. 71.

——Ss. 71 and 20 — (S. 76, of 1882 Act) — Alteration of Memorandum of Association and Articles — Individual appointed as Secretary and his heirs — Salary, etc., provided for in articles — Change in Articles of Association of — Validity of agreement.

Anything appearing in the articles of association but not provided for by the memorandum of association may be altered by special resolution under S. 76 of the Act. If the memorandum refers to the appointment of a certain person and his heirs as Secretary and the articles refer to his powers, the articles relating to the Secretary's powers may be altered by special resolution.

In considering contracts referring to revocable articles it must not be assumed that the contract involves as one of its terms that the article shall be altered and the terms of the contract thereby varied. If there is any such agreement these rights cannot be altered by an adulteration of the articles; if there is no such agreement they can be so altered provided the alteration does not affect rights which have ripened into claims for something already done under the contract in its original form. Where the memorandum of association provided for the appointment of a certain person as Secretary and his powers and emoluments are set out only in the articles.

Held that the provisions indicated prima facie that while the company was prepared to have hereditary Secretaries it meant to retain in its hands full power of contract so as to be able to limit the Secretaries powers to such as experience showed they might be safely entrusted with and their emoluments to such as their merits or the position of the company warranted; and that the powers and emoluments of the Secretaries being set out only in the articles of association which are ordinarily alterable they can be altered in the absence of proof of any agreement to the contrary. (1909) 33 M 36 (39, 40): 1 Ind Cas 803: 1 MLT 290 (DB).

——S. 72.

——S. 72 — Scope and nature.

Section 72, Companies Act (Burma) is merely permissive and is not imperative. It only provides one of several methods whereby a communication or notice may be served on a company. AIR (Vol 28) 1941 Rang 339: 14 Rang 187: 198 Ind Cas 180 (SB).

——S. 72 — Domicile — What is.

The domicile of a corporation is the place considered by law to be the centre of its affairs, which (1) in the case of a trading corporation is its principal place of business i.e., the place where the administrative business of the corporation is carried on; (2) in the case of any other corporation is the place where its functions are discharged. The registration of the company is not for all purposes of itself decisive. The question in each case is, where is it that the real business of the company is carried on? According to the answer to that question, the company's domicile must in the main, be determined. Hence the domicile of a corporation is the place where the centre of control is, where the directing power resides or, where the brain which controls the operations of the company is situate. AIR (Vol 26) 1939 Mad 318: (1938) MWN 1313: 183 Ind Cas 353.

——S. 72 — Change of office — Notice to Registrar.

Where there is a change in the registered office of a company, it is necessary in order that the change might take effect that notification of the change should be given to the Registrar of Joint Stock Companies A mere resolution to change is insufficient. AIR (Vol 18) 1931 Cal 692: 58 Cal 716: 133 Ind Cas 321.

——S. 73.

——S. 73 — Object of — Construction — Burden to establish infringement of law — "Outside the office" meaning of. ...

Section 73 being a penal provision has to be construed strictly and therefore the burden is very strongly on the prosecution, to show that there really has been an infringement of the law and that in circumstances in the case, a meaning must be given to the section which is not the literal one. By S. 73 the Legislature desired to make the company itself continually bring to the notice of those who dealt or might deal with it the fact that it was limited. The section has nothing to do with advertising the whereabouts of a company or affording facilities to members of the public in finding its place of business. The requirements of the Act would be satisfied by a board of the necessary conspicuousness and legibility outside the office room inside the building in which it is situated. It cannot be held that when an office is situated within a compound, the law requires the name of the company to be painted or affixed outside the compound as well as outside the office. The words "outside the office" in S. 73 (a) do not mean outside the premises. AIR (Vol 28) 1941 Bom 97: 43 Bom LR 105: 42 Cr LJ 452: ILR (1941) Bom 186: 193 Ind Cas 620 (DB).

——S. 76.

——Ss. 76 and 79 (3) — Scope and applicability exercise of jurisdiction conferred by S. 79 (3) — Condition precedent — Impracticability of calling a meeting — Tests. See 1947 ALJ 337: AIR (Vol 34) 1947 All 361 (FB).

——Ss. 76, 32 — Conviction of director under S. 76 — Conviction under S. 32, may be dropped.

Where the director of a company is convicted under S. 76, for being wilfully a party to a default by which no general meeting was held as required by S. 76, his further conviction under S. 32 may very well he dropped. AIR (Vol 29) 1942 Cal 225 : 74 CLJ 367 : 45 OWN 1130 : 43 Cr. LJ 466 : 199 Ind Cas 94.

——S. 76 (2) — Default — Conviction.

An ordinary director of a company who is not knowingly and wilfully a party to the default under S. 76 (2), cannot be convicted. (1942) 197 Ind Cas 729 : 1941 MWN 959 : 55 MLW 18 (2) : 43 Cr. LJ 295.

——Ss. 76 (2), 131 — Condoning delay.

Where the Registrar has condoned the delay in holding a general meeting, he must also be deemed to have condoned the delay in filing a balance sheet before the general body at its meeting. AIR (Vol 28) 1941 Mad 504 : 1941 MWN 225 : (1941) 1 MLJ 419 : 53 MLW 660 : 42 Cr. LJ 683 : 195 Ind Cas 140.

——S. 76 (1) — Eo-nomine managing director — Default —Conviction for.

Where the evidence does not warrant the conclusion that the person who was one of the managing directors eo-nomine was intentionally and wilfully a party to the default under S. 76 (1), his conviction cannot be sustained. (1941) 196 Ind Cas 126 : 1941 MWN 381 : (1941) 1 MLJ 702 : 53 MLW 680 : 42 Cr. LJ 854 (DB).

——S. 76 — Meeting.

Section 76, demands that there shall be a general meeting held once at least in every year. i.e., one meeting per year, and as many meetings as there are years. It does not mean that the same meeting can go on being held once in each year. The section requires that a separate and distinct meeting should be held. AIR (Vol 25) 1938 Mad 640 : 47 MLW 635 : (1938) 1 MLJ 856 : (1938) MWN 608 : 39 Cr. LJ 907 (1) : 177 Ind Cas 600.

——S. 76— Scope and nature — Persons responsible for failure to call general meeting — Whether can be excused — Balance-sheet, preparation of.

The object of S. 76, is to enable a member of a company, where there has been default on the part of those whose duty it is to summon the meeting to apply to the Court to direct the calling of a meeting. It is not intended to enable the Court to make an order which will excuse the persons responsible from the consequences of their omission. The terms of the section are mandatory and the section makes no reference to the balance sheet. AIR (Vol 21) 1934 Cal 624 : 61 Cal 408 : 151 Ind Cas 693.

——S. 76 — Extraordinary meeting.

Where certain share-holders of the Company sent in a requisition to the directors for the holding of an extraordinary meeting and according to that requisition an extraordinary meeting was held, that such a meeting cannot be a general meeting within the meaning of S. 76 of the Act. 72 Ind Cas 349 : 25 Bom LR 224 : 24 Cr. LJ 349 : AIR (Vol 10) 1923 Bom 194 (DB).

——S. 76 (1) — General meeting — Default in holding.

Under S. 76 of the Companies Act there is no difference between a general meeting and an extraordinary meeting of the company. Where an extraordinary general meeting of a company was held within fifteen months of the last general meeting, no offence had been committed under S. 76 (1) of the Act. 1 UPLR (HC) 171 : 54 Ind Cas 494: AIR (Vol 7) 1920 All 357.

——Ss. 76 and 134 (a) — Conviction of Offiecr — Validity.

Before an officer of a limited company can be convicted under S. 134 (4) for default in submitting the balance-sheet laid before the company at its general meeting, as a general meeting was not held, it must be shown with reference to S. 76 that the Officer was a party to the default in holding the general meeting. 21 CWN 840 : 18 Cr. LJ 325 : 38 Ind Cas 437: AIR (Vol 5) 1918 Cal 190 (DB).

——Ss. 76, 131 — (1882). S. 74 — Definition of Manager — Firm managing a company describing itsef managing agents.

Under S. 74 (1882) the word 'manager' includes every person or body of persons who conducts or conduct the affairs of the company and to whom its management, subject to the control of the Directors, is entrusted and a firm is as capable of managing a company as an individual and if it does so it surely cannot escape liability for its misfeasance or non-feasance merely by calling itself 'Managing Agent', instead of manager. 18 PR 1916 Cr. : 143 PLR 1916 : 17 Cr. LJ 306 : 35 Ind Cas 482: AIR (Vol 3) 1916 Lah 199.

——Ss. 76 and 131 — (1882), S. 74 — Failure to comply.

A magistrate has jurisdiction to entertain an application against the Director of company for failure to apply with the provisions of S. 74 and for misappropriation and falsification of accounts. This power however should generally be used only in consultation with the Registrar, Joint Stock companies. (1911) 8 ALJ 1260: 12 Cr. LJ 596 : 12 Ind Cas 972.

——S. 77.

——S. 77 (6) — Conviction, essentials to be proved.

In order that a conviction under S. 77, of an officer of the company may be sustained, the only thing the prosecution has to prove is that the particular officer knowingly and wilfully authorised or permitted the default. AIR (Vol 23) 1936 Cal 237 : 39 CWN 1152 : 37 Cr. LJ 552 : 162 Ind Cas 282.

——S. 77 — (1882), S. 75 — Offence punishable under the Act — Repeal of Act — Effect of.

An offence punishable under an Act and committed while the Act is in force cannot be punished after the Act is repealed. 18 Cr. LJ 896 : 41 PWR 1917 Cr. : 41 Ind Cas 1008 :AIR (Vol 4) 1917 Lah 280.

——S. 78.

——S. 78 — Meeting on requisition — Date of receipt, presumption.

In the case of calling a meeting on requisition, there is no presumption that the requisition was received on the date it bears. AIR (Vol 27) 1940 Sind 87 : 190 Ind Cas 551.

——S. 78 — Order for winding up — Court's order for winding up based on opinion of majority of share-holders is bad.

Where there was no valid resolution for voluntary winding up ; and no valid ground for making a winding up order, but the Judge passed the order for compulsorily winding up the company on the ground that the majority of the share-holders at a meeting were in favour of winding up.

Held that that is not a sufficient ground for the compulsory winding up order where there was no valid resolution for voluntary winding up. 69 Ind Cas 241 : 49 Cal 399 : AIR (Vol 9) 1922 Cal 365 (DB).

——S. 70.

——S. 70 — Company entered into contract with A and supplied goods — B received and utilised goods — Suit and decree against A for price — Decree unsatisfied — Another suit against both making B liable for price — S. 70, does not apply — Liability of A and B whether joint and several — Suit against B not barred.

A company entered into a contract with A and supplied goods. B received and utilized the goods. The company filed a suit for the price against A alone and got a decree which could not be executed. It was found that A entered into the contract on behalf of B. The company thereupon brought another suit making B liable for the price alleging that B was so liable under S. 70, Contract Act:

Held, that S. 70, has no application to the case.

Held, further that the liability of A and B was joint and several and the fact that a decree had been obtained against A did not bar the subsequent suit against B. (1936) 163 Ind Cas 331: 62 Cal 612: 39 CWN 461 (DB).

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In considering contracts referring to revocable articles it must not be assumed that the contract involves as one of its terms that the article shall be altered and the terms of the contract thereby varied. If there is any such agreement these rights cannot be altered by an adulteration of the articles; if there is no such agreement they can be so altered provided the alteration does not affect rights which have ripened into claims for something already done under the contract in its original form. Where the memorandum of association provided for the appointment of a certain person as Secretary and his powers and emoluments are set out only in the articles.

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Where the evidence does not warrant the conclusion that the person who was one of the managing directors eo-nomine was intentionally and wilfully a party to the default under S. 76 (1), his conviction cannot be sustained. (1941) 196 Ind Cas 126 : 1941 MWN 381 : (1941) 1 MLJ 702 : 53 MLW 680 : 42 Cr. LJ 854 (DB).

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Section 76, demands that there shall be a general meeting held once at least in every year. i.e., one meeting per year, and as many meetings as there are years. It does not mean that the same meeting can go on being held once in each year. The section requires that a separate and distinct meeting should be held. AIR (Vol 25) 1938 Mad 640 : 47 MLW 635 : (1938) 1 MLJ 856 : (1938) MWN 608 : 39 Cr. LJ 907 (1) : 177 Ind Cas 600.

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The object of S. 76, is to enable a member of a company, where there has been default on the part of those whose duty it is to summon the meeting to apply to the Court to direct the calling of a meeting. It is not intended to enable the Court to make an order which will excuse the persons responsible from the consequences of their omission. The terms of the section are mandatory and the section makes no reference to the balance sheet. AIR (Vol 21) 1934 Cal 624 : 61 Cal 408 : 151 Ind Cas 693.

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Where certain share-holders of the Company sent in a requisition to the directors for the holding of an extraordinary meeting and according to that requisition an extraordinary meeting was held, that such a meeting cannot be a general meeting within the meaning of S. 76 of the Act. 72 Ind Cas 349 : 25 Bom LR 224 : 24 Cr. LJ 349 : AIR (Vol 10) 1923 Bom 194 (DB).

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Under S. 76 of the Companies Act there is no difference between a general meeting and an extraordinary meeting of the company. Where an extraordinary general meeting of a company was held within fifteen months of the last general meeting, no offence had been committed under S. 76 (1) of the Act. 1 UPLR (HC) 171 : 54 Ind Cas 494: AIR (Vol 7) 1920 All 357.

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Before an officer of a limited company can be convicted under S. 134 (4) for default in submitting the balance-sheet laid before the company at its general meeting, as a general meeting was not held, it must be shown with reference to S. 76 that the Officer was a party to the default in holding the general meeting. 21 CWN 840 : 18 Cr. LJ 325 : 38 Ind Cas 437: AIR (Vol 5) 1918 Cal 190 (DB).

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——Ss. 76 and 131 — (1882), S. 74 — Failure to comply.

A magistrate has jurisdiction to entertain an application against the Director of company for failure to apply with the provisions of S. 74 and for misappropriation and falsification of accounts. This power however should generally be used only in consultation with the Registrar, Joint Stock companies. (1911) 8 ALJ 1260: 12 Cr. LJ 596 : 12 Ind Cas 972.

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In order that a conviction under S. 77, of an officer of the company may be sustained, the only thing the prosecution has to prove is that the particular officer knowingly and wilfully authorised or permitted the default. AIR (Vol 23) 1936 Cal 237 : 39 CWN 1152 : 37 Cr. LJ 552 : 162 Ind Cas 282.

——S. 77 — (1882), S. 75 — Offence punishable under the Act — Repeal of Act — Effect of.

An offence punishable under an Act and committed while the Act is in force cannot be punished after the Act is repealed. 18 Cr. LJ 896 : 41 PWR 1917 Cr. : 41 Ind Cas 1008 :AIR (Vol 4) 1917 Lah 280.

——S. 78.

——S. 78 — Meeting on requisition — Date of receipt, presumption.

In the case of calling a meeting on requisition, there is no presumption that the requisition was received on the date it bears. AIR (Vol 27) 1940 Sind 87 : 190 Ind Cas 551.

——S. 78 — Order for winding up — Court's order for winding up based on opinion of majority of share-holders is bad.

Where there was no valid resolution for voluntary winding up ; and no valid ground for making a winding up order, but the Judge passed the order for compulsorily winding up the company on the ground that the majority of the share-holders at a meeting were in favour of winding up.

Held that that is not a sufficient ground for the compulsory winding up order where there was no valid resolution for voluntary winding up. 69 Ind Cas 241 : 49 Cal 399 : AIR (Vol 9) 1922 Cal 365 (DB).

——S. 79.

——Ss. 79 (3) and 76 — Exercise of jurisdiction conferred by S. 79 (3) — Condition precedent — Impracticability of calling a meeting — Test — Scope and applicability of S. 76.

It is clear from the language of S. 79 (3) of the Companies Act that there is a condition precedent to the exercise of jurisdiction conferred by it and that is, that it must be found that for some reason it has become impracticable to call a meeting of a company in any manner in which meetings of that company may be called. The question of the impracticability or otherwise of calling a meeting has to to be decided primarily in the light of the Company's Articles of Association, in view of the language used in S. 76 of the Act. There may be cases in which the Articles of Association either fail to make any provisions for a matter which is governed by the general provisions of the Act or make a provision which is in direct conflict with some mandatory provision in the Act applicable to all companies. In the former case it would obviously be necessary to refer to the Act when deciding the question of the impracticability or otherwise of calling a meeting. In the latter case the mandatory provision of the Act will prevail and the provision contained in the Articles of Association will have to be disregarded.

The general provisions contained in S. 76 of the Act have no application to the period intervening between the time limit for calling and holding an Annual General Meeting fixed by Company's Articles of Association and the wider time limit for calling and holding such a meeting prescribed by S. 76 (1). At any time before the expiry of the wider limit prescribed by S. 76 (1), jurisdiction conferred by S. 79 (3) comes into operation and it can be invoked by a director or a member of any company for calling the Annual General Meeting. ILR (1947) All 690 : 1947 Comp. C. 216 : 1947 ALJ 337 : 1947 ALW 341 : AIR (Vol 34) 1947 All 361 (FB).

——S. 79 (3) — Powers of the Court whose jurisdiction has been invoked under S. 79 (3).

Where upon the jurisdiction of the Court under S. 79 (3) being invoked by a party a question is raised as to validity or otherwise of a meeting, the Court has jurisdiction to determine that question. ILR (1947) All 690 : 1947 Comp. C. 216 : 1947 ALJ 337 : 1947 ALW 341 : AIR (Vol 34) 1947 A. 361 (FB).

——S. 79. — Share-holders — Majority, if can add to voting power of directors.

Generally speaking a person cannot charge a majority in the company with wrong in adding to the voting power of the directors. There is no inherent wrong in that. A majority can increase its own majority, generally speaking unless there be an element of expropriation or coercion. AIR (Vol 28) 1943 Cal 174 : ILR (1941) 1 Cal 30 : 72 CLJ 458 : 195 Ind Cas 36.

——S. 79 — Insufficiency of notice.

Share-holder actually knowing about business to be transacted at a meeting cannot complain of insufficiency of notice. 52 Bom 571 : 55 IA 274 : 30 Bom LR 1115 : 32 CWN 1038 : 28 MLW 93 : 48 CLJ 436 : 110 Ind Cas 195 : AIR (Vol 15) 1928 P. C. 180 : 55 MLJ 697.

——S. 79 — Conditional votes.

Where the form of proxy was settled by the Court, but a certain word was entered by the member signing the proxy and he added other words, but the added words were too vague to have any meaning.

Held, that such votes were good. 108 Ind Cas 465: 30 Bom. LR 197 : AIR (Vol 15) 1928 Bom. 80.

——S. 79 — Proxy — Vote by proxy in the presence of the member entitled to vote is valid.

A person to whom a member gives a proxy is that member's agent for the purpose of voting. The authority of an agent may be revoked expressly or by implication, but unless and until it is so revoked that authority continues. If a man is present and allows another to act for him presumably he approves what that other does. 108 Ind Cas 465 : 30 Bom LR 197 : AIR (Vol 15) 1928 Bom 80.

——S. 79 — Second proxy — If revokes the first.

A signed a proxy in favour of B. The time for lodging proxies ends two days before the meeting. The proxy in favour of B is lodged in time. A then signs a second proxy in favour of C and lodges it after the expiry of the time. The proxy being out of time was rejected without scrutiny. The first proxy is not revoked. 108 Ind Cas 465 : 30 Bom LR 197: AIR (Vol 15) 1928 Bom 80.

——S. 79 — An unstamped proxy is bad.

Those proxies which are unstamped, or upon which the stamps have not been cancelled, must be excluded. Any votes recorded on the authority of such proxies go out. 108 Ind Cas 465: 30 Bom LR 197: AIR (Vol 15) 1928 Bom 80.

——S. 79 — The Court has ample power under S. 153 to settle a form of proxy. S. 153 is wider in its terms than S. 120 of the English Act. Any substantial failure to comply with the Court's direction would invalidate the proxy. 108 Ind Cas 465 : 30 Bom. LR 197 : AIR (Vol 15) 1928 Bom 80.

——S. 79 — Valid votes.

Where persons who voted on the amendment proposed, but did not vote on the substantive proposition, but whose votes on the substantive proposition were recorded by their proxies in a meeting of the company, held, for changing its memorandum,

Held, that these votes were good. 108 Ind Cas 465 : 30 Bom. LR 197 : AIR (Vol 15) 1928 Bom 80.

——S. 79 — Debtor's vote.

Proxies given by persons who were debtors to the company are bad. 108 Ind Cas 465: 30 Bom LR 197 : AIR (Vol 15) 1928 Bom 80.

——S. 79 — Proxy.

Proxies given by company in favour of a director of that company are bad. 108 Ind Cas 465 : 30 Bom. LR 197 : AIR (Vol 15) 1928 Bom. 80.

——S. 79 — Undated proxies are valid. 108 Ind Cas 465 : 30 Bom LR 197 : AIR (Vol 15) 1928 Bom 80.

——S. 79 — Amalgamation with another bank — Notice — Omission to mention any secret arrangement — Proceedings when can be upset.

Where there is any secret agreement or any interest of the Directors in the agreement not disclosed in the circular, or in the notice, the Court will view with strictness any omission to refer to it in the notice or in the circular accompanying the notice ; and the omission to mention any secret arrangement would constitue a serious defect in the notice. But where no secret agreement is proved or suggested anywhere there is no indication that there was anything to conceal the Court will as far as possible take a liberal view of the terms of the notice and will not upset the proceedings taken on a notice for some defect which might have been avoided but which was not avoided on account of some honest mistake. A meeting ought not to be treated very critically in order to see whether we cannot pick out some defect in it. Notice calling an extraordinary general meeting of the share-holders of a Bank to

consider the proposal of amalgamating it with another Bank was held not so defective as to upset the proceedings at the meeting, though it failed to disclose the difference of opinion that existed among the directors in the matter and the basis of calculation on which the terms of union were settled and although no copy of the agreement between the banks was sent to the share-holders along with the notice. 90 Ind Cas 580 : 26 Bom LR 987: AIR (Vol. 12) 1925 Bom 49 (DB).

——S. 79 — Proxy — Vote by — Nature of the right — Articles of Association — Construction of.

Right to vote by proxy is the creature of a contract between share-holders and cannot be claimed under the ordinary law. Where the right to vote by proxy is given, all the requisitions of the contract as to the exercise of that right must be followed. Where the Articles of an Association provided that no person without a particular qualification should be appointed proxy, the qualification should exist at the time of the appointment and not merely at the date to which the operation of the instrument is postponed. (1902) 27 Bom 113 : 4 Bom LR 953 (DB).

——S. 79 — Articles of Association — Proxy — Qualification of party — Construction.

One of the articles of association of a limited company was — "No person shall be appointed or have authority to act as a proxy who is not a share-holder in the company."

Held, that to construe this article as requiring the person appointed to be a share-holder when the proxy is signed, is to put too narrow a construction on the words.

The article of association of a limited company ran.

"No person shall be allowed to vote or act as a proxy at a meeting unless the instrument appointing him shall have been deposited at the registered office of the company not less than 48 hours before the time for holding the meeting at which the person named in such instrument proposes to vote" (Art. 66)). A shareholder in the above company executed in 1881 a proxy which was in fact a power-of-attorney, not only to vote at meetings, but to act generally for the share-holder signing it in all matters connected with the company and any other company taking over its business. The proxy authorized and appointed certain specified persons "and all persons who at any time during the continuance of his power-of-attorney may be partners in the firm of Wallace & Co. of Bombay, however that firm may be at any time constituted . . . and in the absence from Bombay of all the said persons, then the persons or person for the time holding the procuration of the said firm and managing the said business jointly, and each of them severally . . . to be my proxy to vote for me and on my behalf at any meeting or meetings of the said existing corporation. This proxy was subsequently, in 1902, used by M., who was then a managing partner of the firm of Wallace & Co. and a shareholder in the corporation, but he was neither a member of the firm nor a share-holder in the corporation when the proxy was signed. Before the meeting his name was entered as usual in a register of proxies kept by the corporation as the person who would use the proxies at those meetings. An objection to the proxy was that M was not named in it.

Held, that although not named in the proxy in the strict literal sense of the word 'named' (Art. 66) he was sufficiently described in the proxy for all business purposes. (1904) 7 Bom LR 99 : 2 ALJ 139: 29 Bom 126: 32 IA 39: 1 CLJ 150 : 8 Sar 768 (PC).

——S. 81.

——S. 81 (2) and Proviso — "Not less than twenty-one days" — Meaning — Day of service and day of meetings if both to be excluded — Waiver of objection as to legality of notice of meeting — What would constitute.

The expression "not less than twenty-one days" occurring in sub-section (2) of S. 81 of the Companies Act means twenty-one clear days exclusive of the day of service and exclusive also of the day on which the meeting was to be held (i.e.,) there must be an interval of twenty-one days in between the date of the meeting and the date of the service of notice.

Under the proviso to S. 81(2) the requirement as to this twenty-one days' notice may be dispensed with by an agreement of all the members 'entitled to attend and vote' and not merely of all the members 'entitled to vote and present in person or proxy' at the meeting. This proviso indicates the intention on the part of the Legislature that the provision in sub-section (2) is mandatory and that it can be dispensed with only by the agreement of all members. It is not enough that the members present at the meeting indicated either expressly or impliedly that they consented to or acquiesced in shortening the period of notice. An express consent of all the members to waive the notice has to be established to sustain a plea of waiver of objection as to legality of notice. ILR (1949) Mad 808: 62 LW 341: (1949) 1 MLJ 662 (DB).

——Ss. 81, 82 — Resolution to "adopt" accounts — — Amendment negativing subject-matter, if can be allowed — Amendment wrongly ruled out — — Proper procedure.

An amendment moved to a proposition, as a general rule, must be germane to its subject-matter and not in substance a direct negative of it. No amendment can be moved which goes beyond the notice conveying the meeting or in the case of an ordinary meeting, beyond the scope of the ordinary business which, by the articles, may be transacted thereat without special notice. Thus, in the case of an ordinary meeting, the agenda of which proposed the reception and adoption of accounts, where a motion is submitted that the report and accounts be received and adopted, an amendment that the directors be removed from office or that the articles be altered, would be irregular; but an amendment to the effect that the accounts and balance-sheet be received but not adopted and that a committee of share-holders, be appointed to look into them and report would be competent.

Where the Chairman wrongly rules the amendment out of order and the original unamended proposition is moved and lost, the proper course is to treat the proceedings subsequent to the putting of the proposition as a nullity and to call another general meeting and start afresh with the consideration of the proposition. AIR (Vol 32) 1945 Bom 475: 47 Bom LR 428: ILR (1945) Bom 687.

——S. 81 — Amendment of articles under S. 20 — Notice under S. 81, absence of — Amendment is 'ultra vires'. AIR (Vol 27) 1940 Lah 243: 190 Ind Cas 819.

——S. 81 — Share-holders deciding by resolution to reduce capital — Application for sanction — Company is entitled to reduce capital — Resolution is not 'ultra vires'. AIR (Vol 25) 1938 Pesh 41: 177 Ind Cas 368.

——S. 81 (3) — Chairman's declaration — Conclusiveness of — Chairman erroneously holding resolution passed — Resolution, if according to law.

The conclusiveness of the declaration of the Chairman contemplated by Cl. (3) of S. 81, at-

taches to the declaration where the Chairman does not find by his declaration the figures for and against the resolution.

But where the Chairman by his declaration finds the figures and erroneously in point of law holds, that the resolution has been duly passed, the resolution cannot be said to have been passed according to law. AIR (Vol 24) 1937 Cal 645: 41 CWN 1137: ILR (1938) 1 Cal 90: 173 Ind Cas 622 (DB).

——S. 81 — Passing of resolutions — Chairman's declaration on a show of hands.

At any meeting at which an extraordinary resolution submitted to be passed or a special resolution is submitted to be passed or confirmed a declaration of the Chairman on a show of hands that the resolution is carried is conclusive evidence and the minutes of the meeting are not admissible in evidence to show that the declaration of the Chairman is unwarranted. AIR (Vol 16) 1929 Bom 38: 30 Bom LR 598: 110 Ind Cas 649.

——S. 81 — Amendment.

Amendments can be allowed, but it must depend upon the nature of the resolution and the nature of the amendment whether it could be or should be allowed by the Chairman. AIR (Vol 12) 1925 Bom 49: 26 Bom LR 987: 90 Ind Cas 580 (DB).

——Ss. 81, 203 — (1882), Ss. 77, 173 (b) and (c) — Liquidator — Appointment — Notice — Validity of liquidators, appointment.

A notice was given calling an extraordinary general meeting of the share-holders of a limited company, to consider the position of the company, and if necessary, to pass a special resolution that the company be voluntarily wound up and liquidators appointed and that in the event of the said resolution being passed, a special meeting be held immediately after the extraordinary general meeting of the share-holders confirming the same. A resolution was passed for winding up of the company and liquidators were appointed; the resolution not being a special resolution as defined by S. 77 the voluntary winding up was not according to S. 173 Cl. (b) and the appointment of the liquidators was a nullity and they had no authority to exercise the statutory powers of a properly appointed liquidator. (1911) 15 CWN 1047: 11 Ind Cas 975.

——S. 81 — Resolution — Confirmation.

A confirmation not 'simpliciter', but with a proviso, is no valid confirmation. (1907) 10 Bom LR 141: 3 MLT 197 (DB).

——S. 82.

——S. 82 — Amendment of articles — Regulation.

There is nothing in the Companies Act which prohibits the Registrar of Joint Stock Companies from refusing to file amendments made in the articles of a company with a view to changing its nature, e. g., converting it from a private to a public or from a public to a private company. On the contrary by reason of S. 82, the Registrar is bound to file them. AIR (V 30) 1943 Pat 278 : 22 Pat 204 : 10 BR 4 : 24 PLT 226 : 207 Ind Cas 630 (DB).

——S 82 — Alteration of articles — Registration — Alteration to carry on illegal business — Registrar has power to refuse registration. AIR (V 20) 1933 Mad 129 : 63 MLJ 917 : 36 MLW 942 : 141 Ind Cas 177 (2).

——S. 82 — Rules of Company — Curtailing powers of Court — Ultra vires.

Obiter — Rules of companies curtailing the power of court to wind them up in circumstances under which the court has power to do so under the Act are ultra wires. (1902) 29 Cal 688 (DB).

——S. 83.

1. **Directors.**
2. **Liability.**
3. **Meeting.**
4. **Suits, maintainability of.**

1. Directors.

(a) General.
(a-1) Appointment of.
(b) Breach of duty by.
(c) Contracts.
(d) Election of.
(e) Powers and duties.
(f) Remuneration.

(a) General.

——S. 83 — Sch. I, Table A, Reg. 72 — Managing director, status of.

A director or managing director is in no way a servant of the company. He is the agent of the company for carrying on its business. AIR (Vol 29) 1942 Lah 47 (50) : 43 PLR 619 : ILR (1943) Lah 28 : 199 Ind Cas 667.

——S. 83 — Position of director.

Although the position of directors of a company differs from that of trustees in some respects, yet to the extent of their being entrusted with the monies of the Company, they are trustees and they are jointly and severally liable for breach of trust. AIR (V 24) 1937 Pat 293 : 3 BR 477 : 168 Ind Cas 786.

(a-1) Appointment of.

——S. 83 — Directors, appointment of— Whether matter of internal management.

Notwithstanding S. 87 (old) the appointment of directors is still a matter of the internal management of the company, and an outsider cannot be expected also to search the register for the list of directors. AIR (V 23) 1936 Bom 62 : 37 Bom LR 978 : 60 Bom 326 : 161 Ind Cas 126 (DB).

——S. 83 — Directors, appointment of — Poll, demand of — Poll not taken — Original meeting, continuance of — Suit by share-holders for declaration that appointment of directors is invalid, competency of.

The Directorate of a Life Insurance Company was composed of two policy-holders' directors elected by the policy-holders and of a certain number of share-holders' directors. The Ordinary General Meeting for the election of share-holders' directors was fixed for October 13, 1930. The Articles of Association had contained a provision that the number of share-holders' directors should be six and that two should retire in rotation, their places being filled by election at the meeting. But the number had been by amendment of the articles reduced to five and it was provided as a special case, that at the General Meeting of 1930, the six directors should vacate office and that no more than five should be elected in place of them. At the meeting held on October 13, 1930, votes were taken by show of hands and five persons were declared elected. A poll was then demanded and the Chairman then directed that it should be held at the Company's office on October 20, and appointed the manager of the Company, Returning Officer for the purpose of taking it. On October 16, the two policy-holders' directors appointed two other persons thus bringing the directors up to four. On October 20, the Returning Officer did not appear and no other arrangement being made for holding the poll, the share-holders who had assembled dispersed. No other attempt was made to take a poll and the four persons at that time claiming to be directors after a couple of days co-opted 3

more directors, thus bringing their number up to the maximum. Four of the share-holders filed a suit praying inter alia that these appointments might be declared invalid and that the Court should direct a poll to be taken to elect the five share-holders' directors :

Held, that the taking of a poll was a mere enlargement of the meeting at which it was demanded and the original meeting continued until the poll had been taken.

Held, further, that so long as the meeting continued, the five directors' posts remained vacant and neither the provision for the automatic re-election of the old directors on failure of their posts being filled up in the meeting, nor the provision enabling directors to appoint any duly qualified person as director could come into operation:

Held, also that as the five persons were installed as directors in contravention of the articles, the mode of constituting them was ultra vires the Board of Directors and the suit by some of the share-holders who had been deprived of their fundamental privilege of choosing their own management was competent :

Held, also, that plaintiffs were entitled to maintain the suit even though the share-holders under the articles could by special meeting remove the directors from the office by three-fourth majority. AIR (V 19) 1932 Mad 100 : 61 MLJ 724 : 34 MLW 746 : 136 Ind Cas 193 (DB).

(b) Breach of duty by.

——S. 83 — Wilful negligence, what is.

Where the Articles of Association comprise the indemnity to directors for anything done by them, except where loss has been incurred as the result of wilful neglect or wilful default on their part, in order to be guilty of wilful negligence not only must a director be guilty of negligence, but he must know that he is committing a breach of duty or is recklessly careless in the matter.

A director is justified in trusting the officials of the Company unless he has reason to suspect them. Where apart from the insolvency of the official, there is no other ground to suspect his honesty, the director is justified in trusting him, as, insolvency does not necessarily mean that a man is dishonest. AIR (V 25) 1938 Mad 124: (1937) MWN 1099 : 46 MLW 869 : (1937) 2 MLJ 848 : ILR (1938) Mad 292 : 176 Ind Cas 592 (DB).

——S. 83 — Directors — Money used for their own interests — Tort or breach of fiduciary obligation, liability of.

The directors of a Bank in conspiring to utilise Bank's money for their own interests are guilty of fraudulent conduct towards the Bank to which they stand in a fiduciary capacity, and are liable to account for it to the Bank.

The suit against them is not merely one for compensation for a tort committed but for breach of a fiduciary obligation towards the Bank arising out of the breach of a quasi-contract. Even if it be viewed as a suit for compensation for a mere tort, the right to sue survives, on the death of one of the directors against the legal representatives by he application of S. 306, Succession Act. AIR (V 22) 1935 Lah 705 : 160 Ind Cas 759 (DB).

(c) Contracts.

——S. 83 — Directors — Contract with company — Contract beyond directors' powers — Ratification by company — Company, liability of.

Obiter. — Any person dealing with a company is supposed to be acquainted with its articles and memorandum and, therefore, to be aware of the powers that the directors have. If, therefore, one enters into a contract with a company and such a contract is beyond the power of the directors, the company cannot be bound by it; and even if the company subsequently ratifies the contract without knowledge of the fact that it was ultra vires, the company cannot be bound by the contract. AIR (V 25) 1938 Mad 227 : (1937) MWN 1223 (2) : (1938) 1 MLJ 391 : 177 Ind Cas 126.

——S. 83 — Director advancing loan — Priority over unsecured creditor.

A contract by which the director of a company lends money to the company and becomes its creditor is in the nature of a contract between the trustee and his cestui que trust: the trustee by discharging a small portion of the cestui que trust's indebtedness puts himself in the position of a secured creditor as against the unsecured creditor, and, therefore, prevents the company from paying off its creditors equitably.

It is not right that the director of an insolvent company about to go into liquidation should be allowed the privileged position of a secured creditor by merely discharging a small portion of the company's indebtedness. As against an innocent purchaser for value of property sold in execution of a debt due to an unsecured creditor, the plaintiff director should not be allowed to enforce his security. AIR (V 24) 1937 Pat 151 : 15 Pat 762 : 18 PLT 217 : 3 BR 391 : 168 Ind Cas 124 (DB).

——S. 83 — Contract — Contract between directors for their own advantage — Duty of Court.

The Courts do not look with favour on agreements between directors for their own advantage and certainly not on those which would severely prejudice other creditors in the event of liquidation. Consequently, where a director claims a considerably big sum of money on the strength of a promise made by a co-director, that he would be paid this amount if anything went wrong with the affairs of the company, it is a case in which formalities cannot be dispensed with, and if they have not been observed, the claim cannot be allowed. AIR (V 22) 1935 Lah 917 (918) : 161 Ind Cas 315.

(d) Election of.

——S. 83 — Directors' election at a general meeting not in conformity with Articles of Association — Such election and proceedings are void if adopted. The directors thus elected are de jure directors till validly replaced in accordance with the Articles of Association of the company. (1938) 67 CLJ 143 : 42 CWN 774.

——S. 83 — Co-operation of director.

The circumstance that a person has failed to secure his election as director at a general meeting of the share-holders does not detract from his eligibility to be co-opted by the directors for the limited period for which the power to co-opt exists. AIR (V 20) 1933 All 344 : (1933) ALJ 290 : 55 All 399 : 143 Ind Cas 7 (DB).

(e) Powers and duties.

——S. 83 — Secretary — Secretary appointed under written agreement — Secretary to be subject to control of directors and managing agents — Company held not precluded from appointing general manager.

Under one of the Articles of Association a company was empowered to appoint and in their discretion remove or suspend managers, secretaries, officers, clerks, agents and servants of the company.

One P was appointed as a secretary of the company for five years. Under the terms of his appointment, he was to devote his whole time to his

duties as such secretary and was in the discharge of his duties, subject to the control of the directors and of the managing agents and was to obey all directions or orders from time to time given to him. The company subsequently appointed certain person to be its general manager. P resented this and absented himself from the office. He filed a suit for damages for wrongful dismissal and contended that he was the principal administrative officer of the company and that the directors had in the circumstances, no right to appoint a general manager :

Held, (agreeing with the judgment of the High Court) that the secretary was a mere servant of the company. The agreement of his appointment certainly could not be read as precluding the company from appointing a general manager. AIR (V 33) 1946 PC 78 : (1946) 1 MLJ 79.

——**S. 83 — Directors — Power to file suits.**

Managing the business of the company would include institution of suits as well, when it becomes necessary in the course of management to recover moneys due to the company . AIR (V 25) 1938 Mad 962 : 1939 MWN 996 : 48 MLW 431 : (1938) 2 MLJ 568 : ILR (1939) Mad 36 : 181 Ind Cas 349 (DB).

——**S. 83 — Powers of directors — Liquidation — Assets, disposal of — Procedure — Resolution by Board of Directors authorising one of them to sell Company's assets — Validity — Transfer made in accordance with such resolution if passes title.**

The assets of a Company cannot be disposed of by a resolution of the directors only; they can only be disposed of after a resolution of the shareholders passed at a special meeting called for the purpose of winding up the Company and disposing of its assets.

Hence a resolution passed by the Board of Directors of a Company authorising one of their numbers to sell the assets of the Company in satisfaction of the debts of the Company is ultra vires and a transfer made in accordance with such a resolution is ineffectual to pass any title in the property to the transferee. AIR (V 25) 1938 Rang 447 : 178 Ind Cas 583.

——**S. 83 — Powers of directors — Articles of Association interpreted — Power to invest funds in purchase of house property — Whether includes power to construct building — Power to invest by unanimous resolution of all directors — Whether unanimous agreement necessary in choice of house — Delegation of choice to committee — Validity of.**

The rules relating to the administration of the Policy-holders' Trust Fund of an Insurance Company provided inter alia that the moneys, funds, and assets of the Fund shall be invested by a unanimous resolution of all the directors for the time being of the company in the purchase of house property. The directors unanimously passed a resolution that a suitable building be constructed on a certain plot at a total cost not exceeding 3 lacs of rupees. The committee which was appointed to look after the construction approved an estimate for a building costing Rs. 2,75,000. The majority of the directors subsequently resolved to increase the cost to 4 lacs but on the objection of the dissentient director, ordered the construction of a building on a different plan within the limit of 3 lacs but as to leave scope for further extension:

Held, that on a proper construction of the rules, unanimous consent of the directors was necessary not only as regards the amount that should be invested but also as regards the form and nature of the building that should be put up, and the resolution of the majority to construct the building according to the new plan was, therefore, ultra vires.

Held, further, that the fact that the duty of constructing the building had been delegated to a committee did not make any difference inasmuch as the directors could not delegate the power of selecting a house, to a committee. They could only delegate the duty of constructing a building which had been unanimously approved.

Per Madhavan Nair, J.— The power to invest funds in the purchase of house property was not intended to include the power to invest the funds in the construction of a building.

Per Jackson, J.— The power to invest in the purchase of house property includes the power to invest in building a house. Buying includes building. AIR (V 21) 1934 Mad 411: (1934) MWN 446: 39 MLW 779: 67 MLJ 336: 152 Ind Cas 965 (DB).

——**S. 83 — Delegation of power by directors.**

Where the directors of a company resolved that one of them be authorised by a power-of-attorney to be executed by two of the directors named in the resolution to appoint or remove agents, managers and other officers of the company and the director so authorized dismissed the manager:

Held, that the directors had power to delegate their powers in this matter to one of themselves and that, therefore, the dismissal was valid. AIR (V 20) 1933 All 344: (1933) ALJ 290: 55 All 399: 143 Ind Cas 7 (DB).

(f). Remuneration.

——**S. 83 — Director — Fees — Suit for fees — Adjustment — Set-off.**

Where in a suit by a director against the Company, the plaintiff claims his fees as a director, the Company cannot adjust the claim against interest due from the plaintiff on account of late payment of calls without the consent of the plaintiff. In such a suit the claim of the defendant Company is not in the nature of a set-off but a claim that the amount due to the plaintiff had already been adjusted. Consequently, no question of payment of court-fees by the defendant arises. AIR (V 24) 1937 Lah 62: 38 PLR 941: 164 Ind Cas 586.

——**S. 83 — Remuneration — Services of Director to be gratuitous under by law — Director acting as Secretary entitled to share profits under another by law — Held, Company could not withhold payment of honorarium — Interpretation of by-law.**

By law, No. 28, of a certain co-operative building society provided that the services of the members of the Board of Directors would be gratuitous. Under by-law No. 29, the ultimate authority in all matters relating to the administration of the society was the general body of the members who were to meet from time to time and among other matters which may be dealt with by the general body was the amendment or repeal of any existing by-law or the enactment of a new by-law. By-law No. 60 provided for the distribution of profits. According to by-law No. 60 (2) one-fourth was to be paid as honorarium to the Secretary and Treasurer not exceeding Rs. 150. In a suit by one of the Directors for remuneration for services rendered by him as the Secretary, it was contended that the payment of honorarium was gratuitous and the general body could withhold such payment under by-law No. 29:

Held, that by-law No. 28 did not prevent the director holding the office of the Secretary from sharing benefits conferred by by-law no. 60. The payment is called "honorarium" in by-law No. 60,

Cl. 2 on account of the character of the services rendered. It was not dependent upon the vote of the general body but under by-law No. 60 (2), it was no doubt open to the general body to alter the by-law; but until the by-law No. 60 was altered, it was not open to the general body to vary that by-law and to withhold payment of one-fourth of the annual profits. Thus the Secretary prima facie was entitled to claim payment of the profits in accordance with by-law No. 60 (2):

Held, further, that by-law No. 60 contemplated the payment of an annual lump sum contingent on a person serving as Secretary for the entire period and he was not entitled to claim any portion of the profits for the broken period of the year he served. AIR (V 24) 1937 Mad 379: 45 MLW 297: (1937) 1 MLJ 511: 171 Ind Cas 518.

——S. 83 — Remuneration of directors.

It is a general principle that the directors of a Company cannot claim remuneration unless the articles expressly provide for it and if the articles provide for payment of any remuneration, the director can sue for it. This principle has been held to be applicable to persons who take office as directors, whether members or non-members. AIR (V 24) 1937 Mad 379: 45 MLW 297: (1937) 1 MLJ 511: 171 Ind Cas 518.

2. Liability.

——S. 83 — Chairman receiving money on behalf of company — Liability.

Where a chairman of a company receives certain sums on behalf of the company in the capacity of a Chairman and expends the sums on matters connected with the company, he cannot be made personally liable for the sums so received. AIR (V 25) 1938 Lah 341: 178 Ind Cas 23.

——S. 83 — Liability of director.

Where a loan is tainted with dishonesty and the directors are responsible for the loan, they are liable for the debt. AIR (V 23) 1936 Lah 271: 167 Ind Cas 307 (DB).

——S. 83 — Liability of directors — Articles of Association limiting the liability of director — Legality of.

There is nothing in the Companies Act, to prevent such a clause being inserted in the Articles of Association as would seriously limit the liability of a director or officer of the Company. AIR (V 21) 1934 All 855: 4 AWR (HC) 132: 154 Ind Cas 33 (DB).

3. Meeting.

——S. 83 — Ss. 83-B, 78 — Alteration of number of directors by general meeting — Notice of meeting, contents of — Validity of meeting — Power of Company in general meeting to appoint additional directors.

One of the Articles of Association read: Until otherwise determined by a general meeting the number of directors shall be not less than three or more than seven:

Held, that a resolution at a general meeting that the number of directors should be increased to more than seven was valid and that no special resolution was required.

A share-holder is entitled to be given adequate information as to the business to be transacted, as S. 78, Companies Act, in fact requires: but it cannot be held that unless the notice of the meeting recites all facts necessary to meet every technical objection which may be raised as to its validity the meeting held in pursuance to such notice must be invalid.

One of the Articles of Association of the company was: The directors shall have power, at any time, and from time to time, to appoint any other qualified person to be a director, either to fill a vacancy or as an addition to the board, but so that the total number of directors shall not at any time exceed the maximum number fixed by Art. 98, and any person so appointed shall retain his office only until the next following ordinary meeting, and shall then be eligible for re-election:

Held, that the ordinary power of the company in general meeting to appoint additional directors had not been excluded by the Articles of Association. AIR (V 27) 1940 Sind 87: 190 Ind Cas 551.

——S. 83 — Presumption — Onus.

Minutes of proceedings of general meeting of a company and of its directors are presumed to be true. The onus lies heavily upon those who assert to show that they are incorrect. AIR (V 22) 1935 Lah 157.

4. Suits, maintainability of.

——S. 83 — Suit to challenge directorate and remove directors, maintainability — Suit for declaring plaintiff as director, competency of.

A suit by A to establish the rights by declaration and injunction of B, C, D and E does not lie. A suit challenging the position of a particular board and to remove them from the directorate, is wrongly constituted. But a suit for a declaration that the plaintiff is a director and for the protection of his rights qua director is competent. AIR (V 28) 1941 Cal 136: ILR (1940) 1 Cal 560: 195 Ind Cas 376.

——S. 83 — Scope — Suit for declaration that plaintiffs were not share-holders and directors, not maintainable.

Where in a suit brought by the plaintiffs for a declaration to the effect that they were not the share-holders and Directors of a Company, it appeared that the plaintiffs substantially asked for all the reliefs to which they were entitled:

Held, that as no money was paid by the plaintiffs a prayer to the effect that the register of the company may be rectified by the removal of the plaintiffs' names from the list of share-holders would merely be a prayer for a nominal relief and hence the objection to the maintainability of the suit in a declaratory form was without any substance. AIR (V 23) 1936 Lah 790: 161 Ind Cas 952 (DB).

——S. 83 — Position of director — Suit for injunction to restrain Directors from future acts — Maintainability.

In a suit for an injunction by a member of a company he had not asked the Court to pronounce upon the validity of the past acts of the directors. He asked only that for the future, the directors should be restrained by injunction from disregarding the provisions of the Memorandum of Association regarding quorum and security. The directors were not impleaded as defendants:

Held, that, whatever the directors may have done in the past, it was not right to assume that the directors will not in future conduct the affairs of the company with due order and regularity and in accordance with the interpretation placed by the Court, on clause embodying the object of the company, of the Memorandum of Association, and as regards the future conduct of the directors in this respect, there was no reason to depart from the ordinary principle that the Court will not interfere in the management of a company's internal affairs. AIR (V 22) 1935 Lah 792: 160 Ind Cas 24 (DB).

——S. 83 — Suit for declaration and injunction by excluded director — Duty of Court.

Where the plaintiffs, certain elected directors of a company are being excluded from participation

in the management of the affairs of the company by the defendants claiming to be directors, there is a continuing invasion of the rights of the elected directors and it is fitting that in such a case the Court should grant a temporary injunction restraining the defendants from interfering with the discharge by the plaintiffs of their duties and with the exercise by them of their powers as directors. AIR (Vol 20) 1933 All 344: (1933) ALJ 290: 55 All 399: 143 Ind Cas 7 (DB).

——S. 85.

——S. 85 — Contravention — Offence.

Contravention of the provisions of S. 85, amounts to an offence punishable with fine. AIR (Vol 23) 1936 All 830 : (1936) ALJ 1105 : 1936 AWR (HC) 964 : 38 Cr. LJ 111 : ILR (1937) All 220 : 166 Ind Cas 53 (FB).

——S. 85 — Contravention of — Jurisdiction — High Court.

In the case of offence due to the contravention of the provisions of S. 85, the High Court has no jurisdiction to take cognizance and try such offence and impose fine. If the case were committed to the High Court under S. 194 (1), Criminal P. C., or proceedings were started on an application of the Advocate-General under S. 194 (2) or were transferred to it under S. 526, Criminal P. C., then the High Court would have jurisdiction to try the accused; but it would not have jurisdiction to try the accused merely on an application made under S. 85 of the Act. AIR (Vol 23) 1936 All 830 : (1936) ALJ 1105 : 38 Cr. LJ 111: 1936 AWR (HC) 964 : ILR (1937) All 220 : 166 Ind Cas 53 (FB).

——S. 85 — Directors — Share qualification.

It is not obligatory on a director to hold shares and though in the articles, provision is generally made that a director should hold a certain number of shares the articles may be amended so as to enable persons to be directors without any share qualification. AIR (Vol 20) 1933 Lah 51 (52) : 33 PLR 979 : 140 Ind Cas 128 (DB).

——S. 85 (2) — Ceasing to held Qualification shares by a Director — Whether amounts to vacation of office — Eng. Law — New Act VII of 1913.

Under Eng. Law and S. 85 (2) of the New Act VII of 1913, the mere ceasing to hold the necessary qualification shares, involves vacation of his office by a Director though this is not precisely provided in Act VI of 1882. 15 Cr LJ 380 : 39 PWR Cr. 1914 : 250 PLR 1914 : 23 Ind Cas 748 : AIR (Vol 1) 1914 Lah 222 (DB).

——S. 86.

——S. 86 — Allotment of shares and making of calls by directors when they did not possess the requisite number of shares — Validity.

When the allotment of shares and making of calls are made by directors when they did not possess the requisite number of qualifying shares, their acts, cannot on that ground be held to be invalid as affording a ground for the shareholders to throw up their shares on the company. 1950 ALJ 836 : AIR (Vol 37) 1950 All 508.

——S. 86 — Loans to directors of Bank — Legality.

The exclusion of the new S. 86-D (1), from banking companies under Cl. (3) of the same section makes it clear that loans to directors of a bank are contemplated as part of its business. AIR (Vol 29) 1942 Mad 737 (1) : 55 MLW 532 (1) : (1942) 2 MLJ 307 : ILR (1943) Mad 291 : 204 Ind Cas 557.

——S. 86 — Loan sanction to one of directors — Registrar's duty — Interference by High Court.

In contravention of the provisions of S. 86 (D), Companies Act, the directors sanctioned a loan to accused No. 2 — who as a director — for a period of one year. Before that year had terminated, the complainant, who was one of the directors, moved his fellow directors to cancel the earlier resolution. They refused to do this and resolved that as the year for which the loan was made had not then elapsed, they would not interfere. The complainant thereupon filed a complaint under S. 86 (D), against the directors, who were parties to the second resolution. The Registrar of Joint Stock Companies was approached in this matter but he refused to intervene :

Held, that the parties to both the resolutions acted wrongly. There was undoubtedly a contravention of the provisions of S. 86 (D), in sanctioning a loan to a director and when the attention of the directors on the second occasion was drawn to this, they should have taken steps at once to see that the illegal loan was terminated. Even if the complainant was prompted by personal motives he was justified in his conduct. The Registrar of Joint Stock Companies should have taken action in the matter and at least have told the directors that they should see that such an illegality was not committed again and that they should take steps to end it ;

Held, further that it was not however, necessary to intervene in the matter at the instance of a private party and to punish various accused for something that was done more than one year before, especially as the loan had been repaid and no fresh breach under S. 86 (D) had been committed. AIR (Vol 29) 1942 Mad 452 (1) : 55 MLW 232 : 1942 MWN 296 : (1942) 1 MLJ 520 : 43 Cr. LJ 770 : 201 Ind Cas 701.

——S. 86 — Application for loan by director's munim — Director supporting it — Money used for benefit of director — Liability.

The defendant was director of a Bank and an application by his munim for loan from the Bank was supported by a statement as to his business and property. This was known by the defendant to be untrue. The loan was in reality for the benefit of the defendant's firm and the receipt of the money was entered in the books of the firm. The Bank sued the munim for money but he had been adjudicated insolvent during the suit:

Held, that the defendant had acted dishonestly in sanctioning the loan application and was liable for the fraud. The money ostensibly lent to the munim was added to the defendant's joint family estate and was recoverable therefrom. AIR (Vol 23) 1936 Lah 268: 17 Lah 262: 38 PLR 526: 162 Ind Cas 204 (DB).

——S. 86 — Validity of director's acts.

Even though none of the directors of a Company had paid the allotment money on the shares held by them, all acts done by them as such directors are valid. Where, therefore, in a meeting called for the purpose they allot the shares to the shareholders, the allotment is proper. AIR (Vol 22) 1935 Lah 464: 155 Ind Cas 536.

——S. 86 — Acts of director — Invalidity of appointment — Effect — Validity of bona fide acts of de facto directors.

Where though the appointment of the director of a company who had signed a plaint on its behalf was from the outset irregular, there was clear evidence to show that he was in fact appointed, and had even since continued to act as a director and there was no reason to question his good faith in so acting and in signing the plaint:

Held, that he was a de facto director and that his act in signing the plaint was validated by S. 86 of the Companies Act. AIR (Vol 18) 1931 Rang 139: 9 Rang 56: 134 Ind Cas 737 (DB)

——S. 86 — Validity of director's acts — Onus.

In a suit instituted on behalf of the Company the defendants pleaded that the person who had signed the plaint as director was not entitled to institute suits on behalf of the Company. The trial Court held that the signing and verifying of the plaint was an act contemplated by S. 86, Companies Act, and, therefore, the action of the director in signing and verifying the plaint must be regarded as a valid act, whether he was properly appointed as a director or not and on this ground refused to allow the defendant to cross-examine the director with regard to his qualifications as a director of the Company:

Held, that the defendants were entitled to cross-examine the director so as to expose all the facts bearing on the question and it was only when all those facts were properly before it that the Court could properly come to a finding as to whether S. 86 covered the case or not. AIR (Vol 18) 1931 Rang 54: 130 Ind Cas 843 (DB).

——S. 86 — Ultra vires acts of Directors — Members of company are not bound.

A compromise by directors of unpaid calls under guise of forfeiture is ultra vires and invalid and the members of a company are not bound by acts ultra vires of their directors though beneficial to the company unless such acts have been expressly ratified by all the share-holders or unless all, with knowledge or notice, have acquiesced in what has been done. Where memorandum of association gives directors no power to forfeit shares, such forfeiture can be set aside. 54 Bom 178: 32 Bom LR 87: AIR (Vol 17) 1930 Bom 267 (DB).

——S. 86 — Official liquidator, power of — Forfeiture of shares.

It is not open to the official liquidator to take advantage of any irregularity in the procedure of the Directors in forfeiting the shares so long as the Directors were acting intra vires and bona fide. In this respect, the official liquidator stands in the shoes of the Directors and therefore it is not open to him to take advantage of the default of those whom he represents. 109 Ind Cas 662: AIR (Vol 16) 1929 Lah 70.

——S. 86 — Election of Directors — Non-election of Directors for a particular year — Directors of previous years continue.

Where the general meeting of a Company was not held in which the Directors are to be elected, the Directors elected at the previous general meeting would continue in office and a suit for a declaration that all acts done by them were illegal and void does not lie. 116 Ind Cas 724: 32 CWN 1084 : AIR (Vol 15) 1928 Cal 868 (DB).

——S. 86 — Invalidly appointed Director.

A Director invalidly appointed cannot in the absence of a provision in the Articles of Association, bind the share-holders unless the defect is unknown at the time. 101 Ind Cas 568: AIR (Vol 14) 1927 Lah 797 (DB).

——S. 86 — Directors — Action of — When binding on Members — Right to forfeit shares — Liability as contributory.

A right to forfeit shares must in order to be effectually exercised be pursued with the greatest exactness by the proper parties, i.e., by the Directors properly appointed and by the requisite number of them and in the proper manner and for proper cause. And the right must be exercised bona fide for the purpose for which it was conferred. Where the Managing Director forfeited the shares of a contributory on request of the Board of Directors to him to settle the matter with the party but he never laid before the Board the action he took, held that the Managing Director's action was altogether ultra vires and that, on the company going into liquidation, the appellant was rightly placed in the list of contributaries and his name could not be removed. 37 PR 1915: 101 PWR 1915: 2 PLR 1916: 29 Ind Cas 567: AIR (Vol 2) 1915 Lah 109.

——S. 86 — Director — Irregular appointment — Allotment of shares — Delay — Notice of allotment.

Under the articles of association if the quorum is of three Directors and two of these only are regularly appointed, the construction of the Board is irregular and its allotment of shares is invalid unless the articles validate an act of de facto Director done in good faith. Persons to whom no notice of allotment is served cannot be put on the list of contributories at the time of liquidation. 36 All 412: 12 ALJ 667: 25 Ind Cas 210: AIR (Vol 1) 1914 All 471 (DB).

——S. 86 — De facto and de jure Directors.

As between a company and third persons the Directors de facto are Directors de jure. (1911) 13 Bom LR 162: 10 Ind Cas 748.

——S. 86 — Act of Directors or Manager.

Acts done bona fide by a Manager or Director are valid in spite of a defect in their appointment, not only between company and outsiders but between company and its members. (1911) 108 PWR 1911: 179 PLR 1911: 46 PLR 1911: 10 Ind Cas 515 (DB).

——S. 86 D.

——S. 86-D — Applicability — Banking company — If prohibited from lending money to concerns of which director of Bank is also director.

There is no prohibition against a banking company lending money to concerns of which a director of the bank is also a director. There are certain prohibitions under S. 86-D of the Companies Act, but these prohibitions do not apply to banking companies. (1949) 53 CWN 662.

——S. 87.

——S. 87 (4) — Failure to send requisite information by director within statutory period — Extension of time by Registrar — If can affect the guilt of the director.

It is not within the powers either of the director of a company or the Registrar to contract or to attempt to contract themselves out of the provisions of the Companies Act. Hence when a director fails to send the requisite information to the Registrar within the statutory period, he is guilty and the fact that the Registrar gave him an extension of time could not affect his guilt. (1946) 1946 AMLJ 35.

——S. 87 (4) and (2) — "Who", "knowingly and wilfully", meaning of — Prosecution of company for omission to inform change — Prosecution, duty of.

The word "who" in S. 87 (4), refers only to an officer of the company and not to the company: and the words "knowingly and wilfully" only relate to person and not to a company. So, in a case against the company it is unnecessary for the prosecution to prove that anybody connected with the company had knowledge of the change. AIR (V 30) 1943 Mad 214: 1942 MWN 761: 56 MLW 80: (1943) 1 MLJ 119: 44 Cr. LJ 380: 205 Ind Cas 324.

——S. 87 (2) — Duty of company — Discharge.

Where a statutory duty is cast upon a company to do something, it must take steps to see that it is aware of all the changes that it has to notify to the Registrar, and if it fails to do so, then the company becomes liable for the default. The scheme of penalties in the Act makes the company liable for every default without proof of negligence. No distinction can, therefore, be made between facts which are available from the records of the company and facts which are not. AIR (V 30) 1943 Mad 214: 1942 MWN 761: 56 MLW

80: (1943) MLJ 119: 44 Cr LJ 380: 205 Ind Cas 324.

——**S. 87 (1) (b) — Scope and object — Attachment of managing agent's remuneration.**

The restriction by S. 87 (b), is against a managing agent making a voluntary charge or assignment of his remuneration and the object is undoubtedly to prevent him from doing so to the detriment of the company. It is an entirely different matter when a creditor of a firm of managing agents seeks to recover his debt by attaching the remuneration to which the managing agent is entitled. A restraint on voluntary alienation does not bar a compulsory sale at the instance of a creditor. AIR (V 28) 1941 Cal 240: 195 Ind Cas 69.

——**S. 87 (2) — Notice of change of directors, absence of — Offence.**

The provision in the foot-note of Form No. 26, Appendix A, Companies Act, requiring a notice of the change among directors to be given within 30 days from the date of occurrence, is not mandatory and no offence is committed by a Company by not filing such notice. AIR (V 19) 1932 Mad 497: 35 MLW 661: 33 Cr LJ 589: (1932) MWN 1157: 138 Ind Cas 317.

——**S. 87 — Change of director — Failure to give notice — Conviction — Time for giving notice.**

Where one of the directors of a company resigned on the 6th February and notice of this resignation and of the name of the new director was given to the Registrar only on the 8th May and the managing director and the secretary of the company were convicted under S. 87, Companies Act, for not giving notice to the Registrar in proper time :

Held, that inasmuch as no period is prescribed by law within which such notice should be given, the accused could not be convicted under S. 87. AIR (V 18) 1931 Cal 265 (1) : 35 CWN 227 : 32 Cr LJ 778 : 58 Cal 882 : 131 Ind Cas 592.

——**S. 87 — Appointment of directors — Part of 'indoor management'.**

Persons contracting with a company are bound to know, or are precluded from denying that they know, the constitution of the company and its powers as given by statute and the memorandum and articles, but they are not affected with notice of all that is contained in the register of Directors kept as required by S. 87 of the Act. Notwithstanding the provisions of S. 87, the appointment of a Director still remains part of "the indoor management" of the company and it would hardly conduce to facility of business if outsiders were compelled to search the register and find for themselves whether a person who was permitted to act as a Director of the company for some length of time was also its Director de jure. AIR (V 13) 1926 Bom 28 : 27 Bom LR 1218 : 91 Ind Cas 334 (DB).

——**S. 87-A.**

——**S. 87-A — Managing Agents — Agreement to employ firm of four partners as managing agents in 1907 — One partner died in 1910 — Other two partners assigning their shares to stranger in 1920 — Stranger again assigning in 1922 to P — Last surviving partner assigning his interest to D in 1939 — Company serving notice on firm that agreement of 1907 terminated — No new agreement entered — Only intimation of changes noted — P suing for damages for breach of agreement of 1907 — Suit, if tenable.**

Four persons K, B, G and A constituted a firm K. A. and Co. These persons promoted a company called A. C. W. Ltd. For the services rendered, the company entered into an agreement with the firm on 7th December 1907 appointing the latter as secretaries, treasurers and agents of the company. The agreement provided as long as the said firm and the said company shall exist and continue to carry on business either in the present or any other name, and that such appointment shall not be liable to be at any time revoked or cancelled on any ground or for any reason whatever, save and except their being found guilty of fraud in the management and discharge of their duties as such secretaries, treasurers and agents, and the said company doth hereby for itself and its successors covenant with the said K, B, G and A and the said firm severally and jointly that the said company shall from time to time when the constitution of th said firm changes by death, retirement, admission of any new partner or otherwise enter into a fresh agreement if necessary with the said firm and the partner or partners therein in the terms in these presents contained.

K died in 1910 and in 1920 B and G assigned their shares to N. N in his turn in 1922 assigned his interest to P. Both assignments were intimated to the company who only took a note thereof in the meetings of the board of directors. No fresh agreements were however entered into with the new firms which were constituted by the addition of new partners. In 1939 the only surviving partner A assigned his interests in the firm to his son D. The company thereupon served a notice on K. A. and Co., which then consisted of P and D intimating to them that the agreement dated 7th December 1907 has come to an end, so the original firm of K. A, and Co., had ceased to exist. P then brought a suit against the company for damages on account of the breach of the agreement:

Held, that without setting up a novation or an estoppel P could not sue for damages for breach of the agreement of 7th December 1907, to which he was no party as there was lack of mutuality. AIR (V 31) 1944 Bom 205 : 46 Bom LR 265 (DB).

——**S. 87-A — As amended in 1936 — Retrospective effect.**

With respect to agency agreement, Companies Act, 1936, is not retrospective except that by S. 87-A, managing agencies existing when the Act came into force, can only survive for 20 years from that date. AIR (V 31) 1944 Bom 205 : 46 Bom LR 265 (DB).

——**S. 87-A — Managing Agents — Expenses of management — Criminal intention, if can be presumed.**

No Judge or lawyer without an intimate knowledge of business can estimate how much or how little is required to be spent on management, advertisement, and commission agency, in order to ensure success for a newly launched business. It depends upon innumerable fortuitous factors of trade, business, market, and particular social conditions. The management, advertisement, and commission agency expenses of all Insurance Companies is notoriously heavy. Their business depends upon their success in persuading members of the public to engage in a gamble, because all insurance is in a sense a gamble, either with misfortune or with death. To suggest that the success or failure of a business of this kind is something which can be naturally or probably predicated is to lose all sense of direction. Such matters cannot be enclosed within the straight jacket of a legal principle as to presume the existence of a criminal intention against an accused, of which there is not a tittle of evidence. (1936) 161 Ind Cas 280 : 63 Cal 18 : 37 Cr LJ 439 (DB).

——**S. 87-A — Rights and duties — Managing agents — Provision in Articles for immediate execution of agreement with managing agents — Managing**

agents drawing monies from bank for their remuneration and preliminary expenses — Agreement not executed — Suit by Company — Laibility of Bank — Articles, how far notice to strangers — Managing agents, whether liable to refund the moneys — Action for money had and received, nature of.

The Articles of Association of a Company directed the Directors to execute forthwith a deed of agreement of managing agency with a firm, which was scheduled to the Articles. The firm, purporting to act as managing agents, began to operate on an account with a Bank. They drew money from the Bank for paying themselves their remuneration and for the preliminary expenses incurred by them for the Company. The agreement was not in fact executed, and the firm subsequently resigned their agency. The Company sued the Bank and the firm for recovery of the monies drawn by the firm on the Company's account :

Held, (1) that though strangers to a Company have constructive notice of the Memorandum and Articles, they are entitled to assume that the provisions therein contained have been complied with by the officers of the Company and the Bank was, therefore, entitled to assume in this case that the agreement has been executed and was, therefore, not liable to the Company:

(2) that the Company was not entitled to recover the amounts from the firm as money had and received, as the firm had drawn only such sums as they would have been lawfully entitled to draw if the agreement had been executed.

Money cannot be recovered back as money had and received if the circumstances are such that there is nothing unconscionable or improper in the defendant having retained the money, even though he could not have maintained an action in law for recovering the same from the plaintiff.

(Nature of an action for money had and received discussed.) AIR (V 22) 1935 Mad 799 : 68 MLJ 510: 41 MLW 527 : (1935) MWN 568 : 156 Ind Cas 570 (DB).

——S. 87-B.

——S. 87-B — **Removal of managing agents by ordinary resolution — Power of company — Articles of Association requiring extraordinary resolution.**

Section 87-B, Companies Act, is directed solely to securing that a managing agent shall not be validly appointed, removed or have his contract altered without a resolution of the Company. It does not empower the Company to remove its managing agents by ordinary resolution when the Articles of Association provide that he could only be removed by an extraordinary resolution. 77 IA 128: 1950 Comp. C. 133: 52 Bom LR 501: AIR (Vol 37) 1950 PC 81.

——S. 87-B (c), — **Applicability and scope.**

As a general rule, a party to a contract cannot assign his liability thereunder without the other party's consent. Under S. 87-B (c), too, the office of the managing agent cannot be transferred without the consent of the company. The Companies Act does nothing more than give statutory recognition to the general law. A transfer by the managing agent of a company of his office amounts to the tranfer of a liability under a contract and would be void against the whole world without the company's consent. Section 87-B (c) applies to the case of the transfer of the office of the managing agent by the managing agent to himself and certain others. AIR (Vol 31) 1944 Bom 76: 45 Bom LR 1075: 214 Ind Cas 42.

——S. 87-B — **Scope and effect — Managing agents removable under articles of association only by extraordinary resolution — Ordinary resolution dismissing them — If valid.**

S. 87-B (f) does not authorise the removal of the Managing Agent by passing a simple resolution where the articles appoint the Managing Agent. The purpose of S. 87-B is to prevent the appointment or dismissal of a Managing Agent to a company without the shareholders in general meeting, giving their assent. But when the articles of association bind the members of the company and the company itself to follow a certain procedure in dismissing its Managing Agents, and that procedure does not contravene the provisions of S. 87-B, but goes beyond those provisions in the way of providing protection for the members of the company, there is nothing in S. 87-B (f) which authorises the abrogation of a contract contained in the articles of association prescribing that the services of the Managing Agents shall be dispensed with in a particular manner. Where therefore the articles of association provide that the Managing Agents are removable by an extra-ordinary resolution of the company passed at on extra-ordinary general meeting at which persons holding not less than three-fourths of the issued ordinary capital of the company are present, an ordinary resolution at a general meeting passed by a majority of sixty-eight per cent. of the share-holders entitled to vote dismissing the managing agents is inoperative and invalid. (1946) 50 CWN 310.

——S. 87-B (c) — Applicability. (1948) 2 MLJ 237 (PC).

——S. 87-C.

——Term "net profits" as used in Company's Articles held not same as used in S. 87-C, Companies Act. AIR (Vol 28) 1941 Rang 145: 1941 Rang LR 181: 195 Ind Cas 523 (SB).

——S. 88.

——S. 88 — **Company — Agreement by promoters of company before its incorporation — Agreement cannot be enforced by company even if after incorporation it has ratified it.**

A company after its incorporation cannot ratify an agreement ostensibly made on its behalf before it is incorporated. A fresh agreement can, however, be made, after the company comes into existence, between the former contracting parties and the company upon the same terms as those contained in the earlier agreement. If the terms are not expressly set out in the new agreement but are ascertained by reference in it to the terms contained in the old one, the new agreement will be of full effect upon the terms in the earlier agreement. An agreement, to which the company was not a party, which was entered into on its behalf by the promoters of the company before its incorporation cannot be enforced by the company even if after its incorporation it has adopted and ratified the agreement. AIR (Vol 33) 1946 Cal 23: ILR (1944) 2 Cal 101.

——S. 88 — **Powers of director — Chairman's right to create lien.**

Where though the Articles of Association of a corporation are silent as to the authority of the Chairman to execute a declaration creating a lien on property of the Corporation in respect of a loan sanctioned by the Board of Directors, the Chairman has an implied authority to execute such declaration as principal officer, while carrying on the business of

the Corporation. AIR (Vol 26) 1939 Sind 100: 181 Ind Cas 681.

——S. 88 — Contract — Shares — Purchase by company itself — Validity — Company, if estopped from pleading that purchase is ultra vires — Remedy.

The company is not estopped from denying that the contract entered into by it was ultra vires. Nor can a representation by its officers that the shares were being purchased for one of its constituents estop the company from pleading that the shares were purchased for itself and the purchase being of its own shares was ultra vires. In such a case the remedy if at all can only be against the officers who made the representation on the faith of which the contract was entered into. AIR (Vol 30) 1943 Mad 111: 55 MLW 653: 208 Ind Cas 270.

——S. 88 — Bank — Person taking transfer of property from its accountant within few days of Managing Director's death, if protected.

Where a person knowing at least something about the constitution of a bank and knowing that its Managing Director has died, takes, a transfer of the bank's property from its accountant within a few days after the death of the Managing Director, he is not entitled to assume that the transfer was authorised and regular. AIR (Vol 29) 1942 Oudh 417: 18 Luck 110: 1942 OWN (CC) 319: 200 Ind Cas 485 (DB).

——S. 88 — Contract before formation of company — Company, if bound.

A company cannot be bound by a contract entered into on its behalf before the company was formed, and it is not competent to bring a company in existence bound to enter into contract with a third party, the terms of which have been arranged before the company was formed. It is for the company to consider after its formation whether it will enter into the contract or not. AIR (Vol 21) 1934 Bom 427: 36 Bom LR 907: 59 Bom 218: 156 Ind Cas 80 (DB).

——S. 88 — Power to borrow — Construction of articles — Power in emergencies — Ultra vires borrowing — Ratification by directors — Effect — Mortgage deed — Necessity of common seal — Defect in seal — Validity of deed — Execution of deed by agent — Defect in resolution appointing agent — Validity of execution — Presumption of regularity of acts of internal management.

Where the Articles of Association of a company contained a clause giving extensive powers to the managing agent to conduct and manage the business and affairs of the company and to enter into all contracts and do all other things usual and necessary or desirable in the management of the affairs of the company but there was also another clause which expressly prohibited the Board of Directors from delegating their power to borrow:

Held, that the two clauses must be read together and the former clause could not be so interpreted as to give the managing agent unrestricted powers of borrowing on behalf of the company.

Held, further that the latter clause did not, however, prohibit the managing agent from incurring a temporary loan in an emergency for protecting the interests of the company under the ordinary rules of law relating to principal and agent.

Where a loan contracted by a managing agent was shown as a debt in the report of the directors to the share-holders submitting the audited accounts, which was signed by the directors at a properly convened meeting:

Held, that, assuming that the managing agent had acted ultra vires in contracting the loan, there was a ratification by the directors which made the loan binding on the company.

Under S. 88, Companies Act, a mortgage-deed could be validly executed on behalf of a company by any person acting on behalf of the company. It need not necessarily be under the common seal.

If a document under seal is not necessary, then a mere defect in the manner of affixing the seal will not render the document invalid.

A provision in the Articles of Association prohibiting the directors from delegating their power to borrow does not prevent them from empowering one of the directors to execute a mortgage deed in respect of a loan which has already been incurred, and to settle the details of the mortgage transaction.

Where a mortgage deed is executed by an agent authorised by the directors the transaction is not vitiated by the fact that there was a defect in the passing of the resolution authorising the agent to execute the document. The creditor is entitled to assume that all acts of internal management have been regularly performed. AIR (Vol 19) 1932 All 141: (1931) ALJ 1038: 53 All 1009: 134 Ind Cas 244 (DB).

——S. 89.

——S. 89 — Hindu joint family doing business in name of P and Co. — P and Co. acting as managing agents of L and Co. — P manager of family in his own name executing promissory note and borrowing money from J — Certain shares in P's name pledged with J as security — Money deposited in Court on behalf of L and Co. — No indication in promissory-note that P was acting on behalf of L and Co. — Letter written by P to J on same date as promissory note stating that money was borrowed for J and Co. — Suit to recover money — Fact that L and Co. benefited held was not sufficient to bind company — Company held not liable even if J knew about object of loan.

A Hindu joint family of which P was the manager was doing business in the name of P and Co. P and Co. were the managing agents of L and Co. which was in liquidation. P in his own name executed a promissory note in favour of J and borrowed money from him. As a security for the loan certain shares in a company held by the family in the name of P were pledged with J. The money borrowed by P was deposited in the High Court on behalf of L and Co. in order to secure the postponement of the appointment of a provisional liquidator. There was no indication whatever in the promissory note that P was acting on behalf of L and Co. On the day on which the promissory note was executed P wrote two letters to J in one of which there was no reference to the object of the loan and in the other there was nothing but the object of the loan, namely that the money was borrowed "for the requirement in connection with L and Co." In a suit for the recovery of the loan, the question was whether L and Co. was liable for the payment of the loan. It was argued from the fact that the company benefited and that the letter showed that J knew for what purpose the money was being borrowed that the company should be held liable:

Held, that there was no intention to bind L and Co. The mere fact that the company benefited was not by itself sufficient to bind the company. If P borrowed money from J for his own purpose to lend it to L and Co. L and Co. could not be held liable to J even if J knew with what object the money was being borrowed. Before L and Co. could be held liable it must be found that the loan was actually a loan to L and Co. But all the indications were that the loan was made to P personally and on his personal security, there being good reason why J should not lend money to the company i.e., the fact that company's credit had been impaired. AIR (Vol 33) 1946 All 372 (DB).

——S. 89 — Borrowing — Director — Money borrowed by one of managing directors — Liability of company.

Where a registered company having for its objects such as are expected of a company incorporated for the purpose of carrying on business of investment, authorises one of the managing directors to invest the moneys of the company in shares and securities and sell them when deemed necessary and for that purpose to borrow money from a firm of which a co-managing director was the head himself, as an agent and he borrows large sums from the firm and utilised them for the purpose of gambling in differences on behalf of the firm and further embezzles large sums of the company, the company is liable for the sums borrowed unless the position of the co-managing director made a difference. AIR (Vol 31) 1944 Mad 532: (1944) 2 MLJ 77: 1944 MWN 548: ILR (1945) Mad 107 (DB).

——S. 89 — Director — Powers of — Articles of Association — Liquidation — Court's powers.

The question of the directors exceeding the borrowing powers conferred upon them by the Articles of Association is essentially a question of internal management of the company. The Court will not go into that question on a winding up petition especially when since the filing of the petition the company has by a resolution ratified the borrowings by the directors and has taken the view that the directors have acted in the best interests of the company. AIR (Vol 29) 1942 Bom 231: 44 Bom LR 387: 203 Ind Cas 116.

——S. 89 — Directors lending to company in excess of their borrowing powers — Monies utilised by company — Company, liability of.

Where the directors lend to the company in excess of the borrowing powers conferred upon them by the Articles of Association and all these moneys are in fact utilised by the company, the company is liable to pay that amount. If in fact the monies have not been utilised by the company, the company is not liable for them. AIR (Vol 29) 1942 Bom 231: 44 Bom LR 387: 203 Ind Cas 116.

——S. 89 — Director — Borrowing ultra vires — Recovery of money.

Where the borrowing is ultra vires the directors and not ultra vires the company, the money could be recovered in an action for money had and received. AIR (Vol 23) 1936 Bom 62: 37 Bom LR 978: 60 Bom 326: 161 Ind Cas 126.

——S. 89 — Liability of company on promissory note executed by managing agents for loan advanced to him personally — Conditions to be present — Company being benefited by the loan — If affects the question.

Where a managing agent executes a promissory note and obtains a loan personally, the company cannot be made liable on it by the mere proof of the fact that the money so borrowed went to benefit the company. Before the company can be held liable it must be shown and found that not only that the money came into their hands but that it was in effect put into theirs hands by the creditor through the managing agents, it being understood by both parties when the note was executed that the company would be liable for repayment. ILR (1946) All 361: 223 IC 311: 1946 AWR (HC) 236: 1946 ALW 70: 1946 OWN (HC) 70: AIR (Vol 33) 1946 All 372: 1946 Comp C 214.

——S. 89 — Authority.

Unless a person is so specifically authorized to do, either as a managing agent or otherwise, he cannot execute or make a promissory note in his own name so as to bind the Company. AIR (Vol 17) 1930 All 778 (DB).

——S. 89 — Company's liability on endorsement — Matter of construction.

The question as to the liability of a Company on a particular endorsement is in every case one of construction. If on the true construction of the instrument, the bill or note is the bill or note of the Company, the Company will be liable upon it, and not the individuals whose names are on it, unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not the bill or note of the Company, the persons whose names are upon it will be liable upon it whether they intended to be so or not. It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand. Where the endorsement was "M. and Sons, Managing Agents of L. A. Company."

Held, that it would not necessarily be clear to anyone that the responsibility of L. A. Company was involved and that L. A. Company therefore was not liable. AIR (Vol 12) 1925 Cal 1062: 89 Ind Cas 328: 52 Cal 802: 29 CWN 828 (DB).

——S. 89 — Powers of manager — Transfer of negotiable instruments.

The ignorance of the Manager of the Bank of the terms of the Articles of Association does not affect his power to make a transfer of negotiable instruments. He is the agent of the Bank for performing all ordinary banking transactions, and a transfer of such an instrument is a very ordinary transaction. AIR (Vol 11) 1924 Lah 462: 80 Ind Cas 741: 6 LLJ 183 (DB).

——S. 89 — (S. 72 old Code) — Signed on behalf of Company — Promissory note signed by Secretary, on paper bearing rubber stamp of Company.

Where one Joshi was the Secretary of the Defendant Company and was authorised by them to sign promissory notes on their behalf, and, for the purchase of certain machinery by the Defendant Company, the said Joshi executed a promissory note signing it as 'Joshi Treasurer' and the top of the note bore the rubber stamp of the Defendant Company,

held, that the promissory note was signed on behalf of the Company. S. 47 of the Act X of 1868 discussed. 4 Bom 275, not Foll. AIR (Vol 10) 1923 Bom 29: 67 Ind Cas 941: 24 Bom LR 355 (DB).

——S. 91-A.

——S. 91-A — Contracts, what are.

Contracts referred to in S. 91-A also include contracts not made at a meeting of the directors. They include even petty purchases from another firm in which the purchasing director is interested. AIR (V 25) 1938 Cal 440 : 42 CWN 533 : 39 Cr L J 687 (2) : 176 Ind Cas 108 (DB).

——S. 91-A — Power of Company to borrow money from its director.

A Company is entitled to borrow money from one of its directors. But that is subject to the fundamental position that the director, even though disclosing his interest as required under S. 91-A, Companies Act, does not take undue advantage of his position because, fundamentally, the position of a director is very like that of a trustee. He occupies a fiduciary position and so the transaction must be fair and proper. AIR (V 38) 1951 Nag 255 : ILR (1950) Nag 562 : 1950 Comp C 225 (DB).

——S. 91-A — Directors — Position of — Trustee.

The Directors of the company are agents of the company and trustees for the shareholders and cannot enter into a contract with the company for personal benefit. AIR (V 2) 1915 Mad 1179 : 38 Mad 991 : 32 Ind Cas 350.

——S. 91-A — Breach of provisions, effect of.

The breach of Ss. 91-A, 91-B and 91-C, though made punishable, does not ipso facto render the contract void or voidable. AIR (V 16) 1929 Mad 353 : 1928 MWN 481 : 115 Ind Cas 486 (DB).

——S. 91-A — Formal disclosure when unnecessary.

Where the interest of the Director in the other party to the contract is such that it is likely to produce a conflict between his duty to the company and his duty or interest in the other party, he is bound to disclose it. But if the whole body of the directors was already aware of such interest, formal disclosure is not necessary. AIR (V 16) 1929 Mad 353 : 1928 MWN 481 : 115 Ind Cas 486 (DB).

——S. 91-A — Lease to relations — Pecuniary interest when made out.

Srinivasa Ayyangar, J. — A Director of a company executed a lease on behalf of his company. He took extraordinary interest in arranging the lease, and the lease was also executed in his own house. His son, who had obtained power-of-attorney from the nominal lessee, was made a major partner with six annas share in the lease. Further there was difference between the rate of working charges to be given to the company as stated in the lease and that on the basis of which the lessees were to calculate their profits. And this difference could not be accounted for. The Director, however, was separate from his son who was partner in the lease.

Held, that the partner must be considered to be pecuniarily interested in the lease. (Wallace, J., contra.) AIR (V 16) 1929 Mad 353 : 1928 MWN 481: 115 Ind Cas 486 (DB).

——S. 91-A — Non-disclosure, allegation of.

Company in its plaint alleging against Director that he had interest in contract but not alleging also non-disclosure of such interest — It will not be allowed to make the allegation after issues framed and evidence closed. AIR (V 16) 1929 Mad 353 : 1928 MWN 481 : 115 Ind Cas 486 (DB).

——S. 91-A.

——Per Srinivasa Ayyangar, J. — The Articles of Association of a company did not object to a Director's being interested in contracts to be entered into with the Company provided such interest was disclosed at a meeting of the Directors at which the contract would be made. The Company sued one of its Directors alleging that he had interest in a contract entered into on behalf of the Company, but it was not alleged in the plaint that the interest was not disclosed by him.

Held, that although under S. 91-A, the question of proving non-disclosure would not arise, still, under the Articles, when the charge of having interest in the contract was made, the onus of showing that he complied with the proviso by disclosing his interest was upon the Director though the plaint did not charge him with non-disclosure. (Wallace J. contra.) AIR (V 16) 1929 Mad 353 : 115 Ind Cas 486 : 1928 MWN 481 (DB).

——S. 91-A — Non-disclosure and vote.

The law applicable to companies which have their articles of association embodying the terms of Ss. 91-A, 91-B, 91-C, Companies Act is this. Non-disclosure of his interest or voting by a Director will not per se render the contract void or voidable. But non-disclosure or voting where, but for the vote, the contract would not have been sanctioned, will in all cases render the interested Director liable to account for secret profits. AIR (V 16) 1929 Mad 353 : 115 Ind Cas 486 : 1928 MWN 481 (DB).

——S. 91-A — Relationship.

Per Srinivasa Ayyangar, J. — In India the interest of Director in a contract need not necessarily be a pecuniary interest, but even mere relationship, as that of husband and wife or father and son, is interest, if the circumstances are such that it may reasonably be regarded as affecting the Director's mind. Obiter. AIR (Vol 16) 1929 Mad 353 : 1928 MWN 481 : 115 Ind Cas 486 (DB).

——S. 91-A — Sub-partnership.

Sub-partnership with other party to contract is interest in contract. AIR (V 16) 1929 Mad 353 : 1928 MWN 481 : 115 Ind Cas 486 (DB).

——S. 91-A — Valid Articles.

Articles of Company not objecting to Director being interested in contract with company but requiring such interest to be disclosed and further that interested director shall not vote in such contract or if he does, his vote shall not count — Article not altered after amendment in 1914 — Though Ss. 91-A and 91-B impose penalty for breach, they do not render Article ultra vires. AIR (V 16) 1929 Mad 353 : 1928 MWN 481 : 115 Ind Cas 486 (DB).

——S. 91-B.

——S. 91-B — Interested director — Company P financed by Company M who in their turn financed by Company S — Company S advancing sum to P through M — Directors of P, directors of M also — S taking equitable mortgage of P's property — Advance exceeding limits of borrowing powers of directors of P — Claims of S and M, if could be resisted on these grounds.

A company P upto its liquidation was financed by another Company M who in their turn were financed by Company S. Company S was to be a secured creditor of P for the amount by virtue of an equitable mortgage evidenced by an indenture dated February 28, 1928, and confirmed by another indenture dated August 11, 1931. The claim of M was intended as an alternative to the claim of S: it was that if the latter failed to established its claim, M should be admitted to rank as unsecured creditors in respect of the said sum. The Official Liquidator of P resisted the claim of M on the ground that the sums advanced were in excess of the borrowing powers of the directors of P under Art. 73 of Table A of the Memorandum being more than the amount of P's issued share capital. The main objection

taken to S's claim was that the directors of P were disqualified under S. 91-B of the Companies Act from entering into them on behalf of P since they were all directors and share-holders of M :

Held, after considering all the evidence that the indentures of February 28, 1928 and August 11, 1931, embodied a contract or arrangement in which each director of P was concerned or interested within the meaning of S. 91-B by reason of his being a director and share-holder in M. The indentures of February 25, 1928, and August 11, 1931, were therefore, voidable by the Official Liquidator. But S. 91-B would not operate to deprive of the benefit of his contract with the Company, a third party who had no notice of the defect in the directors' authority. This would be contrary to principle; such a person would be entitled to assume that the internal management of the Company had been properly conducted. But on the facts of the present case it was impossible to regard S as ignorant, that in any question between P and M the former had no independent board and indeed no single director who was not interested on behalf of M. The S Company could not on the facts disclaim knowledge of the interest of the directors of P in 1928 or 1931 and were not entitled to assume on either occasion that the provisions of S. 91-B had been complied with. No case of ratification by the preference share-holders of P could be made out, and the result was that the Official Liquidator was entitled to avoid the equitable mortgage which was the S Company's sole ground of claim in the winding up of P.

Held, also, that Art. 73 limited the directors' authority to borrow. The requirement of the article was that the directors should so restrict their borrowing that the amount for the time being remaining undischarged shall not exceed the limit specified. The intention of the article was not satisfied by treating it as a direction that beyond the specified limit further borrowings, though not prohibited, were to be expended in reduction of existing loans. Assuming, however, that the directors from 1921 to 1928 exceeded their authority in so far as the advances obtained from M exceeded the limit, the loans were not ultra vires of the Company. and that the money was received by the Company and applied for its purposes. In these circumstances, it was plain that the Official Liquidator could not reduce the balance outstanding at the date of liquidation by disputing the liability of P to repay the whole sums advanced. AIR (V 25) 1938 PC 159 (164): 42 CWN 733: 4 BR 540: 67 CLJ 338 : ILR (1938) Bom 421 : 1938 O W N (C C) 859 : 40 Bom LR 1109 : 32 SLR 517 : 174 Ind Cas 545.

——S. 91-B — Officer — One person officer of two companies — Knowledge acquired as officer of one, if can be imputed to other company.

Where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud, of even irregularity, the Court will not draw the inference that he has fulfilled these duties. AIR (V 23) 1936 Bom 62: 37 Bom LR 978: 60 Bom 326: 161 Ind Cas 126 (DB).

——S. 91-B — Internal management — Principle of English cases, if applicable — Notice — People dealing with company, if fixed with notice of limitation on power of company — Reason for rule.

The principle of the English cases as to internal management ought to be applied to a case of disability of directors arising under S. 91-B. People dealing with a joint stock company are fixed with notice of any limitations on the power of the company contained in the statute under which it is incorporated or in the Memorandum or Articles of Association; but if it is shown that a particular act was ostensibly authorised by the statute and the Memorandum or Articles of association, persons dealing with the company are not concerned to see that the company has put itself into a position to exercise its power properly. It is generally expressed by saying that outside parties are not concerned with the internal management of the company They are not, for instance, concerned to see that there was a proper quorum of directors present or that persons who were apparently directors of the company had in fact been validly appointed. Those are matters of internal management. If the disability of a director to vote upon a contract in which he was personally interested were imposed by the Articles of Association, the question whether he was personally interested in, and entitled to vote upon, a particular contract would be regarded as a matter of internal management, with which persons dealing with the company would not be concerned. The reason for the the rule in S. 91-B is that it would be disastrous in a business community if contracts made with companies could be impeached on account of matters known to the company but not to the other contracting party. AIR (V 23) 1936 Bom 62 : 37 Bom L R 978 : 60 Bom 326 : 161 Ind Cas 126 (DB).

——S. 91-B — Invalid allotment — Articles providing for a quorum of three at Directors' meeting — Five Directors at a meeting allotting shares to three of them — Allotment is invalid.

The five Directors of a Company held a meeting and passed a resolution to allot the unallotted shares of the Company to three of them in certain proportion. By the Articles of Association, the allotment was in the absolute discretion of the Directors. Further the Articles required a quorum of at least three for a Directors' meeting, and it was further provided that no Director could as a Director vote on any contract or arrangement in which he was either directly or indirectly concerned or interested.

Held, that no doubt an allotment of shares is a contract and the three contracts were the subject of one vote recorded in one resolution but one vote is not divisible in three votes. Firstly, because in fact it was one vote and not three, secondly, because each of the contracts was not considered separately on its merits, and thirdly, because each director was interested in the allotments to the other two and probably voted for them in consideration of an allotment to himself. Therefore, whether the subject-matter be considered as three contracts or as one arrangement, the three directors were not entitled to vote and that there was no quorum and the resolution and the allotments were therefore, invalid. AIR (V 8) 1921 Bom 372 : 23 Bom LR 1104 : 64 Ind Cas 933.

——S. 92.

——Ss. 92 (5), 93 — Offence — Prospectus filed in English — Subsequent issue of incomplete prospectus in Bengali — Such prospectus not filed before Registrar — Offence not technical.

The accused filed a prospectus in English in the office of the Registrar, Joint Stock Companies. This prospectus fulfilled all the requirements of law. Subsequently they issued a prospectus in Bengali, substantially identical with the English prospectus, but which did not contain certain particulars requir-

ed by S. 93 of the Companies Act. A copy of this document was forwarded by a private person, to whom it had been sent, to the Registrar, who thereupon filed a complaint under S. 92 (5) of the Act before the Chief Presidency Magistrate on the ground that the Bengali prospectus had been issued without having been filed before him. The Magistrate held that in effect the Bengali copy had been filed, that the offence was purely technical and that the omission was not culpable and acquitted the accused :

Held, that the issue of the Bengali prospectus which did not in fact contain certain particulars specified in the English prospectus and required by law under S. 93 to be included in every prospectus issued on behalf of a company, was in contravention of S. 92 and the accused were liable to be convicted under S. 92 (5).

Held, also that as the question involved was one of great importance in view of the scope of the Act under consideration and of the necessity, in the interests of the community, of the strictest observance of its provisions, the Court should not give effect to the argument that the proceedings were initiated by a private individual, and refuse to interfere as there was a contravention of law. AIR (V 23) 1936 Cal 33 : 40 CWN 320 : 37 Cr L J 379 : 63 CLJ 188 : 160 Ind Cas 829 (DB).

——**S. 92 — Prospectus.**

An advertisement in a newspaper offering to the public some shares of the Company for sale is a 'prospectus" as defined in S. 2, cl. 14 of the Act and a copy of an advertisement of this nature must be filed with the Registrar before using it. AIR (V 12) 1925 Cal 714 : 88 Ind Cas 5 : 29 CWN 523 : 26 Cr LJ 1016 : 52 Cal 440 (DB).

——**S. 93.**

——**S. 93 — Prospectus — Relevancy of in determining rights of share-holders.**

The real foundation of a share-holder's rights and liabilities is the Articles of Association. Ordinarily the prospectus is not relevant in any matter touching the contract between share-holder and the company. It is not the contract, but only the matter, which induces the contract. It would be relevant in an action for recission based on misrepresentation or fraud, or in an action for deceit, but not in a matter of contract. The contract proper is to be found in the application for allotment and in the Articles of Association. But where the application for allotment stipulates that the shares are subject to the provisions of the Memorandum of Association, of the Society and the special conditions of such bond-shares —" and the special conditions are found only in the prospectus, it is necessary to read certain terms of prospectus into the contract. (1946) 1946 NLJ 128.

——**S. 93 — Shares — Misrepresentation — Person induced to apply for shares upon misrepresentation and fraud — Right to avoid time for exercising.**

Any contract that is induced by undue influence, misrepresentation or fraud is voidable at the option of the party who was led to enter into the contract by reason of undue influence, misrepresentation or fraud. This proposition though applicable to contracts relating to the purchase of shares of a company is subject to certain other rules of law, and one of those rules is that the repudiation or the avoidance of the contract by the share-holder must be within a reasonable time and before the commencement of proceedings for the winding up of the company. AIR (V 25) 1938 All 193 : (1938) A L J 94 : 1938 AWR (HC) 84 : ILR (1938) All 301 : 174 Ind Cas 886.

——**S. 93 — Shares — Misrepresentation by Secretary — Rescission of contract — Liability of company for damages.**

The Secretary of a company has no general authority to make representation to induce persons to take shares in a company. Hence, a person who is induced to take shares in a company by a fraudulent misrepresentation not authorized by or known to the officers of the company entitled to make representations, of the Secretary of a company, is not entitled to maintain an action against the company for the rescission of the contract, or for damages for such misrepresentation. AIR (V 24) 1937 Lah 644 : 39 PLR 293 : 173 Ind Cas 165 (DB).

——**S. 93 — Misrepresentation — Agreement to purchase shares — Rescission.**

Where a person signed the Memorandum of Association of a proposed company and agreed to purchase a certain number of shares but subsequently, before registration of the company, he asked the promoter to cancel his shares alleging that he had been induced to purchase shares by the misrepresentation of the promoter:

Held, that he was bound by his agreement and could not rescind it. AIR (V 24) 1937 Lah 527 : ILR (1937) Lah 294 : 39 PLR 760 : 172 Ind Cas 11.

——S. 93 — If a document falling within the definition of a prospectus in S. 2 (14) of the Companies Act, contains misstatements, the directors of the company would be liable to pay compensation under S. 100 of the Act to all who subscribe for shares on the faith of the prospectus for the loss they may sustain by reason of any misstatement contained therein and the fact that the prospectus did not comply with the requirements of S. 93 or that a copy of the same was not filed with the Registrar would not exempt the directors from the liability imposed by that section. AIR (V 21) 1934 Mad 641 : 67 MLJ 437 : 40 MLW 519 : (1934) MWN 1277 : 152 Ind Cas 703.

——**S. 93 — Absence of particulars required to be given in a prospectus — Right of shareholder to rescission of contract to take shares.**

Under S. 93 of the Companies Act a prospectus must contain certain particulars. But there is no penalty prescribed in the Act for non-compliance with this provision of law. When the non-compliance involves misstatement of a material fact, there will be a right of rescission under the general law. But otherwise the omission of any of the particulars will not per se entitle a shareholder to rescission of his contract to take shares. AIR (V 37) 1950 All 503 : 1950 ALJ 836 (DB).

——**S. 93 — Rights of shareholders — Prospectus, if relevant.**

Ordinarily the prospectus is not relevant in any matter touching the contract between shareholder and the company. It is not the contract but only matter which induces the contract. It would be relevant in an action for recission based on misrepresentation or fraud, or in an action for deceit, but not in a matter of contract. The contract proper is to be found in the application for allotment of shares and in the articles of association. But where the application for allotment stipulates that the shares are to be subject to certain special conditions found in the prospectus, that portion of the prospectus must be read into the contract. (1946) 1946 NLJ 128.

——**S. 93 — Director approved and recognized — Outsider cannot question.**

It is not open to an outsider to challenge the appointment of Director or contract a Director's authority to act on behalf of the company when the company has recognized a person to be a

Director for a long time without repudiating his acts on any single occasion. AIR (V 2) 1915 Lah 478: 182 PWR 1915: 31 Ind Cas 595 (DB).

——S. 96.

——Ss. 96 and 123 — Arbitration — Submission to — Contract not under seal.

Section 96 of the Companies Act does not provide that an agreement to refer disputes must be under seal. A contract relating to the working of a certain machinery made not under seal and providing for reference of all future disputes to arbitration, is not illegal. S. 123 of the Act applies only to those submissions to arbitration which have been made under the provisions of the Act. AIR (V 2) 1915 All 234: 37 All 273: 13 ALJ 312: 28 Ind Cas 384 (DB).

——S. 100.

——Ss. 100(1), 2(14), 92, 93(5) — Mis-statement in prospectus — Liability of directors to make compensation to person taking shares — Prospectus not complying with requirements of S. 93 — Liability of director.

If a document falling within the definition of a prospectus in S. 2 (14), contains mis-statements, the directors of the company would be liable to pay compensation under S. 100 to all who subscribe for shares on the faith of the prospectus for the loss they may sustain by reason of any mis-statement contained therein, and the fact that the prospectus did not comply with the requirements of S. 93 or that a copy of the same was not filed with Registrar would not exempt the directors from the liability imposed by the section.

It is immaterial for the purposes of S. 100 (1) whether the director who is sought to be made liable saw the prospectus or not. AIR (Vol 21) 1934 Mad 641: 67 MLJ 437: 40 MLW 519: (1934) MWN 1277: 152 Ind Cas 703.

——S. 100 — Retirement of directors.

Where before allotment of shares in a limited company, two of the directors mentioned in a prospectus retired and the fact of retirement was not communicated to the allottee of shares.

Held, that the allottee of the shares would be entitled to rescind the contract of allotment of shares and claim a refund of the moneys paid by him. 1929 MWN 837: AIR (Vol 17) 1930 Mad 325.

——S. 101.

——S. 101 — Shares — Allotment — Payment in cash.

A subscriber to Memorandum of Association of a company has to pay for his shares in cash, in spite of his agreement with the promisee that he should receive them for his legal services rendered in connexion with the promotion of the company. AIR (Vol 31) 1944 Mad 322: 57 MLW 69: (1944) 1 MLJ 107: 1944 MWN 73: ILR (1944) Mad 796 (DB).

——S. 101 — Allotment.

There is nothing in S. 101, which forbids the directors to allot shares to applicants who neglect to pay the application money in terms of the prospectus once the first allotment has been regularly made, although it may be that a provision in a prospectus empowering them to do this would be an infringement of the Act. AIR (Vol 27) 1940 Cal 164: ILR (1939) 2 Cal 512: 188 Ind Cas 468.

——S. 101 (3) — Scope — Application for share not accompanied by 5 per cent. of share money, whether valid offer — Company, if can demand share amount from applicant.

Sub-section 3 of S. 101, lays down a mandatory requirement. The applicant for a share is under a statutory obligation to pay 5 per cent. of the nominal amount of the share along with his application, and the Company is also under the obligation to see that he does so, and it is against public policy that any allotment should be made without compliance with this requirement. Consequently, where an application for share is not accompanied by such payment, the application does not legally constitute a valid offer so as to entitle the Company to demand the share money from the applicant. AIR (Vol 26) 1939 Nag 225: 1939 NLJ 305: ILR (1941) Nag 567: 183 Ind Cas 748.

——S. 101 — Allotment of shares — Distinction between allotment and transfer.

An allotment of shares is an act of the company by which the applicant for shares becomes the holder of unappropriated shares; shares standing in the name of A cannot be allotted to B by the company even with A's consent; such shares may be transferred by A to B, the company's powers of interference in respect of such transfer being determined by its Articles of Association AIR (Vol 24) 1937 Lah 812 (814): 40 PLR 52: 175 Ind Cas 17 (DB).

——S. 101 (3) — Scope — Allotment made without payment of at least 5 per cent. of nominal value of shares — Validity.

Section 101, Sub-s. (3), is applicable to all allotments of shares whether at the time of the floating of the company or any subsequent period. Any allotment which is made without payment of at least 5 per cent. of the nominal value of the shares by the applicant is, therefore, invalid. AIR (Vol 23) 1936 Lah 790: 161 Ind Cas 952 (DB).

——S. 101 — Allotment — Application for shares on August 10, 1930 — Allotment made on September 17, 1931 — Letter of allotment money on March 2, 1932 — Company going n liquidation next day — Allotment, held invalid.

The respondents applied for the shares, on August 10, 1930, and a sum of Rs. 250 was paid along with the application. The allotment was said to have been made on October 17, 1931. On March 2, 1932, a letter was issued to the respondents asking them to pay the allotment money as well as the call money. The company resolved to go in liquidation on March 3, 1932:

Held, that the respondents were not the purchasers of the shares since they were not allotted to them till October 17, 1931, and also because no notice of allotment was ever sent to them. Moreover, the letter calling for allotment money was highly suspicious in view of the fact that the company resolved to go into liquidation the next day. AIR (Vol 23) 1936 Lah 16: 38 PLR 788: 161 Ind Cas 294.

——Ss. 101, 102 (2) — Misfeasance — Allotment without application and allotment money — Offence.

The directors who make allotment of shares without the application and the allotment money, are guilty of misfeasance. They are also guilty of misfeasance if they are a party to a calculated and deliberate fraud in the flotation of the company and in the conduct of its business. AIR (Vol 21) 1934 All 855: 4 AWR (HC) 132: 154 Ind Cas 33 (DB).

——S. 101 — Allotment — Conditional application for shares—Shares allotted—Condition not fulfilled — Applicant accepting position of share-holder — Dividend accepted — Shares pledged — Such shareholder, whether can subsequently contend, that allotment was void on ground of non-fulfilment of condition.

An application for shares was made by the applicant conditional on an undertaking by the Bank that he would be appointed a permanent director of the local branch. The Bank had, however, allotted him shares regardless of this con-

dition. The applicant accepted the position as share-holder by accepting dividends, filing suit to enforce it and by pledging the shares:

Held, that he could not contend that the allotment was void on ground of non-fulfilment of condition precedent as he had by his own conduct waived the condition. AIR (Vol 22) 1935 Lah 691: 160 Ind Cas 793 (DB).

——Ss. 101, 102 (2), 235 — Director party to fraud in floating Company, misfeasance — Director's liability.

Directors are guilty of misfeasance for wilful contravention of S. 101 and are liable under S. 102 (2) of Companies Act, to pay compensation to the company. Under S. 235, they must discharge every creditor of the Company and return the money of the share-holders. Such payments would be a contribution to the assets of the Company which by way of compensation the Court thinks just within the meaning of S. 235. AIR (Vol 21) 1934 All 855: 4 AWR 132: 154 Ind Cas 33 (DB).

——S. 101 — Allotment, when to be made.

An allotment of shares if not made within a reasonable time may not be accepted. AIR (V 21) 1934 Bom 97 : 36 Bom LR 32 : 150 Ind Cas 645.

——S. 101 — Allotment of shares — Right to revoke offer to purchase shares before intimation of allotment.

Before a person is informed of the allotment of shares to him, he has a right to revoke his offer to purchase the shares and ask for the return of the money paid for that purpose inasmuch as in order to obtain a binding allotment there must be an application, an allotment and a communication of the allotment. AIR (Vol 20) 1933 Rang 388: 7 Rang 10: 150 Ind Cas 696.

——S. 101 — Discount.

If an arrangement for the issue of shares is such that in the course of its due working out there is as much as a possibility that in the result the shares will have been issued at a discount, then the issue of the shares as fully paid cannot be justified. 123 Ind Cas 177: 51 CLJ 469: 34 CWN 709: AIR (Vol 17) 1930 PC 151.

——S. 101 — (Case under Act of 1882) — Member — Allotment — Calls — Notice — Death of member.

Where the death of a member of a company, has not been communicated to the company, all notices to be served on him will be deemed served properly if they are sent to his registered address whether they come into the hands of his executor or other representatives or not. Where there is no registered address, notices may be sent to the address to which they should be sent in order to reach him while he was alive or it may be proved that the notices reached the hands of the representatives; in either case, the notice must be deemed to have been properly served. (1902) 4 Bom LR 215.

——S. 102.

——S. 102 (2) — Allotment made without application and allotment money — Offence of misfeasance committed. AIR (Vol 21) 1934 All 855: 4 AWR (HC) 132: 154 Ind Cas 33 (DB).

——S. 102 — Application for allotment of shares — Invalid allotment — Revocation before ratification.

Two Directors of the Bank had made a delegation of the power of allotting shares to the General Manager. Subsequently, these two (one representing a third Director by proxy), together with a third, purported to confirm the decision of the previous week. Neither of these two Directors had paid their allotment money by the date. Held, that no proper meeting of the Directors could be said to have been held and that there was no valid delegation of the power of allotting the shares or any valid allotment of the shares to the defendants. It was open to the defendant to revoke his application for the allotment of any shares, anterior to the date of any valid allotment or ratification by the Board of Directors. AIR (Vol 6) 1919 Lah 351: 52 PWR 1919: 51 Ind Cas 812 (DB).

——S. 102 — Allotment of shares by Secretary and Treasurer — Validity of.

An allotment of shares by the Secretaries & Treasurers is valid if the Articles of an Association, not especially providing for allotment by the Directors, provide that the general management should be by Secretaries and Treasurer subject to the Directors' supervision and that powers should be conferred upon the Secretaries by the Directors from time to time and if the form of application put forward the Secretaries as the persons to whom the application should be made. AIR (Vol 2) 1915 Mad 325: 16 MLT 538: 26 Ind Cas 349 (DB).

——S. 102 — Member — Allotment — Calls — Notice — Death of Member.

Where the death of a member of a company, has not been communicated to the company, all notices to be served on him will be deemed served properly if they are sent to his registered address whether they come into the hands of his executor or other repersentatives or not. Where there is no registered address, notices may be sent to the address to which they should be sent in order to reach him while he was alive or it may be proved that the notices reached the hands of the representatives; in either case, the notice must be deemed to have been properly served. (1902) 4 Bom LR 215.

——S. 103.

——S. 103 — Company not obtaining certificate — Managing agents borrowing money beyond powers — Money utilised by company — Liability.

Where the managing agents of the company borrow money which is not within their power, on behalf of the company which could not then commence any business inasmuch as it had not got a certificate under S. 103, Companies Act nor exercise any borrowing powers under S. 103, the borrowing cannot be said to be a bona fide transaction and even if the money is utilised for the company, the company cannot be saddled with the liabilities therein. AIR (Vol 27) 1940 Oudh 202: 1940 OWN (CC) 274: 1940 AWR (CC) 141: 15 Luck 515: 186 Ind Cas 813 (DB).

——Ss. 103, 235 — Directors guilty of wilful negligence, liable to make re-payment.

In a case the minimum subscription required according to the Articles of Association of a certain Company had been subscribed, but the amounts due on them by the directors had not all been paid and the certificate permitting the Company to commence business had been obtained as the result of a false declaration made. The directors knew of the obtaining of this certificate and they were fully aware that the Company had started business. The Company closed its doors shortly and a compulsory winding up order was passed:

Held, that the directors were guilty of wilful neglect and hence were liable to make re-payment under S. 235 Companies Act. AIR (Vol 25) 1938 Mad 124: 46 MLW 869: (1937) MWN 1099: (1937) 2 MLJ 848: ILR (1938) Mad 292: 176 Ind Cas 592 (DB).

——S. 103 (3) — Applicability — Contract Act, S. 70.

Stamp and Registration expenses advanced to a company which never commenced business are not recoverable from the company having regard to the provisions of S. 103 (3) of the Companies

Act. This section applies to all contracts of a company, whether preliminary or final or in the course of carrying on its business. The word "provisional" in the section means that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until the company became entitled to commence business.

Such expenses cannot be claimed under S. 70 of the Contract Act. In as much as the company never became entitled to commence business, the expenses were not incurred for its benefit. Further the section does not apply to persons who are incompetent to contracts. It can only apply where the law can imply, from the circumstances, a promise to pay. Where the statute prohibits the company from making a binding contract before commencement of business, no implication of a promise to pay can or should be made. 54 CWN 157: 1950 Comp. C 160: AIR (Vol 37) 1950 Cal 491.

——S. 104.

——S. 104 — Agreement to allot fully paid shares in consideration of allotment of fully paid shares in another company — Statement of particulars filed with Registrar with 12 annas stamp:

Held, that the contract of which the particulars were recorded in the form submitted to the Registrar under S. 104 did not amount to a conveyance within the meaning of S. 2 (10), Stamp Act, and that it was properly treated by the parties as an agreement and stamped with a 12 annas stamp. AIR (Vol 24) 1937 Mad 259: 45 MLW 84: (1937) MWN 3: (1937) 1 MLJ 108: ILR (1937) Mad 559: 167 Ind Cas 513 (FB).

——S. 104, Form No. 6 — Allotment of shares in consideration of transfer of business — Agreement in writing — Whether a conveyance — Stamp duty payable — Stamp Act (II of 1899), S. 2 (10).

200 shares of a business concern had been allotted in consideration of a written agreement as regards the transfer of business and the Company accordingly submitted a return as to allotment in Form No. 6 accompanied by the agreement which formed the consideration for the allotment of the 200 shares. It was contended that the agreement in question was liable to stamp duty as a conveyance:

Held, that the agreement was not a conveyance that it was liable to a stamp duty of Re. 1 only, and that the fact that the agreement in pursuance of which the shares were allotted was a written one was not material. AIR (Vol 21) 1934 Lah 533: 36 PLR 143: 15 Lah 509: 150 Ind Cas 790 (SB).

——S. 104, Form 7, Col. 3 — Agreement — Contract only one of agreement to transfer property in future — Contract, if can be treated as a conveyance.

Under S. 104, the particulars of the contract 'constituting the title of the allottee' should be filed with the Registrar. If this contract consists merely of an agreement to transfer property in future, the particulars thereof cannot be treated as a transfer of the property in presenti. Sub-section (2) of S. 104 clearly lays down that the particulars would be liable to the same stamp duty as would have been payable if the contract of which the particulars are supplied had been reduced to writing. Further, Col. 3 of Form 7 prescribed under the Act itself recognises a distinction between sales of property and agreements to all property which might form the consideration for the allotment. AIR (Vol 21) 1934 Lah 530: 36 PLR 9: 15 Lah 501: 150 Ind Cas 781 (2) (SB).

——S. 104 — There is nothing in S. 104, Companies Act which requires that a duty payable on a conveyance should be levied on agreement for allotment of shares by a company in future. AIR (Vol 19) 1932 All 291: (1932) ALJ 394: 137 Ind Cas 337 (FB).

——S. 104 — Return as to allotment of shares — Duty of Directors and Managers.

It is the duty of the Directors and Managers of a company to furnish the return of allotments of shares required by S. 101 of the Companies Act 18 PR 1916 Ref. Ignorance of law is no excuse. AIR (Vol 6) 1919 Lah 361: 26 PR Cr 1919: 20 Cr LJ 725: 52 Ind Cas 885 (DB).

——S. 104 — (1882), S. 28 — Contract to take shares — Winding up — Contributory — Set off.

If before a contract to take shares is rescinded, a winding up be commenced or a concern ceases to be a going concern, the share-holder will be liable as a contributory. It is only a debt due in praesenti from the company that can be set off for future calls on shares. An arrangement that a registered company's purchased shares are not to be paid for in cash but are to be issued to the purchaser as fully paid-up shares as part of an advance which the company has undertaken to make, is illegal, if not made in writing and filed with the Registrar of Joint Stock Companies. AIR (Vol 1) 1914 Lah 483: 102 PWR 1914: 201 PLR 1914: 25 Ind Cas 672 (DB).

——S. 104 — (1882), S. 28 — Conditional agreement — Shares — Condition of taking profits.

An agreement that the purchaser of shares in a company need not pay unless the company made profits and paid profits thereon, is in violation of S. 28. If an application for shares is subject to a condition preceding, that condition must be performed to create liability to take them. But in the case of conditions subsequent, the liability arises though it is never complied with. (1912) 36 Bom 557: 14 Bom LR 648: 16 Ind Cas 696 (DB).

——S. 104 (1) (b) — Allotment of share as fully paid-up otherwise than in cash.

Where under the Companies Act, 1913 it appeared the debenture deed provided that the registered holder thereof shall, while the same remains in force and upon giving previous notice in writing, be entitled to surrender this debenture and receive in consideration thereof one fully paid ordinary share of Rs. 100 of the company forming part of or ranking pari pasu with the shares of the original capital, and upon the surrender of this debenture under this condition the holder will not be entitled to proportionate interest thereon and the ordinary share so allotted in exchange shall rank for dividend from and after the half-year in which the registration is made. Held, that the share allotted in those circumstances was allotted as fully paid-up otherwise than in cash. AIR (Vol 5) 1918 Mad 680: 41 Mad 307: 33 MLJ 474: (1917) M WN 776: 6 LW 706: 42 Ind Cas 674 (DB).

——S. 104 — Construction.

The right construction of S. 104 is that the Registrar of Joint Stock Companies should file the documents therein referred when presented even though they might have been presented after the expiry of time fixed for their presentation, and that he should inform the officer of the company who presents the documents for filing that unless within the time to be specified by the Registrar the applicant obtains an order from the Court extending the time for filing up to the time when he actually did file, he will take steps to prosecute him for the default. AIR (Vol 17) 1930 Cal 146: 122 Ind Cas 214: 56 Cal 976.

——S. 104 — Failure to file agreement.

The only consequence of a failure to file the agreement under S. 104 is the penalty provided by Sub-S. 3, and it is no longer the law that the allottee, in the absence of a due filing of the con-

tract, is responsible, as a contributory, for calls as though the shares were unpaid shares. AIR (Vol 13) 1926 All 524: 48 All 503: 24 ALJ 576: 95 Ind Cas 570 (DB).

——**S. 104 — Ratification by board.**

Ratification of previous contract with vendors of business by the Board of Directors cannot be described as a contract in writing constituting the title of the allottee within the meaning of S. 104 (b). AIR (Vol 13) 1926 Mad 380: 23 MLW 571: 1926 MWN 6: 27 Cr LJ 700: 94 Ind Cas 892.

——**S. 105.**

——**Ss. 105, 156 — Application for shares in consideration of company agreeing to place orders for materials with applicant — Validity of agreement — Winding up of company — Applicant, whether liable as contributory — Liability to contribute, nature of — Invalidity of allotment, whether affects liability to contribute.**

A person agreed to take a certain number of shares in a limited company on the understanding that the company would place their orders for materials required for the company through him and give him consideration of all reductions which may be obtained by him or by the company on tenders submitted to the company's engineers. The shares were allotted and he was entered in the share register as the holder of the said number of shares. The company was subsequently ordered to be wound up. The executors of the share-holder brought claims for breach of contract against the company in the liquidation and the Official Liquidators included the executors in the list of contributors in respect of the shares thus allotted. The claim of the executors was rejected by the High Court on the ground that the contract was an illegal one being in contravention of S. 105 of the Companies Act. The executors thereupon prayed that their name might be removed from the list of contributories with regard to the shares in question and for refund of the sum paid by them as application and allotment monies.

This application was rejected upon the ground that there existed a valid contract to take shares to which the illegal agreement was only collateral. The executors appealed to the Privy Council contending that the contract was an indivisible one and void, that the matter was res judicata and they were entitled to have their names removed and to have the application and allotment monies repaid :

Held, (1) that the contract in question did not contravene the provisions of S. 105 of the Companies Act, (2) even on the assumption that the contract was void and the matter was res judicata, the position was entirely altered by the intervention of winding up proceedings. Whatever may have been the rights and liabilities of the contractor before the winding up inasmuch as at the commencement of the winding up the deceased was and had for some years been entered on the register of share-holders as the holder of the shares in question with his full knowledge and assent he was liable to be placed in the list of contributories under S. 156. AIR (V 19) 1932 PC 240 · 9 OWN (C C) 839: 36 MLW 529: (1932) MWN 1141: 63 M LJ 859: 35 Bom LR 312: 54 All 827: 37 CWN 373: 57 CLJ 157: 60 IA 1: 139 Ind Cas 552.

——**S. 105 — Under-writing agreement for commission — Validity — Nature of such agreement — Distinction between under-writing agreement and agreement to place shares — Brokerage.**

Where there is no provision of law authorising the payment of under-writing commission, an agreement to under-write the shares of a limited company for a commission is ultra vires the company. Such an agreement stands on the same footing as an agreement by the company to pay a commission to a person in consideration of his subscribing in praesenti for a definite number of shares. Beyond the agreement to take shares, there is no considera tion in either case for the commission.

An under-writing agreement in the sense in which it is commonly used is an agreement to take up by way of subscription in a new company or new issue a certain number of shares if and so far as not applied for by the public.

An agreement to place shares, even athough the person making it binds himself that within a specified time, or within a reasonable time, he will place a certain number of shares, is a materially different thing from an agreement to take a certain number of shares. If a person agrees to take shares, then by agreeing to take shares he does at that moment become a share-holder and the company are entitled and are indeed bound at that moment to put him on the register. But if he agrees to place shares, he does not agree to become a share-holder nor are the company entitled to put him on the register as a share-holder but he simply agrees that he will procure other persons to take the shares.

Payment by a company of brokerage to brokers for placing its shares with other persons is legitimate. AIR (V 19) 1932 PC 212 : 63 MLJ 533 : 36 MLW 590 : (1932) ALJ 963 : 139 Ind Cas 9.

——**S. 105 — Grant of shares as commission — Ontario Companies Act, S. 100 (2) — Grant of shares in consideration for establishing and providing working capital for a company is ultra vires.**

The appellants were a company which organized building mortgage and discount corporations and provided them with capital. In the course of their operations they promoted the respondent company. In order to make the respondent company effective as a business concern, the appellants considered that the system with which they were acquainted would need to be installed, and at the same time that they could raise the capital necessary for the purpose of carrying on the business, which, in the main, consisted in financing the erection, purchases and sales of the houses in selected spots. With this object, two agreements were entered into. The first recited the arrangements for providing the necessary experience and the assistance for establishing the business and for providing the working capital by underwriting or sale of the respondent company preferred shares and provided that the appellant shall install its business system provide the necessary office place, and do the necessary clerical work and further, in the second the appellant company agreed to enter into a separate agreement compelling it to under-write or sell all of the preferred shares of the company at the original agreed commission. Then followed the provision. "The consideration payable by the second party to the first party for the foregoing is hereby fixed at Rs. 99,983 shares of the common stock of the second party, to be issued to the first party as fully paid and non-assessable upon the first party executing this agreement and the further agreement with reference to the obtaining of the second-party's working capital hereinbefore referred to."

Held, that the latter provision was in contravention of sub-S. 2, S. 100, Ontario Companies Act, (corresponding to Indian Companies Act, S. 105 (2)) and, therefore, was ultra vires the Company. 115 Ind Cas 748 : AIR (Vol 15) 1928 P. C. 143.

——**S. 105-C.**

——**S. 105-C — Construction of — If variable according to various companies or articles of association — Duty of Court to reconcile articles with S. 105C.**

Section 105 (C), Companies Act, can only have one interpretation, and the interpretation cannot possibly vary according to different companies or according to the particular article which a company might choose to frame with regard to the question of issue of shares. There is no obligation upon the Court to try and reconcile the articles of a company With S. 105 (C), as the Legislature has no hand in framing the articles of a company. Regulation 42, Sch. I, Table A, stands on a different footing, as it has been enacted by the same legislature that enacted S. 105 (C). 50 Bom LR 413 : AIR (Vol 36) 1949 Bom. 56 : 1949 Comp. C. 26 (DB).

——S. 105-C — Construction and object of — Discretion of directors as regards issue of new shares and the time of issue — Duty of Court to give effect to object of section — Intention of legislature — Sch. I, Table A, Regulation 42.

Section 105-C, Companies Act, leaves it to the discretion of the directors of a company to decide whether an increase in the capital of the company is necessary or not, as well as to determine at what particular point of time the capital should be increased, if they decide to increase it. The only obligation cast on them is that if new shares are issued, they should be offered to the members in proportion to the existing shares held by each shareholder. The obvious object of the section is that there should be an equitable distribution of shares and that the holding of shares by each shareholder should not be affected by the issue of new shares. It is also incumbent upon the directors to inform the share-holders of the number of shares to which each share holder is entitled and to limit the time within which the offer, if not accepted, would be deemed to be declined.

It is not, however, obligatory upon the directors to offer every one of the new shares. The shares have to be offered as nearly as the circumstances would admit. If the directors act in a way which carries out the object of the section and gives practical effect to the section there can be no contravention merely because some of the new shares are not offered for sale. The Court has to see that the object of the section is not defeated by anything which might result in an absurdity or an anomaly. The Court, according to well-established canons of construction, would even go to the lenght of adding words to the section, if it be necessary in order to give a construction which is reasonable and which helps the Court in achieving the object for which the section was enacted.

Reading S. 105-C together with Regulation 42 in Sch. I, Table A, to the Act, there can be no doubt that the intention of the legislature as expressed in S. 105-C was a principle of equitable distribution which has got to be carried out as practically as possible. 50 Bom. LR 413 : AIR (Vol 36) 1949 Bom. 56 : 1949 Comp. C. 26 (DB).

——S. 105-C — Construction and scope — Duty of company under — Shareholder accepting some of many shares offered to him but not stating anything as to remainder — If declines to accept same — Power of Company to dispose of before expiry of time.

Section 105-C of the Companies Act makes it incumbent upon the directors of a Company when they decide upon increasing the capital of the Company to offer the further shares to be issued by them to the members in proportion to the existing shares held by each member. There is a statutory obligation upon the Company not to deal with the shares offered to a member unless the time fixed in the notice sent to the member has expired, except when the member intimates to the Company that he has declined to accept the shares offered. When the Company receives such intimation, then the Company need not wait till the time fixed in the notice expires. But when a member accepts a certain number only out of the shares offered to him, it does not follow that he has declined to accept the remaining shares offered to him. There must be a definite specific intimation by the member or holder of the shares to the Company that he declines to accept, the offer with regard to the balance of the shares. 51 Bom. LR 529 : AIR (Vol 37) 1950 Bom. 76 (DB).

——S. 105-C — Discretion of directors — Interference by Court — Conditions for — Company in need of funds — Exercise of discretion to issue new shares — If improper — Motive of directors — Relevancy — Bona fides.

In deciding to issue new shares under the powers conferred by S 105 (C), Companies Act, the directors of a company are exercising fiduciary powers, and they should clearly exercise those powers in the interest and for the benefit of the company of which they are the directors. They are not entitled to exercise the powers merely for the purpose of maintaining their own control or retaining their own majority, as that would amount to a breach of faith towards the company. But once it is established that the company is in need of additional funds and that the fresh issue of shares is decided upon in order to make good those funds, then whatever other motives might actuate the directors, the Court will not interfere with the discretion of the directors, as it cannot be said in such a case that it is not a bona fide exercise, however mixed the motives might be, unless it is established that the discretion to issue new shares is exercised solely for the personal ends of the directors, for their personal aggrandizement, for keeping themselves in power, it cannot be said that the discretion has not been exercised in the interests and for the purpose of the company. Once it is established that the company is in need of funds, then any extraneous consideration which might weigh with the directors, even any selfish motive that might weigh with them, is really irrelevant and cannot tilt the balance against the Court holding that, the company being in need of funds, the issue of new shares is fully justified. The party challenging the issue of new shares has the burden on him to show that the issue of new shares was not bona fide and not in the interests of and for the benefit of the company. 50 Bom. LR 413 : AIR (Vol 36) 1949 Bom. 56 : 1949 Comp. C. 26 (DB).

——S 105-C — Requirements of — Duty of directors — Conditions to be observed in issuing further shares — Issue of shares to increase capital — Additional motive to keep out a rival group trying to corner the shares — Legality.

The respondent company was incorporated in 1908 with an authorised capital of Rs. 10 lakhs divided into 10,000 shares of Rs. 100 each. By 1945, 5,404 shares were subscribed and Rs. 25 per share were called on each of them. 4,596 shares out of the authorised capital thus remained unissued. From about July, 1944, P. S. had not submitted the shares purchased by him to the company for registration of the transfers to his name. In the meantime on 8th January, 1945, an application was submitted by the company to the Examiner of Capital Issues for sanction of a fresh issue of capital and the Government granted the sanction on the 16th February, 1945, and the communication was received by the company on the 20th February. On the next day a Board meeting was held at which the directors decided to issue the remaining 4,596 shares at a premium of

Rs. 75 per share and to call Rs. 25 per share on them. The shares were offered to the shareholders shown on the register of members in the proportion of four further shares for every five shares held by them. The directors and their friends applied for and were allotted 1,648 shares and 2,204 shares were allotted to the other share-holders who had applied for the same.

In a suit by two shareholders challenging the validity of the issue of those shares,

Held, (1) S. 105-C of the Companies Act casts on the directors two obligations. They have to offer the shares issued, to the shareholders on the register of the company and not to anyone else, and secondly the offer must be in the same proportion to all the shareholders and there should be no discrimination amongst them. There is nothing in the section to justify the conclusion that the directors must offer all the shares resolved to be issued in one lot to the shareholders. The action of the directors in selecting the time when they will issue the shares as also the proportion in which they should be issued is a matter left to their discretion and it is not the province of the Court to interfere with the exercise of that discretion. This is of course subject to the general exception that the directors are not to act against the interest of the company or mala fide.

(2) The further motive of keeping out the rival group who had not yet become shareholders but were strangers to the company did not prejudicially affect the company or the existing shareholders and the presence of such further motive cannot vitate the good motive of finding necessary funds for the company. The issue of the fresh shares in the circumstances cannot therefore be held to be illegal or void. 52 Bom. LR 745 : AIR (Vol 37) 1950 S. C. 172 : 1950 MWN 745 : 1950 Comp. C. 179 : 1950 SCJ 337.

——S. 109.

1. Applicability and scope.
2. Floating charge.
3. Mortgage or charge on immovable property.
4. Mortgage or charge on book debts.
5. "Not being a pledge", sub-s. (e).
6. Registration.

1. Applicability and scope.

——S. 109 — Unregistered mortgage — Section 109 does not avoid the mortgage which is not registered according to it absolutely, but only so far as any security given thereby on the company's property or undertaking. The effect, therefore, is that if a mortgage is not registered, it is valid as an admission of debt but as against a creditor or liquidator it cannot be said that a valid charge on the company's property has been created. AIR (Vol 17) 1930 PC 66 : 122 Ind Cas 25: 1930 ALJ 190: 7 OWN 305: 32 Bom LR 544: 31 Mad LW 407: 34 Cal WN 557: 57 IA 76.

——S. 109 — Mortgage not registered cannot be repudiated by the Company itself while it is a going concern. AIR (Vol 14) 1927 Rang 288 : 5 Rang 585 : 6 Bur LJ 160 : 104 Ind Cas 326 (DB).

——S. 109 — **Charge by operation of law.**

Section 109 applies to a mortgage or charge created by the Company by contract and not to a charge arising by operation of law. AIR (Vol 14) 1927 Oudh 55: 2 Luck 299: 3 OWN Sup 315: 99 Ind Cas 483 (DB).

——Ss. 109, 120 — **Mortgage by company not registered within time — Company going into liquidation — Time, extension of.**

Section 109, provides that a mortgage by company shall "be void against the Liquidator and any creditor of the company" unless it has been registered in accordance with the provisions of that section. Section 120 allows the Court discretion to extend the time on such terms and conditions as seem to the Court just and expedient.

The result of an order of winding up is to make the creditors entitled to a rateable share in all the property of the company as it exists at the date of the winding up order. The effect of an order extending time in such a case would obviously be to reduce the property available to the creditors.

It is for this reason that such transfers have been declared void against the Liquidator and creditors of the company. For the same reason it would be unjust to the creditors to grant any extension after the company has gone into liquidation. AIR (Vol 24) 1937 Oudh 62: 1936 OWN (CC) 923: 165 Ind Cas 254.

——S. 109 — Scope — The fourth proviso to S. 109 of the Companies Act seems merely to mean that a mortgage or a charge granted by a company is not to be deemed to be an interest in immovable property merely by reason that it comprises or takes effect over debentures held by the company and that such debentures constitute a charge on immoveable property of the company issuing the same. The proviso is taken from the English Act and has reference solely to the purposes of S. 109. AIR (Vol 17) 1930 Cal 536: 57 Cal 328: 34 Cal WN 605 (DB).

2. Floating charge.

——S. 109 — **Trust — Amount deposited by employee with company as security for discharge of his obligations, whether held in trust — Test.**

A fair test as to whether a sum of money deposited with a company by its employee as security for due discharge of his duty, is to be held as a trust fund or not, is to see whether, in the circumstances, it was intended that it should remain a segregated fund, or whether it should, on payment, become the property of the company and be compensated for by the company's express or implied covenant to repay it in exactly the same way as the customer's deposit in a bank creates the relationship of debtor and creditor.

The circumstance that it passed into the general assets of the company and was utilized by them for their general purposes is a strong indication that the relationship of debtor and creditor was created and no trust was constituted as the first duty of a trustee is to avoid mixing the trust funds with his own or to use them for other than trust purposes.

The employee of the company deposited in the general accounts of the company a certain amount as security for due discharge of his obligations. It was agreed between the parties that the employee would get interest on this money and that the money would be a second charge on the machinery and other assets of the company:

Held, that the agreement indicated that the parties never intended that the security money should be treated as a segregated fund in trust for the employee or that it was not to be utilized by the company for any purposes. AIR (Vol 29) 1942 All 119: (1942) ALJ 75: 1942 OWN (HC) 71: 1942 AWR (HC) 44: ILR (1942) All 242: 199 Ind Cas 122 (FB).

——S. 109 — Floating charge — Tests — Agreement that amount paid to company will be second charge on machinery etc., if creates floating charge.

The principal tests as to whether a charge is a floating one or not are: (1) Is it a charge upon all or a certain class of assets. Present or future? (2) Would the assets charged in the ordinary course of business be changed from time to time? (3) Has the company power until such step is taken by the chargees to carry on the business of the company in the ordinary way?

An agreement between the parties that the amount paid to the company will be a second charge on the machinery and other goods of the company, creates a floating charge i.e., a charge which would fasten on to the property that might exist when the time arrived for the charge to be enforced and would be void under S. 109, for want of registration. AIR (Vol 29) 1942 All 119: (1942) ALJ 75: 1942 OWN (HC) 71: ILR (1942) All 242: 1942 AWR (HC) 44: 199 Ind Cas 122 (FB).

——S. 109 (1), Cl. (f) — Floating charge, meaning of — Instrument creating charge unregistered — Legality — Chairman's authority to create lien.

Where the assets of a Corporation are of a fluctuating nature, changing from time to time in the ordinary course of business, and while taking loan creating charge on their assets, no restraint of any kind whatever is placed on the conduct of the business of the Corporation, and the charge does not crystallise into a fixed security, the charge so created is a floating charge.

An instrument creating charge on the property of a Corporation, if not registered as provided by S. 109, Companies Act, is void as against the Official Receiver. AIR (Vol 26) 1939 Sind 100: 181 Ind Cas 681.

——Ss. 109 (1), (f), (c), 230 — Person by agreement appointed selling agent of Company — Deposit of security by such person — Security to bear interest and returnable on expiry of agreement — Amount made second charge on machinery of Company — Company wound-up — Relationship between Company and such person held one of creditor and debtor — Floating charge, requiring registration.

A person entered into an agreement with a Company and was appointed its sole selling agent for a period of one year. The Company accepted from him a certain amount as security. It was to carry interest at certain rate and was to be refunded on the date of expiry of the agreement. By a clause in the agreement it was provided that the amount of security money would be the second charge on the machinery and other goods of the Company. On the expiry of the agreement the person ceased to be the selling agent and demanded the refund of the security. On the failure of the Company, he applied to the Court for an order winding up the Company and the Court passed the winding up order:

Held, that the agreement did not create a relationship of trustee and cestui que trust between the parties. The relationship created was rather one between creditor and debtor and consequently the person was not entitled to any preferential treatment, in respect of this debt by reason of any fiduciary relationship created by the agreement.

Held, also that the charge created by the agreement was clearly a floating charge, and as such, required registration.

A floating charge can be created on part of assets of a Company. The principal tests as to whether a charge is a floating one are: (1) Is it a charge upon all or a certain class of assets, present or future? (2) Could the assets charged in the ordinary course of business be changed from time to time? (3) Has the company power until such step is taken by the chargees to carry on the business of the Company in the ordinary way. AIR (Vol 25) 1938 All 574: (1938) ALJ 820: 1938 AWR (HC) 553: ILR (1938) All 896: 178 Ind Cas 585.

——S. 109 — Floating charge — Charge created on all assets — All such property to be in possession and control of lender Company — Borrower Company not to alienate such property or in case of necessity to alienate undertaking to replace the same by another property of equal value — No floating charge is created.

A floating security is not a specific mortgage of the assets, plus a license to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security.

A deed of charge provided, "The borrower company doth hereby charge to and in favour of the lender company all that the machinery, plant, implements, utensils, furniture and articles manufactured or in course of manufacture, stock-in-trade, raw materials, stores, and other movable effects and things, now or at any time hereafter during the continuance of this security, belonging to or used in connexion with the said business.

The said properties shall be in the lender company's possession and under its control in such manner that such possession and control may be apparent and indisputable. The said properties shall be under the care of a Babu of the lender company."

It was further provided: "The borrower company shall not sell, alienate or alter the said properties, machinery, raw materials, stocks, stores and premises without the permission of the lender company except in the usual course of trade or business, and when such sale, alienation and alteration of such articles shall be rendered necessary ..... shall replace such article by another of at least of equal value." Possession was actually given to the lender company as provided:

Held, the element of possession which was contemplated by this deed, and which was actually given at the time, would prevent the charge from being a purely equitable charge of a character coming fairly within the description of a floating charge. AIR (Vol 14) 1927 Cal 682: 54 Cal 513: 103 Ind Cas 748 (DB).

——S. 109 — Pledge of moveables — Where the director of a Company pledged the moveable assets of the company but remained himself in possession as agent of the pledgee:

Held, that only a floating charge was created and it not being registered as required by S. 109, was void against the liquidator. AIR (Vol 13) 1926 Bom 28: 27 Bom LR 1218: 91 Ind Cas 334 (DB).

——S. 109 — Floating charge — Essentials of.

It is the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. AIR (Vol 21) 1934 All 161: (1934) ALJ 195: 3 AWR (HC) 499: 148 Ind Cas 498 (2).

——S. 109, Proviso 4, effect of — Floating charge, incidents of.

A floating charge is a present charge though it does not finally attach or crystallize upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of the business.

In the absence of a stipulation to qualify the elasticity of the floating charge, it leaves the company at liberty to create specific mortgages or charges in priority to itself, but it is not uncommon to insert in a debenture words to the effect that the floating charge is not to authorise the company to create any mortgage or charge ranking in priority to the debenture. AIR (Vol 18) 1931 Cal 223: 34 Cal WN 805: 58 Cal 136: 53 CLJ 269: 131 Ind Cas 689 (DB).

——S. 109 (1) — Document creating security over company's assets — Validity — Tests — Registration with Registrar of Joint Stock Companies — When essential.

A creditor was given possession of the items of moveables pledged to him and it was provided that as and when other moveable properties come into his possession, they also stand pledged to him. The security itself was expressly stated to be a continuing one. On default of payment when demanded he was given the right to have the properties in his possession sold by public or private auction and apply the net proceeds in liquidation of the amounts due to him. Though the debtor company was allowed to run its business, it was only run by the creditor as an agent under an irrevocable power of attorney. In the circumstances,

Held, that it cannot be said that this is a mere floating charge coming under cl. (f) of S. 109 of the Companies Act and non-registration of the deed cannot invalidate the security. The element of possession, which is contemplated by the deed and which was actually given, is an important factor, which stands in the way of the document being regarded as creating a purely equitable charge of a character coming fairly within the description of a floating charge requiring registration. 62 LW 484: (1949) 2 MLJ 66.

3. Mortgage or charge on immovable property.

——S. 109 — Equitable mortgage — It is necessary to file with the Registrar the particulars of a mortgage by deposit of title deeds, whether or no it is accompanied by a memorandum of deposit. AIR (Vol 14) 1927 Bom 167: 29 Bom LR 253: 101 Ind Cas 144 (DB).

4. Mortgage or charge on book debt.

——S. 109 (d) — Mortgage of book debt, what is.

An assignment of a book-debt as security for the purpose of securing an existing debt, constitutes a mortgage of that debt and unless it is registered as required by the provisions of S. 109 (d), the assignment will be inoperative as against the Liquidator and the creditors of the Company. AIR (Vol 22) 1935 Cal 218: 62 Cal 1: 38 Cal WN 1190: 155 Ind Cas 193 (DB).

5. "Not being a pledge", sub-sec. (e).

——S. 109 (c) — Pledge of movable property of company — Registration — Necessity — Mortgage or charge — Distinction.

A pledge of movable property belonging to a company does not require registration under S. 109 (c) of the Companies Act, but a mortgage or charge on movable property, provided such movable property is not stock-in-trade, would require registration. AIR (Vol 36) 1949 Bom 262: 51 Bom LR 271.

——S. 109 (1) (e) — Mortgage and pledge — Distinction — Mortgage also amounting to pledge — Registration, if necessary.

The difference between a mortgage and a pledge of goods is that in the case of a mortgage, the ownership of the goods passes, whereas in the case of a pledge the pledgee gets possession, but no right to the goods beyond what is necessary to secure the debt.

Section 109 (1) (e), clearly contemplates that there can be a mortgage which is also a pledge. In inserting the words "not being a pledge" in this clause, the object of the Legislature must have been to provide that registration should not be necessary where the person entitled to the security has obtained possession of the goods.

Where a bank indorses to its creditors as security, pro-notes drawn in its favour by its debtors and delivers them to the creditor entitling him to realise the securities as and how he pleased, the transaction though it may amount to a mortgage also amounts to a pledge and does not, therefore, require registration. AIR (Vol 30) 1943 Mad 73: 55 MLW 709: 1942 MWN 692: (1943) 1 MLJ 142: 207 Ind Cas 304 (DB).

(Reversing App No. 475 of 1941, dated April 30, 1941).

6. Registration.

——S. 109 — Delay to register, effect of — Mortgage registered within 21 days has priority over a prior mortgage registered subsequently under an order of extension by High Court. AIR (Vol 14) 1927 Oudh 300 : 1 LC 80 : 102 Ind Cas 592 (DB).

——S. 109 — Effect of — Particulars of charge sent but registration made long after.

What avoids a charge is not the lack of registration but the neglect to send in the particulars to the Registrar. It is important to bear this distinction in mind in considering the effect of S. 109 of the Companies Act. Where the particulars are as a matter of fact sent well within the 21 days' period but the actual registration is not effected for over two years, it cannot affect the charge, because the validity of the charge is not made to depend by S. 109 on the date on which the Registrar chooses to make the necessary entries in the register. AIR (Vol 34) 1947 All 117: ILR (1946) All 867: 1947 ALW 204 (DB).

——S. 114.

——S. 114 — Issue of certificate under — Effect.

While it may be a matter of grave doubt whether a certificate issued under S. 114 of the Companies Act could ever render valid something that had already been declared void by S. 109, yet where one is issued, it would not be open to any party to challenge any of the mechanical steps of registration. AIR (Vol 34) 1947 All 117 : ILR (1946) All 867 : 1947 ALW 204 : 1947 Comp. C 249 (DB).

——S. 120.

——S. 120 — Review — Power of District Judge.

The District Judge when he passes an order under S. 120 of the Companies Act, acts as a Court of civil jurisdiction. Section 143, Civil P. C., provides that the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction. Therefore, the District Judge is competent to review his order passed under S. 120. Apart from this he has inherent power to vacate his previous order if he considers it necessary for the ends of justice to do so. AIR (Vol 24) 1937 Oudh 62 : 1936 OWN (CC) 923 : 165 Ind Cas 254.

——S. 120 — Mortgage by company not registered within time — Company going into liquidation — Time for registration not to be extended. AIR (Vol 24) 1937 Oudh 62 : 1936 OWN (CC) 923 : 165 Ind Cas 254.

——S. 120 — (1882), S. 68 — Explanation —Charge on Company's property in favour of Secretary — Omission to register — Enforcement.

Under S. 68 explanation when a charge specifically affecting the property of a company has been granted in favour of an officer of the company, he cannot avail himself of it unless it is registered under S. 68, though he has ceased to be an officer at the time when the charge is sought to be enforced. The words 'as such' are unnecessary though not insensible. The construction of the explanation must depend on its terms and no theory of its purpose can be entertained unless it is to be inferred from the language used. AIR (Vol 7) 1920 PC 56 : 12 LW 92 : 47 IA 33 : 28 MLT 28 : (1920) MWN 419 : 2 UPLR (PC) 118 : 43 Mad 550 : 38 MLJ 444 : 22 Bom LR 568 : 18 ALJ 489 : 56 Ind Cas 163.

——S. 120 — (1882), S. 68 — Floating charge — Provision for cessation of authority to carry on business on default — Charge in favour of officers for salary — Non-registration.

Where the debenture-deed after charging the assets of the company provided that notwithstanding such charge, the company should carry on business and deal with the assets of the company until default was made for six months in the payment of the principal, and that from and after the happening of such default the company should not carry on business and the charge created by the debenture should be immediately enforceable, but notwithstanding such default the debenture-holder allowed the business to go on, held, that a charge created in favour of the Secretary and Manager of the Company for their salary could not be avoided though the floating charge had already crystallized and that the charge being in favour of the officers of the company, they could not take advantage of it, as it was not registered as required by S. 68. AIR (V 4) 1917 Mad 646 : 32 Ind Cas 91 (DB).

——S. 120 — (1882), S. 68 — Scope.

Where a debenture-deed charged all assets of company as floating charge and provided that the company shall carry on business and deal with assets till default is made for six calender months in paying the principal and the company carried on business in spite of the default and created charges even after default, held, the company's right continued till the debenture-holder showed his desire to stop it as by applying for Receiver and that the charges were not void. AIR (Vol 3) 1916 Mad 7 : 29 MLW 110 : 30 Ind Cas 286 (DB).

(Affirmed on appeal AIR (V 7) 1920 PC 56 : 43 Mad 550 : 56 Ind Cas 163.

——S. 120 — Registration in extended time — Subsequent mortgage is registered earlier cannot get priority.

If the Court extends the time for registration and the mortgage is registered within that time the mortgage constitutes a valid charge ab initio, that is, from the date of its execution, subject only to such conditions as are imposed by the Court in the order which extended the time. Where a company's property was mortgaged to two persons and the plaintiff mortgage which was a subsequent one recited that it created a second charge but was registered earlier and the defendant's prior mortgage was registered later but within the time extended under S. 120, with an order while extending the time, that it should be without prejudice to the rights of any mortgagee accrued in the meantime, the order cannot be held as intended to convert the plaintiff's second charge upon the property into a first charge thereon. AIR (Vol 17) 1930 PC 66 : 1930 ALJ 190 : 7 OWN 305 : 31 MLW 407 : 32 Bom LR 544 : 34 CWN 557 : 57 IA 76 : 122 Ind Cas 25.

——S. 126.

——S. 126 — Death of contributory — Liability of legal representatives.

Under S. 126, when a contributory dies, his legal representatives automatically become liable as such in his stead. It is not necessary to make a formal application to bring them on the record. AIR (Vol 19) 1932 Lah 648 : 34 PLR 79 : 141 Ind Cas 168.

——S. 129.

——Ss. 129, 230 (2) — Priority, nature of.

When a Receiver is appointed by a debenture-holder whose debenture is secured by both a fixed charge, and a floating charge the priority given to the preferential debts applies only in respect of assets subject to the floating charge and not to assets subject to the fixed charge. This is what is legally meant by a priority of the charges of workmen against the floating charge of debenture-holder. AIR (Vol 25) 1938 All 609 : ILR (1938) All 869 : 178 Ind Cas 441 (DB).

——S. 130.

——Ss. 130, 132 — "Assets and liabilities", meaning of.

Per Lokur, J. — The words "assets and liabilities" must be taken in the same sense in both Ss. 130 and 132, Companies Act. AIR (V 31) 1944 Bom 107 : 45 Cr LJ 612 : 46 Bom LR 70 : ILR (1944) Bom 302 : 212 Ind Cas 396 (FB).

——S. 130 — Condoning delay.

Where the Registrar has condoned delay in holding a general meeting, he must be deemed to have condoned the delay in filing a balance sheet before the general body of its meeting. AIR (Vol 28) 1941 Mad 504 : 1941 MWN 225 : 53 MLW 660 : (1941) 1 MLJ 419 : 42 Cr LJ 683 : 195 Ind Cas 140.

——S. 130 — Director — Right to take inspection of accounts through agent appointed by him.

Under S. 130 of the Companies Act, a director of a company is entitled to take inspection of accounts not only personally but also through an agent, provided there is no reasonable objection to the person chosen as agent, and the agent undertakes not to untilise the information obtained by him for any other other purpose than the purpose of his principal. AIR (Vol 35) 1948 Bom 301 : ILR (1948) Bom 439 : 50 Bom LR 140 : 1948 Comp. C 34.

——S. 131.

——Ss. 131, 134 — Scope of — Charge in respect of same years against same persons — Legality of.

In respect of the same years, the same perons cannot be charged with offences punishable both

under Ss. 131 and 134, because S. 134, clearly contemplates the sending of a copy of the balance sheet only after it has been placed or laid before the company at a general meeting under S. 131. Where there has been no such placing of the balance sheet before the company at a general meeting, the offence under S. 134 cannot possibly have been committed. AIR (Vol 24) 1937 Mad 341 : (1937) MWN 90 : 45 MLW 242 : 38 Cr LJ 695 : 169 Ind Cas 100.

——S. 131 — Liability of directors.

Persons cannot be held liable in respect of the default made in preparing a balance sheet or placing it before a general meeting of the Company which took place long before they ever became directors or officers of the Company, and indeed before they were even share-holders. AIR (Vol 24) 1937 Mad 341 : 45 MLW 242 : (1937) MWN 90 : 38 Cr LJ 695 : 169 Ind Cas 100.

——Ss. 131, 134 — Failure to balance accounts, prepare balance sheet and make list of members — Conviction under S. 131 — Propriety of accounts called by Courts — Whether sufficient excuse.

The provisions of Ss. 32, 131 and 134, Companies Act, are mandatory as regards the company and a company which makes default in compliance with them renders itself liable to the penalties imposed by those sections. Failure to get the company's accounts balanced and the balance sheet prepared and the list of members made, entails a conviction under S. 131 rather than under S. 134 (4) and the fact that the accounts had been called by various Criminal Courts is no defence. AIR (Vol 21) 1934 Cal 63 : 37 CWN 1159 : 35 Cr LJ 492 : 147 Ind Cas 848.

——S. 131 (2) — False balance-sheet.

Where the directors of a Bank showed in the balance sheet, a cash profit for a particular year by adding a sum which was due to the Bank but was never paid and was never likely to be paid.

Held, that there was a false statement and a very material one in the balance-sheet. AIR (Vol 19) 1932 Sind 4 : 25 SLR 297 : 134 Ind Cas 993.

——S. 131 (1), Proviso — Scope and effect of — Failure to hold meeting and failure to lay balance-sheet and profit and loss account before meeting — Power of Register to condone.

The effect of the proviso to S. 131 (1) of the Companies Act is merely to enable the directors of a company to lay before the general meeting of a particular year the balance-sheet and profit and loss account made up to a date not later than the date of the meeting by more than 12 months. It does not authorise the Registrar to condone the failure to hold the meeting in any particular year; nor does it authorise him to condone the failure to lay before the general meeting a balance-sheet and profit and loss account made up to a date earlier than the date of the meeting by more than 12 months. AIR (V 35) 1948 Cal 42 : 1947 Comp. C 93 : 229 Ind Cas 109 : 48 Cr LJ 236.

——S. 131 — (1882), S. 74 — Filing balance-sheet within one year — Director resigning before the year — Whether liable for failure.

A company is not by law obliged to file a balance-sheet within one year from its registration and a Director resigning within that year cannot be fined under S. 74 of the Act for failing to file the balance-sheet. AIR (Vol 1) 1914 Lah 222 : 39 PWR 1914 Cr : 250 PLR 1914 : 15 Cr LJ 380 : 23 Ind Cas 748 (DB).

——S. 131 — (1882), S. 74 — Penalty of Rs. 1,000 — Whether a lesser fine can be imposed.

Under S. 74 the fine of Rs. 1,000 being a fixed one a lesser fine cannot be imposed where the offence is proved; if it were less, the Chief Court has power to enhance it, in revision. AIR (Vol 1) 1914 Lah 321 : 37 PLR 1914 : 16 PWR Cr 1914 : 19 PR Cr 1914 : 15 Cr LJ 260 : 23 Ind Cas 468.

——S. 131 — (1882), S. 74 — Summary trial — Jurisdiction — Cr P C Ss. 5, 260, 262.

A Magistrate of the First Class can try an offence under S. 74 of the Companies Act in a summary way but he cannot inflict a lesser punishment than a fine of Rs. 1,000. The Magistrate should exercise a wise discretion in trying a case summarily and ordinarily he ought to restrict such trials to simple cases. (1913) 35 All 173 : 11 ALJ 196 : 14 Cr LJ 105 : 18 Ind Cas 665.

——Ss. 131, 248 — (1882), Ss. 74 and 220 (b) — Failure to file balance-sheet — Registrar — Power of High Court — Revision (Criminal).

Under Regulations framed by Local Government under S. 220 (b), only the Registrar is authorised for instituting and conducting all prosecutions specially which are in connection with breach of the rules relating to submission of balance-sheets and other periodical returns. So a complaint under S. 74 for wilful default in filing a balance-sheet not brought by the Registrar but by a clerk of his office and countersigned by the Public Prosecutor, is bad in law and the proceedings of a Magistrate based on such complaints are ultra vires and liable to be set aside on revision by the High Court at any time during the pendency of the case. (1910) 35 PWR (Cr) 1910 : 11 Cr LJ 577 : 8 Ind Cas 190.

——S. 132.

——S. 132 — Book debts — All book debts, whether good, bad or doubtful must be shown — Where provision is made for doubtful and bad debts out of secret reserve, such provision must be shown.

The intention of the Legislature clearly is that all debts which are entered in the current books of the company should be included under the head book debts. A debt is none the less a debt, though there may be little prospect of its recovery, and though the creditor may have means of covering the deficit, if it is not paid. It is always open to a company to write off debts that in its opinion are entirely irrecoverable; and on that being done such debts would cease to be "book-debts". Therefore all genuine book-debts must be covered by the entry against this item, whether they are considered good, doubtful or bad debts, and the clear provisions of the form cannot be allowed to be whittled down by general considerations as to the object of a balance-sheet.

Fawcett, J. — If any part of a secret reserve is availed of to meet bad and doubtful book-debts (it is doubtful whether any secret reserve fund is permissible), it must be revealed in the balance-sheet and not concealed. AIR (Vol 14) 1927 Bom 414 : 29 Bom LR 722 : 102 Ind Cas 504 : 28 Cr LJ 568 : 8 AI Cr R 218 (DB).

——S. 132 — Rights of company — In general a company is entitled to place profits to a depreciation or to a reserve fund, and dissentient shareholders, in the absence of a declaration of dividend or bonus or a winding-up, cannot challenge the decision of the majority. AIR (Vol 14) 1927 Bom 371 : 102 Ind Cas 49 : 51 Bom 372 : 29 Bom LR 447 (DB).

——S. 133.

——S. 133 (3), R. 107 — Offence.

Per Full Bench — Non-fulfilment of the requirements of R. 107 of Sch. I cannot constitute an offence under S. 133 (3) of the Companies Act. AIR (Vol 31) 1944 Bom 107 : ILR (1944) Bom 302 : 46 Bom LR 70 : 45 Cr LJ 612 : 212 Ind Cas 396 (FB).

——S. 134.

——S. 134 — Private limited company issuing patron bonds to public — Bonds held to be debentures — Company held liable to penalty under S. 134.

The India Patron Bank Ltd., was a private limited company incorporated under the Companies Act, its main business being to sell what were called "Patron Bonds", to invest money realised by the sale of those bonds and to take steps to carry out the terms of the scheme of those bonds. The form of the Patron Bond bore a serial number and its title at the top was "The India Patron Bank Limited" and below it "Patron Bond Rupees Ten only". The Bond acknowledged a debt; it was one of a series; it bore the company's seal; it provided for the payment of interest by determining the lucky numbers and it indirectly created a charge of the amount payable on the reserve fund of the company.

Held, that the prize bonds were debentures and by issuing them to the public the company had ceased to be a private company and was bound to file its balance-sheet and the profit and loss account with the Registrar of Companies and that the default of the company in complying with that requirement rendered the company and its directors liable to the penalty under S. 134 (4), Companies Act. AIR (Vol 33) 1946 Bom 18 : 47 Bom LR 660 : 223 Ind Cas 110 (DB).

——Ss. 134, 131 — Conviction under both sections.

In respect of the same years the same persons cannot be charged with offences punishable both under Ss. 131 and 134. AIR (Vol 24) 1937 Mad 341 : (1937) MWN 90 : 45 MLW 242 : 33 Cr LJ 695 : 169 Ind Cas 100.

——S. 134 (4) — Conviction — Essentials to be proved.

In order that a conviction under S. 134 (4) may be sustained the only thing the prosecution has to prove is that the particular officer knowingly and wilfully authorised or permitted the default. AIR (Vol 23) 1936 Cal 237 : 39 CWN 1152 : 37 Cr LJ 552 : 162 Ind Cas 282.

——S. 134 — Failure to balance accounts, prepare balance-sheet and make list of members entails a conviction under S. 131 rather than under S. 134. AIR (Vol 21) 1934 Cal 63 : 37 CWN 1159 : 35 Cr LJ 492 : 147 Ind Cas 848.

——S. 134 (4) — Non-filing of balance-sheet — Balance sheet not due to be filed — How far a defence.

A charge under S. 134 (4), of non-filing of the balance-sheet before the Registrar receives a complete reply if the accused can show that the balance-sheet was not due to be filed before the Registrar. It is immaterial whether the balance-sheet was prepared or not. AIR (Vol 19) 1932 Mad 497 : 35 MLW 661 : 33 Cr LJ 589 : (1932) MWN 1157 : 138 Ind Cas 317.

——S. 134 (4) — Applicability — General meeting not called and balance-sheet and profit and loss account not laid — No copies filed with Registrar — Offence.

S. 134 (1) of the Companies Act comes into play only when there has been a default in complying with the provisions of the section. S. 134 (1) lays an obligation on the company to file with the Registrar of joint stock companies three copies of the balance-sheet and profit and loss account after they have been laid before the company at the general meeting. But when no general meeting has been convened or held at which the balance-sheet and profit and loss account have been laid; there is no obligation to file the copies before the Registrar. Hence there is no default in complying with S. 134 (1) and no offence is committed under S. 134 (4). AIR (Vol 35) 1948 Bom 357 : ILR (1948) Bom 86 : 50 Bom LR 156 : 1948 Comp C 31 : 49 Cr LJ 515 (DB).

——S. 134 (4) — Balance sheet not filed by Director — Offence — Plea of no meeting being held — Territorial jurisdiction.

The Director of a Company cannot plead that no meeting was held, and that no balance-sheet was laid before the meeting and that it was impossible to comply with the section. The Presidency Magistrate in Calcutta could try a charge under the section, even when the company is stituate outside Calcutta, as the balance-sheet was to be filed in the office of the Registrar which was in Calcutta. AIR (Vol 4) 1917 Cal 1 : 45 Cal 486 and 490 : 18 Cr LJ 787 : 22 CWN 96 : 27 CLJ 85 : 41 Ind Cas 307 (DB).

——S. 134 — Realization of fine.

An order directing the Directors individually to pay the fine imposed on the company is illegal. AIR (Vol 11) 1924 Lah 489 : 86 Ind Cas 431 : 6 LLJ 160 : 26 Cr LJ 799.

——S. 136.

——S. 136 (4) — Scope.

Where there is nothing in the order of the Magistrate or in the summons to show that a particular person was summoned as representing the company, or that any proceedings were being taken against the company as such, the procedure in issuing a summons to such a person is clearly incorrect. Sub-section (4) of S. 136, Companies Act, provides for a penalty against the company and there is nothing to prevent the issue of a summons against the company itself. AIR (Vol 31) 1944 Pat 210 : 216 Ind Cas 312.

——S. 136 — Omissions to publish, effect.

Every limited banking company in India is bound to publish a statement provided in the third schedule on dates specified in Sub-S. 1 of S. 136; failure to do so is punishable under Sub-S. 4 of the section. That the statements should not be published in time on account of the change in the closing date of the financial year of the company is no defence. AIR (Vol 11) 1924 Bom 308 : 48 Bom 305 : 26 Bom LR 68 : 25 Cr LJ 1194 : 82 Ind Cas 58 (DB).

——S. 137.

——S. 137 (6) — Scope of.

The intention of S. 137 is to faciliate the investigation of the affiairs of the company and it has no reference to actual proceedings in Court. AIR (Vol 27) 1940 Cal 232 : 44 CWN 454 : 41 Cr LJ 625 : ILR (1940) 1 Cal 575 : 188 Ind Cas 537.

——S. 140.

——S. 140 (3) — Refusal to produce books and documents — Conviction.

Where the appointment of an Inspector is invalid by reason of the provisions of Para. 8 (2), India and Burma (Transitory Provision) Order, 1937, conviction under S. 140 (3), for refusal to produce the books and documents of the company before such Inspector cannot be sustained. AIR (Vol 26) 1939 Mad 589 : 49 MLW 651 : 1939 MWN 743 : (1939) 2 MLJ 97 : 40 Cr LJ 835 : 183 Ind Cas 762.

——S. 141-A.

——S. 141-A — "Of any offence in relation to the company for which he is criminally liable" — Meaning of.

The words "of any offence in relation to the company for which he is criminally liable" in S. 141-A mean, not only criminally liable under the Act but criminally liable under the I.P.C. as well. AIR (V 29) 1942 Sind 9: 43 Cr LJ 304: 198 Ind Cas 95.

——Ss. 141-A, 237 — Offences against director or officers of company — Company being wound up

— Complaint by private person — Offence under Special Act — Procedure.

A private person can make a complaint to a Court of offences under the Companies Act or the I.P.C., against directors or officers of the company in relation to the company even if the company is being wound up.

Obiter:— Where Special Act makes a special offence and a special procedure for the prosecution of offences under that Act, prosecutions not in accordance with the special procedure are barred. AIR (V 29) 1942 Sind 9: 43 Cr LJ 304: 198 Ind Cas 95.

——S. 141-A — Prosecution by private person.

There is nothing in the actual terms of S. 141-A, to justify an inference that the intention of the Legislature was that prosecutions by private persons should not be allowed. That section casts a duty upon the Advocate-General or the Public Prosecutor to cause proceedings to be instituted in certain circumstances. It also casts a duty upon the officers of the company to render assistance in connection with any such prosecution. The terms of the section are quite different from those, for example, of Ss. 196 and 198, Criminal P. C., by which a bar is placed upon the jurisdiction of Criminal Courts. It is immpossible to read into Sub-S. (6) of S. 137 any prohibition of private prosecution. It is not merely that there are no words containing any such prohibition. The subject-matter of S. 137 is an investigation rather than a prosecution. AIR (V 27) 1940 Cal 232: 44 CWN 454: 41 Cr LJ 625: ILR (1940) 1 Cal 575: 188 Ind Cas 537 (DB).

——S. 142.

——Ss. 142 and 140 — Inspectors appointed by special resolution and ordinary resolution — Power of.

Inspectors appointed under S. 142, that is, appointed by special resolution, shall have the same powers and duties as Inspectors appointed by the Central Govt. and the latter class of Inspectors have power to examine persons on oaths and to enforce production of the company's books under penalty. The provision that the company may appoint an Inspector by special resolution, and that if it does so, the person appointed shall have certain drastic powers, does not necessarily imply that it may not do so by ordinary resolution, subject to this that the person so appointed by ordinary resolution would not have those drastic powers. AIR (V 32) 1945 Bom 475 : 47 Bom LR 428: ILR (1945) Bom 687.

——S. 142 — Inspectors appointed by special resolution — Powers of — Appointment by ordinary resolution—Distinction. ILR (1945) Bom 687: 1946 Comp. C. 8.

——S. 145 — Liability of auditors — Auditor should satisfy himself whether the books submitted to him show a true state of affairs — Honesty does not exempt from liability.

Unless Auditors are to be held strictly to their legal liability, however honest they may be the object of the legislature in requiring a certificate from them is absolutely defeated. It is nothing to an auditor whether the business of a company is being conducted prudently or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the share-holders. His business is to ascertain and state the true financial position of the company at the time of the audit and his duty is confined to that. He is to ascertain that position by examining the books of the company. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. If he fails in his duty, he will be jointly and severally liable with those who are responsible for the management of the company, although he is not guilty of any dishonesty. AIR (V 12) 1925 All 519: 88 Ind Cas 785: 47 All 669: 23 ALJ 473: 6 LRA Civ. 425 (DB).

——S. 145 — Under the Act where auditors pass over illegal payments without demanding explanation and the facts disclose that there was deliberate abstention from performing plain and manifest acts and there was absolute duty cast upon them to enquire into the illegal payments and think over the real meaning of dubious transactions they are guilty of misfeasance unless there is anything to the contrary in the Articles of Association. AIR (V 16) 1929 All 826: 121 Ind Cas 693.

——S. 146 — Inspection by proxy.

There is no provision in the Act entitling a member of inspection by proxy, even though she be a woman. Nor can a share-holder beforehand seek to obtain information which can be supplied at the General Meeting and ask the Court to stop the meeting till the information is supplied. AIR (V 13) 1926 Sind 295 : 97 Ind Cas 84.

——Ss. 147 and 169 — Liquidation — Bankruptcy rules — Applicability of.

A company in liquidation becomes solvent when it has paid off its liabilities existing at the date of the winding up order; ordinary bankruptcy rules are applicable to companies in liquidation and when the liabilities existing at the date of the winding up order have been discharged, creditors are entitled to subsequent interest on debts carrying interest. AIR (V 8) 1921 Lah 346: 56 Ind Cas 69 (2) (DB).

——S. 148 — (1882), S. 89 — Before the passing of the Limitation Act and C. P. Code both of 1908, a plaintiff obtained an ex parte decree against a company. After the new Acts came into force, the plaintiff applied for execution and a notice under O. XXI, R. 22 served in the defendant company's office. The defendant company obtained a rule nisi against the plaintiff to explain why the ex parte decree should not be set aside. The plaintiff objected that the application was barred under the Limitation Act 1908. The defendant contended that they had a right under Old Limitation Act of 1877 and that under the General Clauses Act, S. 6 (2) they could not be deprived of that right when the Old Limitation Act was repealed. Held, (i) that the application was time barred under Art. 164 New Limitation Act; (ii) that the C. P. Code (XIV of 1882) S. 436 did not apply to the companies registered under the companies Act, but to the more uncommon companies with a right to sue or to be sued through their trustees or officers; (iii) that the C. P. Code gives remedy of the liability in the ex parte decree; while the Limitation Act merely regulates the time of limitation to seek the remedy. (1910) 12 Bom LR 730: 7 Ind Cas 982 (DB).

——S. 148 — S. 89 of Act 1882 — Service of summons.

The service of summons on a company registered under the Indian Companies Act, 1882, is regulated by S. 89 of the Act. (1910) 12 Bom LR 730: 7 Ind Cas 982 (985) (DB).

——S. 151.

——Ss. 151, 130, 132 — Notification of January 6, 1937, directing alteration in Form F, Sch. III, is ultra vires.

Per Full Bench.— Notification No. 24 (25) Tr. (C.L.) published in Gazette of India 1937 Part I, p. 83, dated January 16, 1937, directing alterations in Form No. F in Sch. III of Companies Act, in pursuance of S. 151 (2) and (3) is ultra vires.

Per Beaumont, C. J.— The Central Govt. although it may alter or add to Form No. F, is not entitled to introduce a new form, nor is it entitled to amend the substantive provisions of the Companies Act: and directly the Central Govt. distinquishes between one company and another, it is in effect introducing a new form, and is altering the provisions of S. 132.

Per Lokur, J.— Sections 131 and 132 make no distinction between a banking company and other companies, and by S. 132 (2) a form is prescribed for all companies alike. The balance sheets of all companies must conform to Form No. F in Sch. III, as nearly as circumstances permit. The Central Govt. is empowered by S. 151 (2) to "alter or add to the forms in Sch. III", but the form as altered or added to will be applicable to all companies under S. 132 (2). To differentiate between one class of companies and another would be amending that section itself and the power of legislating is not conferred upon the Central Govt. by S. 151. So long as S. 132 (2) stands as it it is, prescribing only one form of balance sheet for all companies, the Central Govt. cannot usurp the power of the Legislature by issuing a notification that there will be a different form for banking companies. Section 151 (2) does not confer any such power upon it. Section 151 (2) empowers the Central Govt. to alter or add to an existing form in Sch. III, but not to add one more new form to the schedule. Section 151 (3) requires the altered form to be published in the Official Gazette, but not any new form that is added to Sch. III. AIR (V 31) 1944 Bom 107: 46 Bom LR 70: 45 Cr LJ 612: ILR (1944) Bom 302: 212 Ind Cas 396 (FB).

——S. 151 (3), Per Full Bench (Beaumont, C. J. dissenting).— Where the notification instead of giving the altered form has merely stated that the Form F in Sch. III shall be amended in the manner specified therein, there is substantial compliance with S. 151 (3) and the notification is not defective on that account. AIR (V 31) 1944 Bom 107: 45 Cr LJ 612: 46 Bom LR 70: ILR (1944) Bom 302: 212 Ind Cas 396 (FB).

——S. 152.

——S. 152 — (As it stood before amendment by Arbitration Act of 1940) — Scope — Reference to arbitration — Arbitration Act and Civil P. C., application of.

Under S. 152, Companies Act, 1913, before the Arbitration Act, 1940, came into force, a company could only enter into an arbitration under the provisions of the Arbitration Act, 1899, and consequently companies were outside the scope of Sch. II, Civil P. C., and were precluded from making a reference under that provision. AIR (V 31) 1944 Mad 308 (310): 57 MLW 221: (1944) 1 MLJ 290: ILR (1944) Mad 385: 1944 MWN 203: 217 Ind Cas 399 (FB).

(Overrules AIR (V 31) 1944 Mad 95 : 56 MLW 637 : 1943 MWN 672 : 216 Ind Cas 22.)

——S. 152 — Scope — Arbitration Act and Civil P. C., applicability of.

The Arbitration Act, applies in a case falling within the scope of the Act even when the locus of the subject-matter was outside a presidency town, provided, one of the parties or both of them were companies registered under the Companies Act. The Preamble of the Act makes it clear that that Act has application only to arbitrations without the intervention of the Court. Where, therefore a reference to arbitration, in which a company is interested, with the intervention of the Court, is governed by Scn. II, Civil P. C., relating to arbitrations with the intervention of the Court, the Arbitration Act has no application to such case. AIR (V 28) 1941 Cal 127: ILR (1940) 2 Cal 237: 44 CWN 828: 193 Ind Cas 553.

——S. 152 — Reference to arbitration — Arbitration Act, applicability of.

It is not necessary that any reference to arbitration to which a limited company is a party should be under the Arbitration Act. AIR (V 27) 1940 Lah 97: 190 Ind Cas 146.

——S. 152 — Scope — Reference to arbitration — Arbitration Act, applicability of.

A company, under the Companies Act stands in the Punjab on no different footing than a private individual governed by Punjab Act (I of 1911) If, therefore, an agreement between the parties, one of which is a company, to refer the dispute to arbitration, makes no specific reference to the Arbitration Act, the Arbitration Act will not apply to the abitration agreement between the parties. AIR (V 25) 1938 Lah 827 (828) : 179 Ind Cas 706.

——S. 152 — Scope — Reference to arbitration — Arbitration Act, applicability of — Award executable by what Court — Decree, if passed is nullity.

The word "may" after the words " a company" in the beginning of S. 152, does not go with the sentence "in accordance with the Arbitration Act 1899" but with the words "refer to arbitration". It is obvious that the word "shall" could not be used because then it would become incumbent on the companies to refer every existing or future dispute to arbitration. Again, the existence of the words "in accordance with the Arbitration Act, 1899", in Cl. 1 of S. 152 is an indication that the Legislature considered it to be de riguear that every reference by a limited liability company to arbitration should be in accordance with the Arbitration Act. The Arbitration Act lays down certain rules with regard to the submission to be made to the arbitrator and it is clear that by inserting these words, the Legislature intended that the company should from the very beginning proceed according to those rules, Clause 3 is conclusive on the point that the provisions of the Arbitration Act, only apply to arbitration to which a limited liability company is a party. The limited liability companies cannot refer to arbitration independently of this provision of law, and Sch. II, Civil P. C., has no application. Section 3, Arbitration Act, and S. 89, C.P.C., when read along with subs. 3 of S. 152, Companies Act, makes it indubitable that the Arbitration Act, and the Arbitration Act alone applies to all references to arbitration made by limited liability companies. The result is that the award is executable by the District Judge only and not by the Senior Sub-Judge. AIR (V 25) 1938 Pesh 44 : 177 Ind Cas 659 (DB).

——S. 152 — Arbitration — Application to file agreement in Moffusil Court — Maintainability,

A person residing at M got certain ornaments insured with the defendant company against burglary. There was a clause in the policy that if any question or difference arose between the insured or any claimant on the policy and the company as to the meaning and effect of the policy or as to any claim by or any right or liability of either party by virtue thereof, the same shall be referred to arbitration and that the company shall

not be liable in respect of any claim under the policy unless and until the liability and the amount of the liability of the company in respect thereof shall have been referred to arbitration and determined by an award, and the obtaining of an award thereon was to be a condition precedent to any right of action against the company upon the policy. The policy bore the signature of the directors of the company and their local managers at C. The assured filed an application in the Court at M to file the agreement under Para. 17, Sch. II, Civil P. C., but the company contended that the Court at M had no jurisdiction and that Sch. II, did not apply:

Held, (1) that the burglary which took place at M being one of the facts which it was necessary to establish to obtain relief, a part of the cause of action arose at M.;

(2) that though the Arbitration Act was not made applicable to M, it did not mean that that Court should not look at the Act; but it was bound to see whether the case was governed by that Act and, therefore, beyond its jurisdiction;

(3) that the offer having been accepted at C, a suit could have been filed at C in respect of the subject-matter in dispute and under S. 2, Arbitration Act, that Act applied and the Court at M had no jurisdiction to entertain the application. AIR (V 24) 1937 All 208: 1937 AWR (CC) 52: (1937) ALJ 98: ILR (1937) All 234: 167 Ind Cas 897 (DB).

——**S. 152 — Scope.**

Section 152 empowers a company to refer to arbitration an existing differencee between itself and any other company or person. But a shareholder of a company has no such right against the company. AIR (V 24) 1937 Mad 405: 45 MLW 405: (1937) MWN 518: 171 Ind Cas 690.

——**S. 152 — False statement — Balance sheet — Loan and deposit — Consolidation of the two amounts to suppression of the truth — Loan to depositor shown as overdraft — Whether amounts to concealment.**

A loan and a deposit are items differing completely in principle from the balance sheet point of view. Strictly speaking, they ought to appear on different sides, for one is an asset and the other is a liability. Consolidating the two and presenting them as one item to the readers, is a striking case of non-disclosure, amounting to a suppression of the truth.

A company giving a loan to one of its depositors and showing it to be an overdraft to him conceals the true statement of facts. AIR (V 23) 1936 Cal 680: 40 CWN 1341: 38 Cr LJ 151: ILR (1937) 1 Cal 328: 166 Ind Cas 163 (DB).

——**S. 152 — Scope — Reference to arbitration — Arbitration Act, application of — Reference made outside Arbitration Act — Decree on such reference — Validity.**

The language of S. 152, is not happy and its interpretation is not free from difficulty; but on the wording of the section as it stands and the general policy of the Legislature, which is not to make the provisions of the Arbitration Act obligatory outside the Presidency Towns, the proper construction to place on the section would be to hold that it is an enabling one and that it merely confers power on companies to refer disputes to arbitration under the Arbitration Act, by an agreement in writing, when this course is preferred.

Consequently, it is not obligatory on a company governed by the Arbitration Act to make a reference to arbitration out of Court in the Punjab only in pursuance of the provisions of the Arbitration Act and to file an award made on such a reference in the Court of the District Judge as required by the Arbitration Act and a decree passed by a Senior Subordinate Judge in the Punjab on the basis of an award made on a reference to arbitration outside the Arbitration Act, and out of Court to which a company is a party is a perfectly legal decree. AIR (V 23) 1936 Lah 721: 17 Lah 722: 39 PLR 35: 164 Ind Cas 393 (FB).

——**S. 152 — Applicability — Reference to arbitration — Reference not by written agreement but made by Court in pending suit — Decree on such award — Appealability.**

Section 152, applies to those cases only in which a Joint Stock Company by written agreement refers to arbitration in accordance with the provisions of the Arbitration Act any dispute between itself and any other Company or person.

Where the reference to arbitration was not by written agreement of the parties, but was made by the Court in a pending suit and the arbitrator had to submit his report to the Court which had to pass a decree in the suit in accordance with terms of the award or pass such other order in accordance with law as it thought fit, such a decree is clearly open to appeal in the ordinary course. In these cases, the reference or the award passed thereon, is not made under the provisions of the Arbitration Act and S. 152, Companies Act, has no applicability to it. AIR (V 23) 1936 Lah 257: 163 Ind Cas 339 (DB).

——**S. 152 — Scope — Reference to arbitration — Arbitration Act, application of.**

The Arbitration Act applies to all references to arbitration under the Companies Act wherever they take place, whether they take place within a Presidency Town or in a place to which the Local Govt. has extended the provisions of the Arbitration Act by virtue of the proviso to S. 2 or in place outside Presidency Towns where the Local Govt. has not extended the Arbitration Act under the proviso mentioned. AIR (V 20) 1933 Lah 44 : 33 PLR 1048 : 44 Lah 249 : 141 Ind Cas 64 (DB).

——**S. 152 — Arbitration between company and another person without reference to Arbitration Act — Award filed under Para. 20, Sch. II, Civil Procedure Code — Validity of award — Executing Court — Power to question validity of decree based on award.**

Where the dispute between a limited company and one of its customers was referred to arbitration without any express agreement in writing that the reference was to be governed by the Arbitration Act and the award given by the arbitrators was filed by the Court under Para. 20 of the Second Schedule of the Civil P. C. :

Held, that though it was not free from doubt whether a decree could be legally passed on the basis of the award under Para. 20 of Sch. II of the Civil P. C., inasmuch as the parties had not agreed in writing that the reference to arbitration would be governed by the provisions of the Arbitration Act, yet the decree was not on the face of it a nullity and it was not, therefore, open to the Court to which an application was made to execute the decree, to go behind the decree and question its validity. AIR (V 20) 1933 Lah 46 : 140 Ind Cas 180.

——**S. 152 — Scope — Reference to arbitration — Arbitration Act and Civil Procedure Code, applicability of.**

Section 152, is not restricted by S. 2 of the Arbitration Act, which limits the application of the latter

Act to cases where the subject-matter could be the subject of a suit in a Presidency Town.

Arbitrations between companies in Bihar and Orissa under S. 152, are, therefore, governed by the Arbitration Act and not by Sch. II, of the Civil P. C. AIR (V 20) 1933 Pat 49 : 13 P L T 169 : 136 Ind Cas 445.

——S. 152 — Scope — Reference to arbitration — Arbitration Act, applicability of.

Section 152, does not empower a Court situated in a local area to which the Indian Arbitration Act has not been extended, to apply the provisions of the Arbitration Act to arbitrations between companies or between companies and third persons. AIR (V 18) 1931 Lah 555 : 32 PLR 444 : 132 Ind Cas 399.

——S. 152 (3) Arbitration contemplated in S. 208-C and S. 152 (3) — Distinction pointed out. AIR (V 27) 1940 Cal 220 : 71 CLJ 62 : 44 CWN 285 : I L R (1940) 1 Cal 358 : 188 Ind Cas 143 (DB).

——Ss. 152 (3), 208-C — "In pursuance of this Act," meaning of.

The concluding words of Sub-S. (3) of S. 152 Companies Act "in pursuance of this Act," mean that Ss. 3 to 22, Arbitration Act, 1899, would apply to all arbitrations in which one or both the parties are companies irrespective of the locus of the subject-matter by the force and effect of the Companies Act, and the procedure provided for in the Arbitration Act for extending its field of operation would not have to be followed in such cases. Thus S. 3 and S. 4 (a), Arbitration Act, 1899, would apply to all arbitrations in which a company is a party. Paragraphs 20 and 21 of Sch. II, Civil P. C., are accordingly excluded and the Court to which the award will have to be filed under S. 11 (2), Arbitration Act of 1899, must be either the High Court or the Court of the District Judge, as the case may be. AIR (V 27) 1940 Cal 220 : 71 CLJ 62 : 44 CWN 285 : ILR (1940) 1 Cal 358 : 188 Ind Cas 143 (DB).

——S. 152 (3) — Where one of the parties to an arbitration is a corporation registered under the Companies Act, S. 152 (3) of that Act applies and any award obtained by it may be filed under the provisions of the Arbitration Act. AIR (V 22) 1935 Sind 228 : 34 Cr LJ 175 : 159 Ind Cas 824.

——S. 152 — Agreement to refer.

Where an agreement is made with a company to refer to arbitration under certain contingencies, a Court has no jurisdiction to file the agreement to refer inasmuch as Arbitration Act is made applicable to such agreements by S. 152, Companies Act, and S. 3 Arbitration Act, excludes Sch. 2, Para. 17, C. P. Code, from the operation of that Act. AIR (V 16) 1929 Lah 246 : 118 Ind Cas 533.

——S. 152 — Reference by official liquidator — An official liquidator is not allowed to refer matters in difference to private arbitration.

The powers which a living company as regards reference of disputes to arbitration may possess are not co-extensive with the powers to be exercised by the liquidators. The directors of the company are supposed to know their own business, being businessmen while an official liquidator is very often a new man, unconnected with the business carried on by the company. His knowledge and information of men and things is not likely to be co-extensive with similar knowledge of the directors. Therefore, although a living company is allowed to refer matters in difference to arbitration in a particular way, an official liquidator may not be allowed to make a reference to private arbitration. AIR (V 15) 1928 All 553 : 50 All 867 : 26 ALJ 810 : 110 Ind Cas 695.

——S. 153.

1. Appeal.
2. Applicability and scope.
3. Assent of creditors.
4. "Class."
4A. Creditors.
5. Court, powers and duties. See Note 11.
5A. Court meetings.
6. Effect of sanction.
7. Foreign company.
8. Interpretation.
9. Procedure.
10. Proxy.
11. Sanction.
11A. Scheme.
12. Valuation of scheme.

1. Appeal.

——S. 153 — Scheme — Reconstruction of insurance company involving transfer of money deposited under S. 7, Insurance Act and reduction of contracts of insurance — Order sanctioning — Appeal.

Where the Court sanctions a scheme of reconstruction of an insurance company by its dissolution and creation of a new insurance company involving the transfer of the money deposited by the dissolved company under S. 7, Insurance Act, (a property within the meaning of Cl. (a) of S. 153-A, Companies Act) and the reduction of contracts of insurance, it does so under S. 153, Companies Act, as the jurisdiction of the Court under S. 153, Companies Act, to sanction such scheme has not been in any way affected by any provision of the Insurance Act though in the exercise of this jurisdiction the Court is to keep in view the provisions of S. 8, S. 36 and S. 61, Insurance Act.

Therefore, the order sanctioning such a scheme is an order under S. 153 read with S. 153 (A), Companies Act and is appealable under cl. (7) of S. 153, Companies Act. AIR (Vol 29) 1942 Cal 578: ILR (1942) 2 Cal 85: 46 CWN 441: 204 Ind Cas 175 (DB).

——S. 153 — Statutory meeting of creditors under S. 153 of the Act — Order rejecting proxies and directing another meeting :

Held, that the order was a judgment within cl. 13, Letters Patent (Rang.) and appealable. AIR (Vol 19) 1932 Rang 96: 10 Rang 189: 137 Ind Cas 444 (DB).

2. Applicability and scope.

——S. 153 — Scope — Scheme — Provision for winding up.

In all concerns of the company whether in the matter of winding up or in the matter of a scheme, the policy of the Act seems to be to ascertain the wishes of the creditors as expressed by the majority of them subject to the rights of the minority being safeguarded.

But no Court is entitled to say that it will not ascertain the wishes of the majority in regard to a proposed scheme. Although under Cl. (1) of S. 153 a certain discretion is vested in Court, yet the scope of that discretion is limited.

A Court ought not to decline to order a meeting unless the proposals are illegal as being in contra-

vention of the provisions of the Companies Act or incapable of modification in view of ascertained facts so that it would be a waste of time and expenditure to circulate them.

A scheme under S. 153 provides an alternative mode for winding up. It is a provision to avert a winding up and, therefore, a provision with respect to the winding up within the meaning of S. 271. AIR (Vol 26) 1939 Mad 318: (1938) MWN 1313: 183 Ind Cas 353.

——**S. 153 — Scheme for resuscitation — Failure of — Whether by itself sufficient for winding up order.**

Per Tek Chand, J. — Failure of a scheme of resuscitation of a company is not by itself sufficient to justify a winding up order being made. It cannot be said that because the scheme has failed in this important particular, it has failed in its entirety, and that the only course open to the Court is to order compulsory liquidation.

Section 153, Companies Act, makes provision not merely for schemes for the "resuscitation' or "re-organisation" of companies, but it also provides for "scheme of agreement", which provide an alternative mode of liquidation which the law allows the statutory majority of creditors to substitute for winding up, whether voluntary or under the Court. AIR (V 22) 1935 Lah 779: 16 Lah 1029: 38 PLR 166: 158 Ind Cas 816 (SB).

——**S 153 (5) — Order under — Scope of — Direction that all suits, etc., against Company and Directors and Officers be stayed — Interpretation of — Directors and Officers, if affected in their personal capacity or as representing company.**

Section 153 (5) of the Companies Act speaks of proceedings against a company alone, but not against its Directors or Officers. Where an order passed by the High Court under S. 153 (5) provides that "until the final determination of this application or until the further order of this Court the commencement and/or continuation of all suits and proceedings against the said company, its Directors and Officers in the meantime be and the same are hereby stayed" it must be held that "the Directors and Officers" in the order are referred to as representing the company in its operations as a company and not the Directors and Officers in their personal capacity in private life. AIR (Vol 35) 1948 Cal 242: 52 CWN 708: 49 Cr LJ 397: (1948) 18 Comp. Cas 228.

3. Assent of creditors.

——**S. 153 — (As amended by Act XXII of 1936) — Scheme — Composition scheme — Application to creditors.**

Under S. 153, Companies Act the scheme of composition is applicable to all creditors including those who have already obtained decrees and it is not necessary that there should be a separate meeting of the decree-holder-creditors in order to make the scheme binding on them. AIR (Vol 29) 1942 Cal 442 : 46 CWN 634 : 75 CLJ 203 : 201 Ind Cas 674 (DB).

——**S. 153 — Notice of creditor's meeting — Requisite service — Required majority present — Decision, if binding.**

Section 153, does not make it obligatory either upon the Court or the company to serve a notice of the creditors' meeting on each and every creditor of the company, and there is nothing which would invalidate decision arrived at by the creditors and the company in the absence of any individual creditor. The only safeguard intended to protect the interest of the creditors is that provided in sub-s. (2) of S. 153.

In other words, if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the Court, is binding both on the creditors or members and the company. AIR (V 24) 1937 Lah 442 : 39 PLR 230: 172 Ind Cas 313 (DB).

——S. 153 — Assent of share-holders. — Company ordered to be wound up — Creditor proposing scheme to advance money on mortgage or by sale — Meeting of share-holders accepting scheme to advance 10 lakhs on mortgage — Claims of creditors exceeding the amount — Court adjourning the matter to enable creditor to increase the offer — Offer increased by Rs. 62,000 — Court approving scheme — Scheme as approved held not to have been assented to by the share-holders. AIR (Vol 16) 1929 PC 256: 119 Ind Cas 631: 50 CLJ 561: 1929 ALJ 1289: 1929 MWN 922: 30 MLW 893: 57 MLJ 633.

——**S. 153 — Creditors and Share-holders — Meeting of — Arrangement — Acceptance by creditors not present at meeting — Effect.**

In a meeting held under S. 153 of the Act, the written acceptance of the arrangement by those share-holders and creditors who are not present either in person or by proxy, cannot be taken into account to make up the majority in number representing three-fourths of the share-holders and creditors. AIR (V 4) 1917 Oudh 58 : 4 OLJ 160 : 40 Ind Cas 57.

4. "Class".

——**S. 153 — Scope — Reason for dividing creditors into different classes — "Class", meaning of.**

Section 153, Cl. (1), contemplates the division of creditors into different classes. The reason for dividing the creditors into different classes is that they have different interests. If different state of facts exists among different creditors which may differently affect their minds and their judgment they must be divided into different classes. The word "class" in Cl. (1), has not been defined in the Act.

It must be given such a meaning as will prevent the section being so worked as to result in confiscation and injustice and it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. AIR (Vol 29) 1942 Cal 578 : ILR (1942) Cal 85: 46 CWN 441: 204 Ind Cas 175 (DB).

——**S. 153 — Depositors.**

For the purpose of S. 153, creditors of a certain class (e. g., unsecured creditors), who have already obtained decrees, do not form a distinct class from others of the same class who have not obtained decrees. AIR (Vol 24) 1937 Cal 124: ILR (1937) 1 Cal 368: 172 Ind Cas 349.

——**S. 153 — Unsecured creditor having decree behind him — Whether distinct class.**

It is not for the Court to sanction a scheme which allows one class of creditor or depositor to feast upon the rights of another class.

The interests or the right of an unsecured creditor with a decree behind him, is not so dissimilar from the interests of an unsecured creditor without a decree behind him that it is impossible for them to consult together in common interest in the company and to bring about a prolongation of its life.

An unsecured creditor who is also a decree-holder is not, entitled to force those who manage the company to regard him as belonging to a defined and distinct class of persons as opposed to an unsecured creditor who has not got a decree. (1936) 164 Ind Cas 261: 39 CWN 875.

——**S. 153 — (As amended by Act XXII of 1936) — Scope.**

The amending Act XXII of 1936, purports to explain the meaning of the particular expression "creditors of the same class" in S. 153 of the earlier Act and as such it must have relation back to the time when the prior Act was passed. AIR (Vol 29) 1942 Cal 442: 46 CWN 634: 75 CLJ 203: 201 Ind Cas 674 (DB).

——S. 153 — Section 153, deals with the power to compromise lying in the hands of the creditors and members of the Company. The Act definitely in terms mentions not only the creditors in a general sense but also the classes of creditors and by its language it shows that the intention and scheme of the Act was to have any re-arrangement or settlement approved of on a three-fourths basis by separate meetings of the creditors divided into these classes and the creditors, having decrees against the Company, constitute a separate class and are not in the same position as that of other creditors who are depositors. (1936) 164 Ind Cas 189 (2) : 39 CWN 690.

——**S. 153 — 'Class', construction of — Scheme accepted by majority — Objection by one — Value of — Directors authorised to manage — Proposal in company's name made director — Validity of.**

Section 153, enables the majority of a class of creditors to bind the minority; it exercises a most formidable compulsion upon dissentient, or would be dissentient creditors; and it, therefore, should be construed with care, so as not to place in the hands of some of the creditors the means and opportunity of forcing dissentients to do that which it is unreasonable to require them to do, or of making a mere jest of the interests of the minority.

But the body of persons who have made deposits on the same terms and similar agreements may be regarded as constituting such a class of creditors as the Legislature had in mind when it enacted S. 153.

Where by a very large majority both in the number of persons and in the amount of capital voting, the depositors have accepted a scheme, there is no serious danger in allowing the objection of the solitary objector to be overruled and the will of the majority to prevail.

Where the directors are authorised to manage the business and to exercise all powers, a proposal under S. 153 by the Board of Directors in the Company's name is valid and proper. AIR (Vol 21) 1934 Sind 54: 28 SLR 213: 149 Ind Cas 51.

4A. Creditors.

——**S. 153 — "Creditor" — Person depositing shares or other goods with company for safe custody — Right to rank as creditors.**

There is no warrant for the view that any person having any kind of pecuniary claim against a company is entitled to rank as a creditor in a proceeding under S. 153, the Companies Act. It is no doubt true that even contingent and prospective creditors are creditors for the purpose of the Companies Act.

But a person holding specified chattels deposited with him by another person for safe custody is not a debtor of any kind, whether presently contingent or prospective; nor can the person depositing the chattels be said to be a creditor.

A person who has left certain specified goods in the custody of a Bank merely for purposes of custody, the goods never having become a part of the assets of the Bank, is not a creditor of the Bank within the meaning of S. 153, Companies Act. 52 CWN 708: 49 Cr LJ 397: AIR (Vol 35) 1948 Cal 242 : (1948) 18 Comp Cas 228.

——Ss. 153 and 162 — Creditor bound by scheme — If may present winding-up petition. See Companies Act, Ss. 152 and 153. (1947) 51 CWN 791.

——**S. 153 — Scheme sanctioned — Judgment-creditor of same class as unsecured creditors who have not obtained decree — Execution of decree against company.**

Where a scheme is arrived at between the creditors and members of a company at a meeting of the creditors and the company and is sanctioned by the Court, a person who has obtained a decree against the company cannot execute his decree against the company, he being of the same class of unsecured creditors and the scheme being binding on him as well. AIR (Vol 24) 1937 Lah 442: 39 PLR 230: 172 Ind Cas 313 (DB).

——**S. 153 — Decree-holder and unsecured creditor — Notice of meeting to approve scheme to unsecured creditors — Decree-holder, if bound.**

As between a decree-holder and an unsecured creditor, their interests are not so dissimilar as to make it necessary to place them in different classes. Therefore, where a notice of meeting to approve a scheme of arrangement between the company and unsecured creditors, is issued to the unsecured creditors a decree-holder who is also an unsecured creditor is prima facie bound by the notice. AIR (Vol 24) 1937 Cal 401 : 172 Ind Cas 717.

——**S. 153 — Scheme — Ascertainment of creditors' wishes — Proper method — Value of each creditor's debt — If relevant.**

The proper method of ascertaining the wishes of the creditors is to take into account the value of each creditor's debt, and not to give equal voting strength to each creditor irrespective of the value of the debt due to him. (1950) 54 CWN 80.

——**S. 153 — Arrangement.**

A creditor is bound by an arrangement between the Company and its creditors made under this section. AIR (Vol 21) 1934 Lah 515 (1): 35 PLR 521: 153 Ind Cas 119 (2).

5. Court, powers and duties.

See N. 11.

——**S. 153 — Sanctioning of scheme — Duty of Court.**

In sanctioning a scheme under S. 153, the Court does not simply register a resolution passed by the majority of the creditors or the shareholders. It must look at the scheme and see whether the Act has been complied with and whether the scheme is a reasonable one or whether there is such an objection to it that any reasonable is such an objection to it that any reasonable man might say that he could not approve of it. It is true that if the creditors act on sufficient information and act honestly they are much better judges of what is to their commercial advantage than the Court can be, but that is not conclusive because there might be some defect in the scheme which they did not notice. AIR (Vol 29) 1942 Cal 578 : ILR (1942) 2 Cal 85: 46 CWN 441: 204 Ind Cas 175 (DB).

——**S. 153 — Compromise — Agreement sanctioned by Court, binding nature of.**

Once Court grants sanction to the agreement of the majority of creditors with company concluded at the meeting held under the preliminary order of the Court under S. 153, it binds all those who fall within the class represented by the said majority. Unsecured creditors of a company who have already obtained decree against the company are within the same class as unsecured creditors who have not obtained decree against the company. Hence a creditor who has obtained a decree against the company cannot execute it. AIR (Vol 22) 1935 Cal 777: 62 CLJ 310: 39 CWN 1199 (DB).

——S. 153 — Scheme to be based on correct information and data — Information, if not correct, Court can call for report — Discretion.

If the creditors are acting on sufficient information and with time to consider what they are about and are acting honestly, they are much better judges of what is to their commercial advantage than the Court can be.

Therefore, it is very essential that any scheme which is put forward before the general body of creditors must, as far as possible, be based upon correct information and data but that does not mean that the application for sanctioning a scheme should be rejected if the information is not accurate and complete. In such a case, the Court can call for a report in as short a time as possible which will give a fair idea of the affairs of the company at that moment, and on that state of information the scheme as adumbrated or with the necessary amendments can be circulated along with the report. AIR (Vol 26) 1939 Mad 318: (1938) MWN 1313: 183 Ind Cas 353.

——S. 153 — Arrangement — Duty of Court in sanctioning — Meeting of creditors for making arrangement — Notice.

A Court which is invited to sanction an arrangement must satisfy itself that (i) the meeting was duly held and conducted; (ii) that the compromise was a real compromise: (iii) that it was accepted by competent majority; (iv) that the majority was acting in good faith and for common advantage of the whole class, and (v) that what they did was reasonably prudent and proper.

It is not necessary for the Court to issue notice before ordering a meeting of the class of creditors with whom it was proposed to make an arrangement. Where the Chairman has been careful to satisfy himself and to certify the Court that notice of the application and of the meeting ordered had been sent to and acknowledged by all the depositors, there is sufficient compliance with the law.

The Court does not simply register the resolution come to by the creditors or the shareholders as the case may be. But if the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly they are much better judges of what is to their commercial advantage than the Court can be. AIR (Vol 21) 1934 Sind 54: 28 SLR 213: 149 Ind Cas 51.

——S. 153 — Arrangement — Sanction — Duty of Court.

In exercising jurisdiction under S. 153, the first thing that the Court has to see is whether the provisions of the Statute have been complied with. Secondly, the Court has to see whether the persons present at the meetings have acted bona fide and done nothing injurious to the interest of the classes whom they represented. The Court has further to see whether the arrangement is such as a man of business would reasonably approve and whether it is fair and reasonable as regards the interests of all concerned. The Court has a wide discretion in the matter; but it will reject the scheme only where it is shown that there was something wrong. AIR (Vol 20) 1933 Lah 51: 33 PLR 979: 140 Ind Cas 128.

——S. 153 — Arrangement between company and unsecured creditors — Court sanctioning scheme — Whether binding — Proceedings in execution by one creditor — Power of Court to stop.

Section 153, contemplates the type of arrangement between a company and its unsecured creditors including decree-holders postponing payment of all unsecured creditors including decree-holders. It does not include merely a compromise or arrangement come to in or after a winding up order has been passed and it provides in clear language that when such compromise has been sanctioned by the Court, such compromise shall be binding on the creditors.

The Court can, therefore, stop proceedings started by one of those creditors decree-holders impeaching the arrangement. The Court has power to issue an injunction to restrain him from proceeding further with such proceedings as long as the scheme is in operation. AIR (Vol 23) 1936 Cal 662 : 40 CWN 551: 165 Ind Cas 655.

——S. 153 — Company having registered office at Calcutta and branches in East Bengal — Order by Calcutta High Court directing holding of meetings preparatory to sanctioning of scheme of arrangement — Creditors in East Bengal, if bound by scheme — Jurisdiction of Dacca High Court — Proper order to be made by that Court.

A petition with the object of obtaining orders of Court leading to a scheme of arrangement under S. 153 of the Companies Act was filed in the High Court of Calcutta by a company which had its registered office in the town of Calcutta in West Bengal in the Union of India and which had several branches at Dacca and other places in East Bengal in the Dominion of Pakistan, and an order was made by that Court in which certain preliminary directions were given for the holding of meetings preparatory to the sanctioning of the scheme of arrangement between the company and its creditors and its share-holders. On a similar petition presented to the Dacca High Court on behalf of the company.

Held, (i) that under the High Courts (Bengal) Order, 1947, read with the Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947, the company law governing the administration of Companies in Pakistan since the 15th August, 1947, was the same as the law contained in the Indian Companies Act and that the Dacca High Court as a High Court of Pakistan had jurisdiction to administer the Act in the present case.

(ii) that the proper function of the Dacca High Court in order to see that justice was done between the company in regard to its assets situated in East Bengal and in relation to creditors there would be to make such orders as it considered just of an ancillary nature to facilitate the composition of the debts of the company as a whole. Unless such an order was made the order of the Calcutta High Court, being an order of a Court in what is to be regarded for legal purposes as a foreign country, would not save the company from liability to individual creditors and in spite of final sanction of any scheme of arrangement by the High Court in Calcutta, individual creditors in East Bengal in Pakistan would still be free

to file suits against the company in the Dacca High Court.

The Dacca High Court issued orders of a nature ancillary to the orders passed by the Calcutta High Court. It directed the company to convene meetings of its creditors and shareholders at Calcutta on the same dates and at the same times and under the same chairman as ordered by the Calcutta High Court, and to make arrangements to ensure that the results of the said meetings were reported to the Dacca High Court. In addition to these directions it issued an injunction against the company restraining it from disposing, except in the ordinary course of business, of any of its assets situated in East Bengal without the leave of the Court. (1948) 52 CWN 882 (Dacca).

——S. 153 — Duty of Court.

The duty of the Court in sanctioning a scheme to alter the Memorandum of the company upon the recommendation is as follows:— What the Court has to do is to see, first of all, that provisions of that statute have been complied with; and, secondly, that the majority has been acting bona fide. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by businessmen. 30 Bom LR 197: 108 Ind Cas 465: AIR (Vol 15) 1928 Bom 80.

——S. 153 — Proceedings under — Proper of Company Court — C. P. Code, S. 90, O. 14, R. 6 and O. 36 — If applicable.

By reason of S. 141, C. P. Code, the Company Court is to follow the procedure provided in regard to suits as far as it may be made applicable (e. g.), the provisions for discovery, inspection, hearing evidence, summoning of witnesses and the like, but the Company Court cannot arrogate to itself the special powers and jurisdiction conferred by the Code on the Civil Court. The special provisions of Order 14, Rule 6 or S. 90 or O. 36 of the Code cannot, in view of their express terms, be made applicable to the proceedings under S. 153, Companies Act. (1950) 20 Comp. Cas 68 : AIR (Vol 37) 1950 EP 111 (FB).

5A. Court meetings.

——S. 153 — Though "Court meetings" are subject to the direction of the Court, where no express direction is given, the Articles of the Company must be looked to so far as they are applicable. 30 Bom LR 197: 108 Ind Cas 465 : AIR (Vol 15) 1928 Bom 80.

6. Effect of sanction.

——S. 153 — Defendant in the name of the managing agency firm passed a writing in favour of the plaintiff by which in substance he stood guarantee for the debt due by the company to the plaintiff. Ultimately a petition was presented to wind up the company and acting under S. 153, Companies Act, meetings of the creditors and share-holders of the company were held to consider a scheme of reconstruction which was suggested under the scheme. Every creditor (except preferential creditors) was to receive half the sum in cash and the other half in the shape of preference share:

Held, that the fact that the plaintiffs received from the company half the amount in cash and received also preferential shares for the other half, did not discharge the surety. AIR (Vol 27) 1940 Bom 247: ILR (1940) Bom 387: 42 Bom LR 451: 190 Ind Cas 73 (DB).

——S. 153 — Scheme — Sanction by High Court — Effect — Powers of executing Court to go behind.

A scheme of arrangement which is sanctioned by the Court under S. 153, has the force of a judicial pronouncement and the executing Court cannot go behind it when in execution of a decree obtained against a loan company by one of its depositors, the company sets up the sanctioned scheme as a bar, unless it is shown that the order giving the sanction was without jurisdiction. When the matter comes before the executing Court, it is not open to the decree-holder to urge against the sanctioned scheme, that there was any defect in the procedure or that there was no meeting of the particular class of creditors to which the decree-holder belongs.

Such defects, if any, do not take away the foundation of the authority of the Court in granting a sanction under S. 153, and they are at the most irregularities and do not render the sanctioned scheme a nullity in the eye of the law. The order of the Court sanctioning the scheme unless set aside or modified is binding on the decree-holder and the executing Court is bound to obey it.

Per B. K. Mukherjea, J.— The depositors with a loan company who have already obtained decrees do form a separate class from the ordinary depositors and it is necessary that there should be a separate meeting of such creditors before a scheme binding on them should be sanctioned by the Court.

If the absence of any such separate meeting is brought to the notice of the Court which is invited to sanction the scheme binding on all the creditors it should refuse to sanction it, or the parties affected might apply for a modification of the scheme by expunging the clause which made the scheme binding on that class of creditors who had no opportunity of having a meeting of their own. AIR (Vol 25) 1938 Cal 337: ILR (1938) 2 Cal 30: 179 Ind Cas 405 (DB).

——S. 153 — Effect of the words in S. 153, Cl. (2) is to give the scheme of arrangement when sanctioned by the Court, a statutory operation. Such a scheme of arrangement cannot, therefore, be said to be an adjustment by a lawful agreement or compromise within the meaning of O. 23, R. 3, Civil P. C. and cannot be ordered to be recorded under that rule. AIR (Vol 24) 1937 Cal 381: 173 Ind Cas 431 (DB).

——S. 153 — Depositors passing scheme — Court's sanction — Scheme relating to distribution of funds pro rata — Depositor obtaining decree prior to scheme — Execution.

Where the scheme as passed at the meeting of the depositors and sanctioned by Court which gave effect to the resolution carried at the meeting the depositors held after the depositor creditor had obtained the decree and put that into execution, related to distribution of the available funds among the depositors who were to be deemed as creditors pro rata:

Held, that the scheme could not possibly be held to apply to the depositor who had obtained a decree before the scheme as he had ceased to be a depositor, and as such, he was entitled to execute his decree. AIR (Vol 23) 1936 Cal 402: 166 Ind Cas 815 (DB).

——S. 153 — Composition scheme sanctioned — Scheme, if applies to all creditors — Scheme passed during execution of decree — Execution cannot proceed.

A scheme of composition under Section 153, for payment of money due to the creditors of the judgment-debtor company passed and sanctioned, applies to all creditors of the company including judgment-creditors. Consequently, where, during execution of decree against company, a scheme is filed under S. 153, the execution of decree cannot proceed. The fact that the decrees sought to be executed were passed long before the scheme of composition makes no difference. AIR (Vol 23) 1936 Cal 282: 39 CWN 1198: 166 Ind Cas 408 (1) (DB).

——S. 153 (1) (2) — Scheme creditors bound by it — Depositor obtaining decree against Bank — Subsequent scheme, if binding on him.

It is only the class of creditors who framed a scheme that are bound by it. Where a scheme is framed by the depositors with the object of saving the Bank, a person who is no longer a depositor but has obtained a decree and is a judgment-creditor is not bound by it. It would be most unreasonable to hold that the arrangement made by the depositors in their own exclusive interest should be binding upon other persons who have conflicting interests. AIR (Vol 22) 1935 Cal 398: 156 Ind Cas 590.

——S. 153 — Scheme sanctioned by one class of creditors — Whether will bind a different class of creditors — Agreement entered into by depositor — Whether necessarily binds creditors.

Section 153, itself contemplates an agreement with any class of creditors or an agreement with all creditors but, inasmuch as different classes affected by any scheme must hold separate meetings, and the term "Class" must be confined to those persons whose rights are not so dissimilar as to make it possible for them to consult together with a view to their common interest, an agreement arrived at by one class of creditors will not bind another class which has not been a party to it.

A depositor who has obtained a decree against a banking Company before any scheme has been embarked on by the latter, ceases to be a depositor, and becomes a decree-holder. Consequently, where the scheme was sanctioned by one class of creditors the depositors, a decree-holder, an entirely different class of creditors, will not be bound by it.

The position is not altered by the consideration that the depositors in the meeting, provided to treat decree-holder as creditor. The legal position remains that an agreement entered into by depositors would not necessarily bind creditors, who might conceivably include a much larger body of claimants. AIR (Vol 23) 1936 Cal 162: 40 CWN 580: 166 Ind Cas 957 (DB).

——S. 153 — Arrangement — Consolidation of different classes of shares.

The mere fact that year after year the company, by appropriate means, varies the rights of different classes of shares cannot be tantamount to a compromise or arrangement between the company and its members or to a variation of the conditions in the Memorandum of Association.

A resolution which has the effect of sweeping away the rights and privileges attaching to the ordinary and deferred shares and which leaves two classes of shares with precisely the same rights is perfectly valid and does not require the sanction of the Court. But where even after this resolution, a deferred share cannot be sold as an ordinary one, a proposal to make these two classes of shares into one class involves a consolidation of the different classes of shares and such consolidation modifies the condition of the memorandum. AIR (Vol 22) 1935 All 310 : (1935) ALJ 527: 1935 AWR (HC) 559 : 57 All 810 : 156 Ind Cas 1088 (DB).

7. Foreign company.

——S. 153 — Scope — Application for winding up foreign company made to Court in British India — Jurisdiction of such Court to entertain application under S. 153.

Section 153, is intended to apply both to the case of a going company not in liquidation and to the case of a company in liquidation and there is no reason why one should restrict it to the case of a winding up in the case of a foreign company. The section confers jurisdiction to deal with a scheme, but how the scheme when sanctioned can be rendered effective and operative on the company as a whole, does not affect the jurisdiction of the Court to deal with it.

Once an application for winding up a foreign Company has been made to the Court in British India and the jurisdiction of that Court has been invoked, the expression "Court" in S. 153 must mean the Court in which the company is being sought to be wound up.

And such Court, therefore, will have jurisdiction to entertain an application made by a member or creditor of such company under S. 153 even before an order for winding up is passed by such Court. The right to apply under S. 153, in such a case is not restricted to a liquidator. AIR (Vol 26) 1939 Mad 318 : (1938) MWN 1313: 183 Ind Cas 353.

——S. 153 — "Company" and "Court", meaning of — Bank incorporated in Travancore State, having central office at Madras — Order for winding up passed by Travancore Court — Proceedings for winding up pending in Madras High Court — Jurisdiction.

As a foreign company is liable to be wound up as an unregistered company within the meaning of S. 271, the expression 'company' in S. 153 which means a company liable to be wound up under the Act, would include a foreign company. The expression 'Court' in the case of an unregistered company including a foreign company would mean "the Court in which the said company is liable to be wound up." Hence in the case of a foreign company having its central office in British India, the High Court within whose jurisdiction such office is situated, has jurisdiction to entertain an application under S. 153 at the instance of a creditor or a member of such foreign company.

Where an order for winding up of a company has been passed by the Court of the principal domicile, similar order need not automatically follow in other Courts having ancillary jurisdiction where similar proceedings for winding up might be pending. Such Courts may, in the interests of the creditors on practical considerations, find it just and equitable to pass an order for winding up, but there is nothing to oblige them to pass the order.

A certain bank incorporated in Travancore State had its central office of business at Madras. An order for winding up the bank was passed in the Travancore Court and similar proceedings were also pending in the Madras High Court. An application under S. 153, Companies Act, for sanctioning a scheme of compromise was made to the Madras High Court:

Held, that the Madras High Court had jurisdiction to entertain the application, as the central office of the bank was at Madras.

Held, also that even assuming Travancore State to be the principal domicile of the bank, as Madras High Court was not subordinate to nor an agent of the Travancore Court but had complete control over the conduct of its own liquidation according to its forensic rules, and as it could pass a separate winding up order for the purpose of having control over the British Indian assets in the interests of the British Indian creditors, there was nothing to prevent the scheme being initiated in the Madras High Court, and being provisionally sanctioned and the same being adopted by the Travancore Court.

Held, further that there was nothing to preclude the Madras High Court from summoning a meeting of all the creditors in British India or outside it and eliciting expression of their views or at least to summon meeting of the British Indian creditors and getting the approval of the majority to such a scheme. AIR (Vol 26) 1939 Mad 318: (1938) MWN 1313: 183 Ind Cas 353.

8. Interpretation.

——Ss. 153, 213 — Scheme by company transferring its undertaking to new company — Scheme involving acts ultra vires of company — Court, if can sanction scheme.

The plain language of S. 153, clearly shows that the machinery provided by the section is available where there is and where there is not a winding up in progress, and the section would apply to a going concern as well as in a winding up. Section 213, on the other hand, is applicable only in view of a winding up or in the course of a winding up.

Section 153 has to be given a wide interpretation. The Court can sanction a scheme whereby a company transfers its undertaking to a new concern formed by amalgamation of several companies carrying on similar business and for reorganization of the rights of and distribution of assets among the different classes of share-holders, in the event of the company being wound up after the amalgamation.

The Court can under this section sanction a scheme, even though it involves acts which, apart from such provisions, would be ultra vires the company; but this rule is subject to the limitation that if the Companies Act contains express provision enabling the doing of any act in a particular way, the provisions of the enabling section, and not those of S. 153 must be followed.

Where the scheme is fair and reasonable, put forward bona fide and accepted by a very large majority of all classes of share-holders who have been acting honestly and bona fide on sufficient and detailed information and with plenty of time to consider what they are about, the Court can sanction it. The test of a reasonable compromise or scheme is whether it is regarded by reasonable people conversant with the subject as beneficial to those on both sides who are making it.

Before sanctioning scheme, the Court should ask the company to make some provision for the dissentients. But the Court does not necessarily make any provision in favour of the dissentients, if the Court is satisfied that the scheme is reasonable and fair and in the interest of the general body of share-holders.

In any case, under the modern practice, such a provision is not a sine qua non to sanctioning the scheme if it is reasonable and fair. The question to be seen, therefore, is whether there is any special case made out in the circumstances that the Court should exercise its discretion in favour of the dissentients. AIR (Vol 24) 1937 Bom 423: 39 Bom LR 675: 171 Ind Cas 769.

——S. 153 — Suit by depositor against Bank for money due — Compromise decree providing instalment payment — Scheme sanctioned in respect of Bank after decree — Notice of meeting not given to depositor — Payment of two instalments by Bank in contravention of scheme — Subsequent default — Execution — Maintainability — Decreeholder, if 'depositor'.

The appellant kept a sum of money in fixed deposit with a Bank. By a notice of withdrawal the deposit became repayable and the Bank having failed to pay he filed a suit for recovery of the deposit. In the meantime the Bank applied under S. 153, and the Court sanctioned a scheme which provided that the depositors shall not be entitled to demand payment of their deposit money or interest at once and shall be paid only in terms of the scheme. The scheme was sanctioned after a consent decree was passed ordering instalments to be paid by the Bank to the depositor. There was no proof of notice of the meeting on the depositor. Two instalments were paid by the Bank in contravention of the scheme but defaulted afterwards. The appellant applied for execution of the decree:

Held, that after the scheme was sanctioned by the Court, the Bank paid two instalments in accordance with the terms of the consent decree and in contravention of the scheme.

These facts clearly indicate that the Bank all along knew that the scheme was not intended to be binding on the appellant and in fact did not bind the appellant.

The word "depositors" in the scheme which was agreed upon in this case and which was ultimately sanctioned by the Court could not and in fact did not include the appellant. AIR (Vol 24) 1937 Cal 169 : 171 Ind Cas 492 (DB).

——S. 153 (1) and (2) — "Company" — If includes unregistered company.

The expression "company" in S. 153 (1) and (2), Companies Act, cannot be confined to companies formed and registered under the Act, or an existing company but it includes an unregistered company also. In Section 153 (6) it is provided that in the said section the expression "company" means any company liable to be wound up under this Act, and an unregistered company is liable to be wound up under S. 271 of the Act. ILR (1950) All 590: AIR (Vol 36) 1949 All 778 (DB).

——S. 153 — Construction — Decisions of English Court of Appeal — If binding.

Per Harnam Singh, J.:— In considering the construction of section 153 of Companies Act, which is professedly based on the English enactment, and which it reproduces, almost word for word the language of the English enactment, and which relates to a branch of the law which is entirely English Law, the Courts of India are in practice, if not in theory, bound by the decisions of the English Court of Appeal. (1950) 20 Comp. Cas 68: AIR (Vol 37) 1950 EP 111 (FB).

——S. 153 — Arrangement meaning of.

The word 'arrangement' in S. 153, means something analogous in some sense to a compromise and there must be both give and take. AIR (Vol 21) 1934 Sind 54: 28 SLR 213: 149 Ind Cas 51.

9. Procedure.

——S. 153 — Petition by directors of company asking Court to refer scheme to share-holders and creditors — Subsequent application by creditors

for compulsory winding-up — Application should be first considered.

Where a petition under S. 153, is presented by directors of a certain company asking the Court to refer a scheme which they had prepared to the share-holders and creditors for their consideration and on the day of hearing of such a petition, a petition is filed by certain creditors asking for an order directing the compulsory winding up of the company there is no reason why the application for winding up should not be considered by the Court.

In fact, it should be considered at the earliest possible moment. Even if an order for winding-up is passed, it will not interfere with any proper scheme being considered. AIR (Vol 26) 1939 Mad 58: 48 MLW 648: (1938) MWN 1082: (1938) 2 MLJ 812: 180 Ind Cas 238 (DB).

——Ss. 153 and 55 — Sanction of scheme — Scheme involving reduction of capital — Requirements of S. 55 not complied with — Procedure to be followed.

As the Companies Act expressly prescribes a special procedure for reduction of capital by S. 55 and the several sections following it, a scheme involving a reduction of capital cannot be sanctioned unless the procedure for reduction of capital has also been followed.

It is however not necessary to dismiss the application for sanction of the scheme if the requirements of Section 55 and other sections have not been complied with, and the Court may direct the application to stand over in order to enable the company to advertise the petition and otherwise comply with the requirements of the Act for reduction of capital. ILR (1949) 1 Cal 127: 53 CWN 239.

——Ss. 153, 55 and 58 — Application for sanction of sheme of arrangement — Scheme involving reduction of capital and diminution of liability — Requirements of Ss. 55 and 58 not complied with — Procedure.

If a scheme of arrangement involves a reduction of capital, the special requirements prescribed by S. 55 of the Companies Act must also be complied with. Further if the reduction of capital made by the scheme involves a diminution of the liability in respect of unpaid share capital or payment to any share-holder of any paid-up capital so as to entitle every creditor to object to such reduction the special procedure prescribed by S. 58 and the several following sections must be followed.

If, however, the special requirements of S. 55 and the following sections have not been complied with, the Court need not necessarily reject the application for sanction of the scheme under S. 153 of the Act but may well direct the application to stand over to enable the company to comply with those requirements. (1949) 53 CWN 207.

10. Proxy.

——S. 153 — Under S. 153, the Court has jurisdiction to settle the terms of an instrument of proxy to be used at a meeting of creditors in any form the Court thinks fit to prescribe, and hence in so far as any rule of this High Court purports to fetter or restrict the Court's jurisdiction in that behalf it would be inconsistent with S. 153, pro tanto inoperative and ultra vires. AIR (Vol 19) 1932 Rang 154 : 10 Rang 438: 140 Ind Cas 133 (DB).

——S. 153 — Vote given by an executor on behalf of a deceased member must be disallowed, and it is not possible to distinguish the case of a liquidator or a receiver. 30 Bom LR 197: 108 Ind Cas 465: AIR (Vol 15) 1928 Bom 80.

——S. 153 — Application for sanction of scheme — Meeting of creditors — Persons holding proxy from creditors — If can attend.

Where on an application for sanction of a scheme of arrangement under S. 153 of the Companies Act, the Court directs the holding of a meeting of creditors, only creditors are entitled to be present at such meeting. Persons who hold proxy from creditors but who are not themselves creditors cannot attend the meeting. It is a well-established rule that at a meeting held of a class of persons, holders of proxies who do not belong to the class are not entitled to be present or vote. 54 CWN 70: (1950) 20 Comp. Cas 164: AIR (Vol 37) 1950 Cal 399.

11. Sanction.

(a) Duty of Court.

(b) Jurisdiction of Court.

——S. 153 — Sanction of scheme — Principles to be applied stated — Scheme coming before executing Court — Objections by debtor under S. 47, Civil P. C. — Executing Court, when can go behind scheme — Proposal for arrangement with depositors as well as creditor decree-holder — Preliminary order to convene meeting — Scheme sanctioned — Creditor decree-holders included — Non-service of notice and holding meeting of two classes of depositors not separately — High Court's jurisdiction, if affected.

Where the proposal made by the company was to arrange with its depositors, as well with those who had already obtained decrees, and the preliminary order under S. 153 was to convene a meeting of depositors who had obtained decrees as also those who had not, and such a meeting was held and the scheme accepted at the meeting and sanctioned by the High Court included in its terms the former class:

Held, that non-service of the notice of meeting held in pursuance of the order of the High Court under S. 153 and that no separate meeting of the two classes of depositors was held did not affect the jurisdiction of the High Court when it made the order under S. 153 sanctioning the scheme. This defect ought to have been pointed out at the time when the matter of sanction came up or thereafter, but to the Court which had sanctioned the scheme.

(Principles which must be kept in view before sanction is acceded explained.) AIR (Vol 24) 1937 Cal 507 : 65 CLJ 367: 41 CWN 952 : 176 Ind Cas 474 (DB).

——S. 153 — Composition scheme — Rejection.

Application to sanction scheme of composition and arrangement intended to keep sinking banking companies afloat where its assets consist principally of monies lent out on mortgage, simple bonds, promissory notes, decrees of Court and immovable properties but no cash. (1936) 63 Cal 99.

——S. 153 — Order sanctioning scheme — Power of Court to set aside — Remedy of aggrieved party.

When a scheme is sanctioned by the Court it is final so far as the Court sanctioning it is concerned. As long as the order is not perfected the Court may in exercise of its inherent power rehear the application for sanction. After the order is completed and filed the Court can do nothing except correcting accidental omissions or mistakes in the order, and in a proper case reviewing the other order under C. P. Code. In such circumstances the other remedy of the party aggrieved is to appeal from the order under S. 153 of the Companies Act. ILR (1949) 1 Cal 253: 53 CWN 143.

——S. 153 — Provisional or partial sanction of scheme — Power of Court.

Per Kapur J.: Under S. 153, Companies Act, the Court can either give its sanction to the scheme or refuse it. Besides these two alternatives, no other alternative is available. There cannot be a provisional sanction or a partial sanction or sanction with a condition. (1950) 20 Comp. Cas 68: AIR (Vol 37) 1950 EP 111 (FB).

——S. 153 — (1882), S. 203 — Scheme — Sanction of.

Under (S. 203) of the Companies Act, court cannot sanction a scheme which is neither a bona fide nor a workable one. 30 Ind Cas 386 : AIR (Vol 3) 1916 Mad 1218 (DB).

——S. 153 — Sanction of scheme — Responsibility of Court.

The circumstance that S. 153 of the Companies Act is in Part IV and not in Part V (Winding up) has not done away with the ultimate responsibility of the Court in the matter of sanctioning schemes. The sanction of a scheme by the Court makes it binding on the company and all its members and creditors whether they attended the meetings or not and whether they voted for it or against.

The responsibility of the Court is still greater when the creditors or share-holders who attended the meeting in person or by proxy and approved the scheme by the requisite statutory majority are only a fractional part of the general body of creditors or share-holders as the case may be.

Before, therefore, the Court may take upon itself the responsibility of thrusting the scheme on all concerned it must look at the surrounding circumstances which led to the proposal of the scheme, and see whether the directions of the Court and the requirement of the statute were properly carried out and the meetings were properly convened and conducted and whether the matter was considered from the proper point of view on relevant facts fairly disclosed and put before the meeting and, what is more, be satisfied that the scheme is a fair scheme and that there is no reasonable objection to it.

The Court will reject the scheme if it is brought to its notice and it is satisfied that there has been any material oversight or miscarriage. The Court will be justified in rejecting the scheme if it is satisfied that material facts were intentionally withheld from or otherwise not placed before the meeting or that the object of the scheme is to prevent an enquiry into transactions which require investigation or that there has been flagrant failure or disregard in complying with the provisions of the company law in managing the affairs of the company. ILR (1948) 2 Cal 404: 52 CWN 425: (1948) 18 Comp. Cas 144.

(a) Duty of Court.

——S. 153 — Sanction of scheme — Principles — Duty of Court.

If a scheme has been aprpoved and passed unanimously by the creditors and share-holders present in person or by proxy at their respective meeting held under directions of the Court, the Court shoud no doubt be sow to differ from them, but it should not blindly register the decision of the creditors and share-holders.

The Court has to ascertain and be satisfied as to several matters the principal items of which are: (1) whether the provisions of the statute have been complied with; (2) whether the scheme is a reasonable and practical scheme or there is any reasonable objection to it; (3) whether in approving the scheme the creditors or share-holders had sufficient information and acted honestly and in good faith; and (4) whether considerations of public interest ought in the opinion of the Court, to override the decision of the creditors or share-holders.

The Court should decline to sanction a scheme in the interests of the public and of commercial morality, if the management is found to have been guilty of misconduct in relation to the affairs of the company. ILR (1949) 1 Cal 127 : 53 CWN 239.

——S. 153 — Sanction — Duty of Court.

In according the sanction to a composition scheme the Court has not only to see that the arrangement proposed and accepted by the majority is reasonable and practicable, but also to see that one class of creditors or depositors does not feast upon the rights of another class. It has also to see that the provisions of the statute have been complied with, that the majority is acting bona fide and the minority has not been overridden. AIR (Vol 22) 1935 Cal 777 : 62 CLJ 310 : 39 CWN 1199.

——S. 153 (2) — Sanction of scheme — Duty of Court.

Even if a scheme is passed in the meetings of creditors or members by the requisite majority it can bind all the persons concerned, including the creditors and members, only if it is sanctioned by the Court. The sanction of the Court is not a formal matter; on the other hand, it is the duty of the Court to go into the whole matter carefully and to find out.

(i) whether all the provisions of law and the directions of the Court itself in so far as they relate to the holding of the meeting, the conduct of the proceedings of the meeting and the record of majority votes, etc., have been fully complied with, and (ii) whether the scheme is in the interest of the company as well as in that of its creditors and should be given effect to. 50 PLR 123: AIR (Vol 35) 1948 EP 38: (1948) 18 Comp. Cas 265.

——S. 153 — Leave to convene meeting — When may be granted — Scheme sanctioned by High Court in Indian Dominion — If binds creditors in Pakistan — Framing of such scheme — Information to be laid before Court — Duty of Courts in both Dominions to co-operate.

Before giving a company leave to convene meetings of its creditors and share-holders under S. 153 of the Companies Act, the Court must be satisfied that the scheme of arrangement proposed by the company is a reasonable one and is capable of being implemented by the company.

Ordinarily a scheme sanctioned by a High Court in the Indian Dominion will not per se be binding on the creditors in Pakistan which is a foreign state and will be no defence to their action in the Pakistan Court. There is no doubt, however, that on the principle of international law and as a matter of convenience, the Courts in the two Dominions will co-operate with each other and if an order for winding-up or scheme is made by the Court in one Dominion the Court in the other Dominion will adopt ancillary proceedings. But in order to enable the Pakistan Court to treat the scheme sanctioned by the Indian Court as the main proceedings and adopt ancillary proceedings there, the scheme should be so framed as to be reasonable and fair to the creditors in Pakistan. If the Indian assets yield a larger percentage of payment to the Indian creditors than the Pakistan assets will yield to the Pakistan creditors it will not be fair to frame a scheme on the basis of the Indian assets and liabilities alone and to distribute the assets amongst the Indian creditors

to the ecxlusion of the Pakistan creditors, just as in the converse case the scheme will be unfair to the Indian creditors.

Notice of any scheme proposed in the Court of a particular country should go to all creditors wherever they may be, so that they can, if they like, come in and participate in the distribution under the scheme. For this purpose it is essential to lay before the Court all relevant information as to the company's entire assets and liabilities so as to enable the Court to judge whether the proposed scheme is a reasonable one. ILR (1949) 1 Cal 53: 53 CWN 183.

(b) Jurisdiction of Court.

——S. 153 — Application for sanction of scheme — Jurisdiction of Allahabad High Court — Bank incorporated in British India with registered office in N. W. F. P. — After partition, Bank registered in India under S. 277 and carrying on business from U. P.

A Bank was incorporated in British India under the Companies Act with its registered office in the North-West Frontier Province. After 15th August, 1947, the bank became a company registered under the Companies Act in its application to Pakistan read with the India (Adaptation of Existing Indian Laws) Order, 1947. Thereafter the Bank was registered in India under S. 277 of the Act, in its application to India, as one of the companies established outside British India.

The majority of the creditors of the Bank migrated from Pakistan to India, and the entire business of the Bank was centralised in U. P. and was controlled from there. The Bank continued to function there for some time and thereafter suspended payment. An application was made on behalf of the Bank to the Allahabad High Court under S. 153, Companies Act, for sanction of a scheme of arrangement.

Held, that the Allahabad High Court had jurisdiction to entertain the application. After the partition, the bank could not be considered as a company registered under the Companies Act in its applicability to India, and its position, after its registration in U. P. under S. 277 of the Act was that of an unregistered company.

An application under S. 153 of the Act relating to an "unregistered company" must be filed under the general law in the High Court to whose jurisdiction the company had submitted or made itself amenable or within whose jurisdiction the principal place of business of such a company was situate.

When the Bank established its "residence" in U. P. and made it the principal place of business, it submitted to the jurisdiction of the Court in U. P. AIR (Vol 36) 1949 All 778: ILR (1950) All 590 (DB).

——S. 153 — Application for sanction of scheme — Company having registered office in Indian union — Jurisdiction of Dacca High Court.

The High Court of Dacca in Pakistan has no jurisdiction to entertain an application under S. 153 of the Companies Act for the sanction of a scheme of arrangement between a company and its creditors, if the company has its registered office in Calcutta in the Union of India. Such a foreign company is not a 'company" within the definition of S. 2 (2), and the Dacca High Court is not a "Court" within the definition of S. 2 (3) read with S. 3 of the Act to which S. 153 applies.

A proceeding under S. 153 cannot properly be regarded as a proceeding in a winding-up, and the jurisdiction of the Dacca High Court in respect of that section cannot, therefore, be extended by resort to any of the provisions in Part IX (that is to say, the sections between 270 and 276).

If, however, a petition for sanction of a scheme of arrangement has been previously presented in the High Court at Calcutta where the company is registered, the Dacca High Court has jurisdiction to pass orders of an ancillary nature in pursuance of the comity existing between a Court of one country and the Court of another country. AIR (Vol 26) 1939 Mad 318, Diss. from. (1949) 1 DR 85.

——S. 153 — Application for sanction of scheme — Company having registered office in Calcutta — Jurisdiction of Dacca High Court.

The High Court at Dacca has jurisdiction to pass orders on an application for sanctioning a scheme of arrangement under S. 153, Companies Act, in respect of a company having its registered office in Calcutta. 53 CWN 85 (DR), Diss. from. (1950) 2 DR 201.

——S. 153 — Scheme sanctioned by Court otherwise than in course of winding up — Application for enforcing or modifying scheme or to adjudicate upon rights of parties arising thereunder — Jurisdiction of Company Court.

(1) When a scheme is sanctioned by the winding up Court in course of winding up, the Court may stay the winding up except for the purpose of giving effect to the scheme. In such a case the Court may exercise the powers of the winding up Court in matters arising under or out of the scheme as matters arising in winding up;

(2) where a scheme is of the kind mentioned in S. 153-A or S. 153-B, Companies Act, and is sanctioned even otherwise than in course of winding up, even then the Court may by the order sanctioning the scheme or by any subsequent order make provision for all or any of the matters mentioned in the several clauses of S. 153-A (1) or in S. 153-B;

(3) where a scheme which is not of the kind mentioned in S. 153-A or S. 153-B is sanctioned otherwise than in the course of winding up, the Court sanctioning the scheme has no further seisin on the scheme and has no jurisdiction or powers as the Company Court to entertain any application for enforcing the scheme, or modifying the scheme or to adjudicate upon the rights of parties arising under or out of the scheme and parties claiming under the scheme or de hors the scheme must assert their rights in regular suits or other proceedings as may be permissible in law;

(4) neither the Company, nor the creditors nor the members can by a provision in the scheme which is within clause (3) above confer jurisdiction on the East Punjab High Court which that Court does not either under the East Punjab High Court Order read with the Letters Patent of the Lahore High Court or under the Companies Act or otherwise possess;

(5) nor can the Court by sanctioning a scheme which comes within Clause (3) above including a clause reserving power to the Court to entertain applications subsequent to the sanction arrogate to itself powers and jurisdictions which it does not either under the East Punjab High Court Order read with the Letters Patent of the Lahore High Court or the Companies Act or otherwise possess. (1950) 20 Comp. Cas 68: AIR (Vol 37) 1950 EP 111 (FB).

——Ss. 153, 276 and 277 — Company having registered office in Pakistan — Sanction of scheme of arrangement — Jurisdiction of Indian High Court.

Per Full Bench (Harnam Singh J., contra):— A High Court in India has jurisdiction to sanction

a scheme of arrangement in respect of a company whose registered office is in Pakistan and which has complied with the requirements of Section 277 of the Companies Act. In other words, Section 153 of the Companies Act applies to such companies.

Per Khosla J.— Section 153 (6) of the Companies Act provides an exception to the provisions of Section 276 of the Act and the general rule laid down in Section 276 is not absolute. Therefore, if a foreign company has complied with the requirements of S. 277 and it is to be treated as an unregistered company for the purposes of Part IX of the Act, it is a company liable to be wound up within the meaning of S. 153 (6) and, therefore, a scheme of arrangement can be sanctioned in respect of such a company.

Per Kapur J.— For the purposes of winding up, an "unregistered company" would be covered by the definition of the "company" given in S. 2 (2) of the Companies Act. Section 153 (6) of the Act enlarges the definition of the expression "company" and brings within its ambit all companies which can be wound up under the provisions of the Act which would include foreign companies.

Per Harnam Singh J., contra:— (1) S. 276 of the Companies Act renders inapplicable to unregistered companies the whole except Parts IX and V of the Act. (2) Provisions contained in Section 153 of the Act are not provisions with respect to the winding up of a company and that being so the application of S. 153 to a foreign company is excepted by S. 276 of the Act. (3) The expression "liable to be wound up" in S. 153 (6) is not interchangeable with the expression "can be wound up" and the special definition of the company given in S. 153 (6) renders inapplicable the provisions of S. 153 to companies which are not exposed to being wound up under S. 162 or S. 203 of the Act. (4) A High Court in India not having jurisdiction in Pakistan has no jurisdiction to sanction a scheme of arrangement with respect to a company having its registered office in Pakistan. 52 PLR 349 : AIR (Vol 38) 1951 Simla 145 (FB).

11A. Scheme.

——S. 153 — Composition.

A scheme sanctioned under S. 153 does not date back to the time when the Bank suspended payment but operates only from the date of sanction. Where before date of sanction a person was creditor to the extent of Rs. 4,000 and a debtor to the extent of Rs. 2,000 he must be relieved from liability as a debtor and must be deemed to be a creditor to the extent of Rs. 2,000. 106 PWR 1917: 40 Ind Cas 904 : AIR (Vol 4) 1917 Lah 386 (DB).

——S. 153 — Scheme — Date of operation.

A scheme under the section is binding on the creditors from the date when it is arrived at. The sanction of the Court has a retrospective effect. (1938) ILR (1938) 1 Cal 121 : 65 CLJ 503: 41 CWN 1272 (DB).

——S. 153 — Scheme not fixing time for payment to creditors — Payment to creditors within reasonable time — If implied.

If a scheme sanctioned by Court under S. 153 of the Companies Act has not expressly fixed a time within which the creditors would be paid, the scheme cannot go on for ever. In such circumstances, the law will imply that the payment would be made to the creditors within a reasonable time. (1947) 51 CWN 791 : (1947) 17 Comp. Cas 206

——S. 153 — Company — Compromise or arrangement among creditors — Sanction of Court — Date when arrangement becomes operative.

The compromise or arrangement contemplated by S. 153 of the Indian Companies Act becomes binding from the date when it is arrived at, subject to the sanction by court. If that sanction be refused, the agreement is without effect; but if sanction is given the agreement takes effect, not from the date of sanction, but from the date when it is made. 46 IA 135: 36 MLJ 526: 17 ALJ 533: 23 CWN 697: 21 Bom LR 481: 22 OC 106: (1919) MWN 500: 1 UPLR (PC) 51: 30 CLJ 214: 26 MLT 178: 6 OLJ 423: 10 LW 374: 50 Ind Cas 429 : AIR (Vol 6) 1919 PC 9.

——S. 153 — Scheme for restarting, consideration of.

In considering a scheme the wishes of the creditors and the contributories have to be consulted and not the wishes of any person who may have propounded a scheme. AIR (Vol 19) 1932 Bom 78 : 33 Bom LR 1495: 56 Bom 16: 136 Ind Cas 491 (DB).

——S. 153 — Scheme of re-organization — Consideration.

It is not the function of the Court on a scheme being presented before it to substitute its own scheme for the scheme presented to it for sanction and if the Court is of opinion that unless some radical amendment is effected, or the scheme is fundamentally altered, it ought not to be sanctioned, it is the duty of the Court to reject the scheme.

The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it.

Per Cunliffe J.— The Court is not a mere machine for registration. It will look into the proposed scheme much as a Court of Appeal will canvass, if asked to do so, the decision of a Jury, to ascertain if there was reasonable evidence to support their verdict, but it will always also prefer a living scheme to a compulsory liquidation bringing about an end to a company and usually without any hope of payment in full. The onus of showing that any scheme is unreasonable will prima facie fall on the objectors. AIR (Vol 19) 1932 Rang 154 : 10 Rang 438 : 140 Ind Cas 133 (DB).

——S. 153 — Scheme approved by creditors and share-holders — Power of Court.

The fact that share-holders and creditors of a company have approved of a scheme of compromise or arrangement as contemplated by S. 153, does not mean that the Court is bound to accept the scheme. It is the Court's duty to examine the proposal and decide whether they are fair and reasonable, taking everything into consideration. That the share-holders and creditors have approved of a scheme will, of course, carry weight but there may be more important considerations.

Taking several factors into consideration, the Court rejected the scheme. AIR (Vol 27) 1940 Mad 621 : (1940) MWN 252 : 51 MLW 639: 192 Ind Cas 853 (DB).

12. Variation of scheme.

——S. 153 — Confirmation by Court — Subsequent variation.

Upon confirmation by the Court of a scheme of arrangement, that scheme becomes by virtue of S. 153 binding upon the creditors, the shareholders and the company alike. Its terms can thereafter only be varied by order of the Court

after the variation has been approved at meetings of the creditors and share-holders.

It is not, therefore, possible for the company or its directors or share-holders whether by resolution or ratification or otherwise to alter or vary the scheme under the guise of a compromise with a share-holder as no variations of or departure from that scheme can be validated by the mere acquiescence of the share-holders & creditors. AIR (Vol 25) 1938 PC 284: 5 BR 178: 1938 AWR (HC) 222: 68 CLJ 567: 43 CWN 205: (1939) MWN 78: (1939) 1 MLJ 98 : 1939 OWN (CC) 249: 49 MLW 444: 41 PLR 177: 41 Bom LR 147 : ILR (1939) Lah 1: 19 PLT 820: ILR (1939) Kar (PC) 16: 178 Ind Cas 659.

——**S. 153 — Scheme — Modification — Powers of Court.**

The Court has no power to modify or alter a scheme without the consent of those who agreed to it. The powers of the Court under the Companies Act are strictly limited to those given in specific sections. Under S. 153, it may order a meeting to be held to consider a scheme of arrangement and may grant or withhold sanction of such scheme. It cannot modify or alter or expunge any part of it without the consent of those who have agreed to it.

A depositor in certain loan company obtained a decree for his deposit and subsequently at a meeting for approving the scheme at which he was present and departed after filing objection to scheme, the scheme was modified whereby the decree-holders against company were to be treated as depositors. The scheme was sanctioned by the Court. The decree-holder applied for execution of decree but it was dismissed holding that the scheme was binding on him. He did not appeal against this decision but more than three years after the sanctioning of the scheme, applied to cancel it or to modify it by expunging the clause whereby the decree-holders were also included among the depositors:

Held, that the application to cancel or withdraw the sanction already given should not be allowed after such a long delay. AIR (Vol 24) 1937 Cal 667: 41 CWN 599: 175 Ind Cas 892.

——S. 153 — Scheme — Alteration of scheme passed at meeting — Court has no power to modify. AIR (Vol 24) 1937 Cal 401: 172 Ind Cas 717.

——**S. 153 — Scheme — Court's power to modify.**

The Court's powers under S. 153, are strictly limited. The Court may either sanction or refuse to sanction a scheme approved by the company and its creditors or its members. It has no power to modify or alter the scheme unless the company and its creditors or members have had an opportunity of considering the scheme again along with such suggested modifications and have agreed thereto. AIR (Vol 24) 1937 Cal 124: ILR (1937) 1 Cal 368: 172 Ind Cas 349.

——**S. 153 — Depositor becoming decree-holder — Company subsequently embarking on scheme — Depositor, if bound — Remedy.**

A depositor ceases to be a depositor when he obtains decree against the company and becomes a decree-holder against it. When after passing of such decree, the company embarks upon a scheme and a meeting is called and notice is sent to all depositors, the decree-holder creditors are not bound to attend the meeting and any scheme framed at such a meeting is not binding on them.

The meeting, though sanctioned by the Court, has no right by a mere definition to include the decree-holders within the scope of depositors, any more than a company has the right by definition to include its general trade creditors.

Where the meeting includes the decree-holders as depositors and the Court sanctions it per incuriam or because the circumstances are not sufficiently explained to the Judge, the decree-holders can get the scheme modified by the Court, by having such portion of the scheme which affects them expunged from the scheme. AIR (Vol 22) 1935 Cal 117: 38 CWN 1171: 155 Ind Cas 811.

——**S. 153 — Arrangement — Effect — Modification by Court.**

It is usual for the scheme to contain a provision empowering some one, be he a Liquidator or some other officer of the company, to assent to any such modification as the Court may think fit to impose. In the absence of any such person, it is not open to the Court suo motu to impose on the creditor any condition which will operate by way of modification of the scheme especially in the absence of the consent of the persons who have entered into the arrangement. AIR (Vol 21) 1934 Cal 816 : 61 Cal 913: 38 CWN 920: 153 Ind Cas 511 (2) (DB).

——**S. 153 — Scheme of composition sanctioned by Court — Variation — Jurisdiction of Court.**

The Court has no jurisdiction to vary or modify a scheme after it has been confirmed by the Court and after it became binding upon the creditors and the share-holder of the company. Thereafter its terms can only be varied by an order of the Court after the variation has been approved of at the meeting of the creditors and of the share-holders. It is not possible for the company or its Directors or share-holders to vary the scheme. (1950) 54 CWN 80.

——**S. 153A.**

——**S. 153-A — Scheme and order of Court approving it directing transfer of assets and liabilities of a company in liquidation to another company — Documents transferring such assets and liabilities — If liable to stamp duty under the Stamp Act (II of 1899), Sch. I, Arts. 23 and 2 (10).**

A scheme of arrangement under S. 153-A of the Companies Act was approved by the Court and the order of Court provided that for the purposes of carrying out the scheme the official liquidators of the company in liquidation should transfer its assets and liabilities to another limited company which was to float a number of joint stock companies for taking over the assets and liabilities of the company in liquidation. The official liquidators transferred the assets and liabilities of the company in liquidation to the transferee company under a deed of indenture and the transferee company transferred to newly floated companies taking over the assets and liabilities of the branches by deeds of indenture. The deeds contained further convenants by the transferee as to payment of consideration in the matter. A newly floated company which had taken over the assets and liabilities of a branch filed suits in the District Munsif's Court on promissory notes executed in favour of the branch. On a question whether the deeds of transfer of the assets and liabilities were liable to stamp duty.

Held:— The title of the transferee company to the property and assets transferred as the result of the order of Court under S. 153-A of the Companies Act is derived from and by the force of the order of the Court itself. Where however documents which are in form transfers of assets and liabilities by act of parties though carried out pursuant to the order of Court are executed they cannot be regarded as vouchers passed by the parties in token of their having carried out the terms of the Court's order. Such a document is a con-

veyance as defined by S. 2, Cl. (10) and Art. 23 of the Stamp Act and is to be stamped as such. The transfers cannot be treated as deeds of composition within the meaning of Art. 22.

The plaintiff suing on the promissory note can establish its title to recover the book debts of the branch taken over by it on the basis of the order of the Court approving the scheme of arrangement. Under Section 38 (2) of the Stamp Act the documents have to be sent by the Munsif to the Collector who has to levy the proper duty and the penalty in respect of those documents. ILR (1951) Mad 111: 63 LW 756: 1950 Comp. Cas. 214: (1950) 2 MLJ 216 : AIR (Vol 38) 1951 Mad 209 (FB).

——S. 153-B.

——S. 153-B — Acquisition of shares — Scheme — Court, if can enquire into merits of scheme — Opinion of majority — Onus.

Section 153-B, provides that where there is a contract or scheme for the acquisition by one company of shares in another company, which has been accepted by the statutory majority (three-fourth) of share-holders in the latter company, the transferee company can acquire compulsorily the shares of the minority, unless the Court orders otherwise. Section 153-B does not confer any right on the Court to consider the merits of the contract so far as concerns the majority of share-holders who have accepted it. In their case, the matter is complete; the contract has gone through. As regards the minority, the section seems to be based on the view that prima facie the minority are acting unreasonably in refusing to come into line with the majority, and ought to be forced into line, unless the Court orders otherwise. The Court must consider whether the attitude of the minority was reasonable. The burden is upon the dissentients to adduce reasons for thinking that the majority of share-holders were wrong. The Court ought not to limit the class of cases in which the Court should take action under S. 153-B. The Court would be justified in not accepting the opinion of the majority of share-holders where there has been misrepresentation which may have influenced the view of the majority of share-holders, or where there is the possibility of some unfair dealing, for example, the directors of the transferor company having some ulterior motive in advising the share-holders to accept the offer; or the majority of share-holders having some interest conflicting with that of the minority, for instance, being interested in the transferee company, and, therefore, willing to accept a less value for their shares than they would have accepted if they had had no such interest. In cases of that sort, the Court would certainly look critically at the opinion of the majority of share-holders. But if the Court starts with the presumption that the majority of share-holders were right, it is no good, allowing Counsel for the dissenting share-holders to indulge in detailed criticisms of the valuation on which the offer was based or accepted, where all the facts on which those criticisms are founded were before the company when the majority of share-holders accepted the offer. Under S. 153-B the Court can direct that the transferee company is not to exercise the powers of compulsory purchase given by the section over the shares of the dissenting members but, the Court has no power to direct the transferee company to pay the dissenting members something which they have not offered to pay. In cases where the Court is asked to approve a contract the Court cannot require the purchaser to disclose the basis on which his offer was made. AIR (Vol 30) 1943 Bom 325: 45 Bom LR 633: ILR (1943) Bom 581: 209 Ind Cas 382 (DB).

——S. 153-B — Court's jurisdiction to intervene under S. 153-B.

Per Kania J.— The Court's jurisdiction to intervene under S. 153-B is not limited to cases of misrepresentation and fraud. AIR (Vol 30) 1943 Bom 325: 45 Bom LR 633: ILR (1943) Bom 581: 209 Ind Cas 382 (DB).

——S. 153-B — Valuation of concern — Expert valuation.

Per Kania J.— In valuing concerns, where the assets are admittedly worth over two crores of rupees, a difference in value of a few thousands or even a lac or two on one item can hardly justify the Court in interfering, because another expert might urge that on another item there was an over-valuation. AIR (Vol 30) 1943 Bom 325: 45 Bom LR 633: ILR (1943) Bom 581: 209 Ind Cas 382 (DB).

——S. 153-B — Costs under S. 153-B.

Per Kania J.— Generally in a petition under S. 153-B, costs should follow the event in the normal course. AIR (Vol 30) 1943 Bom 325: 45 Bom LR 633: ILR (1943) Bom 581: 209 Ind Cas 382 (DB).

——S. 154.

——S. 154 — Scope — Conversion — Private or public company, whether can be converted into public or private company.

Section 154, deals with the conversion of a private company into a public company, and the section is based upon the assumption that such a conversion can be made by merely altering the articles. The purpose of the section is to ensure that when a company has been converted from a private company to a public company, certain information must be sent to the Registrar of Joint Stock Companies, and if such is not done, certain penalties are provided. There is nothing in Section 154 from which it can be inferred that a public company cannot be converted into a private company by alteration of the articles. There was no need for a specific section to deal with such a conversion, because the information which Section 154 requires to be sent to the Registrar need not be sent where the conversion is from a public company into a private one. In short, where such a conversion takes place, there is no need for a section corresponding to Section 154. Hence a public company can be converted into a private company by suitable amendments made to the Articles of Association of the company. It is not necessary to wind up the company and reconstitute it. AIR (Vol 30) 1943 Pat 278: 22 Pat 204: 10 BR 4: 24 PLT 226: 207 Ind Cas 630 (DB).

——S. 154 — Articles amended — Confirmation of High Court.

Amendment to the Articles of Association of a company do not require the confirmation of the High Court. AIR (Vol 30) 1943 Pat 278: 22 Pat 204 : 10 BR 4: 24 PLT 226: 207 Ind Cas 630 (DB).

——S. 156.

1. Applicability and scope.
2. "Assets of the company".
3. Interest.
4. **Members — liability of.**
5. Past members — liability of.
6. Set-off.

1. Applicability and scope.

——Ss. 156 and 186 — Applicability — Summary order under S. 186 — Conditions for making — Option of liquidator in respect of unpaid call — Suit

in respect of call beyond time without approaching Court under S. 187 — Effect.

An order under S. 186 of the Companies Act can only be made in respect of contractual debts due by the contributory to the company. Section 186 has no reference whatever to the statutory liability created by S. 156. It is only those debts which a liquidator can realise by means of a suit that can be ordered to be paid by the Court under S. 186. The liquidator, instead of having to institute a suit against a contributory, is allowed to come to Court and obtain a pay order under S. 186.

If the company's claim is barred by limitation in respect of a contractual debt due by the defendant, the liquidator cannot obtain an order under S. 186. That section does not create new liabilities or confer new rights on the liquidator but merely provides summary proceedings in the winding up by the Court against debtor-contributories for enforcing existing liabilities and the power of Court, under S. 186, to order payment is discretionary.

In summary proceedings so instituted every objection is just as open to the person sought to be charged as it would have been if a suit had been brought by the liquidator in the company's name for the same money.

The debt in respect of a call does not stand on a different footing on the ground that it might become a statutory liability under S. 156 of the Companies Act. For the statutory liability to arise, there must be a call made by the Court and in the absence of such a call the statutory liability cannot be realised by the liquidator.

The liquidator has his own powers whether a call is within time or barred by limitation. If the call is within time he might file a suit or proceed under S. 186. If the call is barred by limitation, he has to go to the Judge in chambers under S. 187 of the Act and satisfy him that the position of the company is such that that call should be enforced by a call made by the Court in the winding up proceedings.

But if he does not choose to proceed under S. 187, and files a suit he cannot get over the bar of limitation by saying that because the winding up order has been made, the debt has become a statutory debt or the period of limitation has been extended and that a fresh start of limitation is furnished by the winding up order. AIR (Vol 37) 1950 Bom 386: 52 Bom LR 559 (DB).

——Ss. 156 and 187 — Scope and effect of — Contractual debts due to company and statutory debts — Distinction as to nature and mode of recovery and limitation — Suit by liquidator for unpaid call — Limitation — Order of winding up — Effect — Fresh starting point — If afforded — Limitation Acts, Arts. 112 and 120.

A clear distinction has to be made between debts due to a company which are contractual debts and debts due to the company which are statutory debts by reason of S. 156 of the Companies Act. A liquidator is under no obligation to follow any particular procedure or to obtain the sanction of the Court in order to realise a contractual debt.

He is within his rights to file a suit for that purpose; but he must do so within the time limited by Art. 112 of the Limitation Act, and he cannot get an extended period of limitation merely because of a winding up order. Once limitation begins to run no subsequent event will stop it and the winding up order cannot furnish a new period of limitation.

If the liquidator wants to recover a debt which is a statutory debt created by reason of S. 156 of the Companies Act, he cannot recover it by any other method except by the mode laid down by S. 187 of that Act. The distinction is due to the fact that contractual debts constitute the assets of the company and the assets have got to be realised by the liquidator on the company being wound up.

The statutory liability of a contributory under S. 156 is entirely a different matter. It is not to be realised in the ordinary course, but only after the Court has applied its mind to the various considerations laid down in S. 187. It is only when the Court is satisfied that the contributory should be called upon to discharge his statutory liability that the Court may make a call and ask him to discharge the liability.

It is open to the liquidator to recover or realise an unpaid call as a statutory debt under S. 156 and to ask the Court after approaching it under S. 187, to make a call in which case he would not be met by the bar imposed by Art. 112 of the Limitation Act. If he does not choose to do, but chooses to file a suit, it is one to recover a contractual debt and must be subject to the limitation under Art. 112. If the statutory liability is to be enforced, then Art. 120 and not Art. 112, Limitation Act, would apply. But Art. 120 cannot be availed of when the liquidator has not adopted the proper procedure for realising the statutory liability of the contributory. 10 Bom 483 Diss. AIR (Vol 37) 1950 Bom 386: 52 Bom LR 559.

——S. 156 — Scope and effect — Contributory — Liability of member whose name appears on register in the absence of rectification. See Companies Act, Ss. 38, 184 and 156. AIR (Vol 37) 1950 Bom 217: 52 Bom LR 40.

——Ss. 156(1) and 159(1) — Applicability — Suit by liquidator of company for recovery of unpaid calls from contributory — Limitation — Limitation Act, Arts. 112 and 120.

The words "calls made by the liquidator" in S. 159 (1), Companies Act, have been somewhat loosely used as equivalent to "calls made in liquidation proceedings;" and in this sense S. 159 does not at all deal with that portion of a contributory's liability which represents an amount equivalent to calls made before the winding up order and remaining unpaid.

It only provides that in the case of calls made in liquidation proceedings the time for payment is the time specified in the calls. It does not follow from this that a contributory does not become liable to pay anything until a call is made in the liquidation proceedings.

It is obvious that in enforcing the liability of a contributory in respect of unpaid calls the liquidator is not seeking to recover the calls as such. The liability to pay the calls was ex contractu while the liability to pay the amount of the unpaid calls as a contributory is ex lege under S. 156. Article 112 of the Limitation Act has therefore no application to a suit under S. 156 (1) by the company in liquidation by its liquidator for recovery of calls in arrears.

The liability ex lege arises upon the winding up order being made and Art. 120 of the Limitation Act

applies to the suit. (1950) 1950-20 Com Cas 15 (Bom).

——Ss. 156 and 40 — Contributory, who is.

After the commencement of the proceedings for the winding up of a company, the fact that the share-holder whose name stands and has been for over a year in the register of the company became a member under an instrument of transfer which being improperly stamped cannot be admitted into evidence or acted upon, cannot be taken into account and the share-holder must be treated as a contributory. It is too late in such a case to fall back upon the illegality of the transfer and to urge that the share-holder is not to be treated as a contributory. AIR (Vol 31) 1944 Pat 226: 23 Pat 182: 218 Ind Cas 202 (DB).

——S. 156 — Calls — New liability — Previous calls made and becoming time-barred — Effect of.

New liability to contribute under S. 156, arises for the first time upon the winding up and is unaffected by the fact that previous calls have been made by the Company and have become barred by limitation. AIR (Vol 28) 1941 Cal 143: ILR (1940) 2 Cal 175: 45 Cal WN 879: 194 Ind Cas 59.

——S. 156 — Scope — Liability of share-holder for unpaid calls.

Section 156, imposes new rights and liabilities upon share-holders as soon as the liquidation proceedings start. As soon as a company goes into liquidation, this section saddles the share-holders with a new liability in respect of unpaid calls and such unpaid calls are recoverable at the instance of the Liquidators though barred by time. AIR (Vol 22) 1935 Lah 335: 38 PLR 587: 16 Lah 1055: 156 Ind Cas 951 (DB).

——S. 156 — Contributories, liability of.

Section 156, proceeds on the assumption that the contributories are all innocent parties and that they must contribute equally towards the loss sustained by the company for no fault of theirs subject, however, to certain equities which are contained in the exceptions to that section. AIR (Vol 21) 1934 Sind 39: 149 Ind Cas 869.

——S. 156 — Share money — Liability of contributories as regards balance of share money becomes claim only when Court is satisfied that call is necessary. AIR (Vol 17) 1930 All 617: 124 Ind Cas 726.

——S. 156 — Share-holders holding fully paid up shares at the time of liquidation are not contributories. AIR (Vol 11) 1924 All 772: 81 Ind Cas 508: 46 All 759: 22 ALJ 719: 5 LRA Civ 518 (DB).

——S. 156 — Suit by contributories after winding up order.

An action by the contributories after a winding up order, for the determination of their liability is not contemplated by the legislature. This matter cannot be decided by any other court than the court conducting the liquidation. AIR (Vol 4) 1917 Lah 391: 13 PR 1917: 29 PLR 1917: 37 Ind Cas 791.

——S. 156 — (S. 61 of 1882 Act) — Liability, nature of — Limitation Act, Art. 112.

The liability created by S. 61 of the Companies Act, is a new one and the fact that the recovery of the call would be barred if sued for by the company before liquidation does not affect the one created by S. 61. (1907) 31 Mad 66 (67): 3 MLT 250 (DB).

2. "Assets of the company".

——S. 156 — Assets — Uncalled capital company's assets or capital — Under articles preference share-holders entitled to return of capital in priority to other share-holders — Whether can be repaid their repayment of investment out of calls — Payment of dividends on preference share.

The unpaid or uncalled capital upon issued shares forms part of the capital or assets of the company. The fact that it has not been called up before the winding up but remains unpaid until the Liquidator has exercised his powers under S. 156, does not make the unpaid share capital excluded from the assets or capital of the company.

Hence, where under the articles of a company the preference share-holders are entitled in winding up to return of capital in priority to other share-holders, the unpaid ordinary share capital can be called up to meet the amount required to repay the preference share capital.

Such payment, of course, is subject to the discharge of all debts owing by the company and payment of charges ranking prior to the preference shares. But the preference share-holders are not entitled to dividend when the company has made no profits at all. AIR (Vol 28) 1941 Mad 806: (1941) 2 MLJ 94: 54 MLW 745: 1941 MWN 972: 199 Ind Cas 602.

3. Interest.

——S. 156 — Liability, nature of — Interest prior to payment order.

The liability created by S. 156, is a new liability and no provision is made for interest therein. It may be that when a Court makes a payment order under that section it could direct future interest on the amount fixed in the payment order until realization, but it cannot include interest prior to that time. AIR (Vol 23) 1936 Lah 739: 166 Ind Cas 745 (DB).

4. Members — Liability of.

——S. 156 — Calls — Failure of share-holder to pay — Liquidation — Liquidator, can make call for dues irrespective of limitation — Court, can enforce call.

Where a share-holder of a company has failed to pay for shares allotted to him as a signatory to the Memorandum of Association or on application, he can, in the event of the company going into liquidation, be placed upon the list of contributories and the Liquidator can make a call upon him for what is due, irrespective of any question of limitation, in which case the Court can enforce the call without requiring the Liquidator to institute a suit. AIR (Vol 28) 1941 Mad 565: ILR (1941) Mad 538: 53 MLW 321: (1941) 1 MLJ 369: 1941 MWN 275: 199 Ind Cas 848 (DB).

——S. 156 — A member of a Company in liquidation is liable in respect of unpaid calls even though the calls were made by the Company before it went into liquidation, and a suit of the Company for its realisation had become barred by time under Art. 112, of Limitation Act. The principle is that when a Company goes into liquidation, S. 156, Companies Act creates a new liability on the share-holders in respect of such calls which is distinct from and independent of the rights which the Company had against them before the winding up. AIR (Vol 21) 1934 Lah 1015: 36 PLR 282: 155 Ind Cas 16.

——**S. 156 — Liability of share-holder, nature of.**

The liability of a share-holder under S. 156 in respect of the shares held by him is absolute and flows from the fact of his being on the register, in respect of these shares. Though the original contract of allotment may supply the reason for his name having been placed on the register in respect of the shares, after the winding up, his liability in respect of the shares arises ex lege and not ex contractu. AIR (Vol 19) 1932 PC 240: 9 OWN (CC) 839: 36 MLW 529: (1932) MWN 1141: 63 MLJ 859: 35 Bom LR 312: 54 All 827: 37 Cal WN 373: 57 CLJ 157: 60 IA 1: 139 Ind Cas 552.

——S. 156 — Share-holder obtaining shares with collateral agreement for commission — Breach or unenforceability of agreement does not interfere with his liability as contributory. AIR (Vol 17) 1930 All 357: 1930 ALJ 139 (DB).

——S. 156 — Application for winding up — The qualification in Cl. 4, S. 156 that a member shall not be liable to pay more than the unpaid amount of his share does not make him the less a contributory in the particular case where the capital is fully paid up and a petition for winding up by members who have paid up their share capital fully is maintainable under S. 166. AIR (Vol 17) 1930 Mad 240: 57 MLJ 426: 120 Ind Cas 372: 53 Mad 38: 1929 Mad WN 605: 30 MLW 717 (DB).

——**S. 156 — Principle explained — Share-holder is liable even after transfer.**

Under the Indian Companies Act which is almost a reproduction of the English Act the liability of the share-holder is not in any way taken away so far as the company is concerned by any transfer, surrender or forfeiture of the shares. The rule in Knights' Case (1867) 3 Ch App 321 that an entry of forfeiture in the books of the company must be presumed to have been properly made can have no application to cases where the facts are against any such presumption being raised. To make a person who has forfeited his shares liable as a contributory on a liquidation all that is necessary is that the liquidation must have taken place within one year of the alleged date of forfeiture and that a list of contributories must have been made. It is not necessary that the list should have been placed before a meeting of the creditors. Under the Indian Companies Act a person who is a signatory to the Memorandum of Association is responsible for the shares which in the Memorandum of Association is shown opposite his own name and such a person is bound so far as the creditors of the company are concerned to pay up the amount due on such shares. AIR (Vol 11) 1924 Mad 703: 83 Ind Cas 94: 20 MLW 74: 1924 MWN 582.

——S. 156 — When a person signs the Memorandum of Association purely on the understanding that he would be given certain number of shares as fully paid up in consideration of assets transferred to the Company he is, not liable as contributory even though the contract to transfer such paid-up shares is subsequently cancelled. AIR (Vol 13) 1926 All 524: 48 All 503: 24 ALJ 576: 95 Ind Cas 570 (DB).

——**S. 156 — Limitation Act, Art. 112.**

A member of a company is chargeable to the extent of his original share for all the charges if the company is wound up and must contribute his unpaid share to the company's assets to pay the creditors and the expenses of winding up of the company, under S. 61 unless he proves as against the liquidator, that he should not be put on the list of the contributories. AIR (Vol 3) 1916 All 317: 38 All 347: 14 ALJ 349: 35 Ind Cas 159 (DB).

——**S. 156 — Contributory shares — Liability of purchaser.**

If a voidable contract be not rescinded before the winding up of a company, the share-holder will be liable as a contributory; and he cannot be allowed to allege fraud or misrepresentation after the company has been wound up except under special circumstances. AIR (Vol 1) 1914 Lah 480: 165 PLR 1914: 69 PR 1914: 113 PWR 1914: 24 Ind Cas 236 (DB).

5. Past member — Liability of.

——**S. 156(i), (iii) — Past member — Liabilities.**

Where in the case of winding up of a company existing members on list A are not called upon to contribute to the full extent of the unpaid amounts of their share money, a past member on list B cannot be liable to contribute till list A is exhausted. AIR (Vol 23) 1936 Lah 739: 166 Ind Cas 745 (DB).

(Reversing AIR (Vol 23) 1936 Lah 226: 38 PLR 693: 163 Ind Cas 126).

——**S. 156 — Past member.**

A member of a company does not by his death become a past member within the meaning of S. 156. Though he dies, his estate continues to be liable as a member. AIR (Vol 20) 1933 All 334: (1933) ALJ 233: 55 All 417: 143 Ind Cas 762 (DB).

6. Set-off.

——**S. 156—(1882), S. 61—Set off—Preference to creditors.**

A member of a Joint Stock Company or friendly society with limited liability under liquidation cannot set off paid up calls or calls to be paid up against a debt due to the company and thus give a preference over the creditors. The principle applies equally to a set off claimed in court as to an attempted appropriation by way of set off out of court. AIR (Vol 5) 1918 Mad 995: 40 Mad 1004: 21 MLT 233: 32 Mad LJ 528: 38 Ind Cas 233 (DB).

——**S. 158.**

——**Ss. 158 and 160 and C. P. Code (V of 1908), Ss. 2(1) and 50 — Contributory — Who are all his legal heirs and representatives.**

The expression, "heir and legal representative" is not necessarily confined to an heir or legal representative of the person primarily interested. A person may be said to represent the estate of a deceased person whether he is that person's legal representative or the legal representative of his legal representative. By reason of S. 160 (1) of the Companies Act, on the death of a member who is a contributory according to S. 158, his legal heir and representative would become himself a contributory. By virtue of the same provision his legal representatives and heirs will themselves become contributories on his death and as such cannot object to being brought on the list of contributories. AIR (Vol 35) 1948 Mad 162: (1947) 2 MLJ 180: 1947 MWN 414: 60 LW 659: 1947 Comp C 189.

——**S. 158 — Contributory, who is.**

A company, or the Liquidator where it is wound up, is not concerned with the person paying the consideration but with the person who has signed the

transfer form as purchaser and whose name is entered as owner of the shares in the share register. Where certain shares have been entered in the name of a person with his knowledge and consent, prima facie, he is the contributory who is liable in respect thereof. AIR (Vol 23) 1936 Bom 24: 37 Bom LR 904: 60 Bom 297: 160 Ind Cas 638.

——S. 158 — Liability in respect of balance on shares — When enforceable.

Although the liability of a share-holder as regards the balance due on his shares is a debt accruing on the date of taking of the shares, the liability is enforceable only after a valid call has been made. AIR (Vol 19) 1932 Cal 716: 36 CWN 589: 59 Cal 1186: 140 Ind Cas 252.

——Ss. 158, 166 — Company — Winding up — Right of share-holder to apply for winding up after forfeiture of share — 'Contributory' meaning of.

Under S. 166, an application to the Court for the winding-up of a company can be made, inter alia, by a contributory of the company, provided the shares in respect of which he is a contributory were originally allotted to him, or had been held by him and registered in his name, for at least six months during the 18 months preceding the commencement of the winding up.

Where certain persons who were among the original registered share-holders applied for the compulsory winding up of the company on May 25, 1931, and it was contended that they were not entitled to apply for winding up as their shares had been forfeited in March, April and May, 1931:

Held, that, assuming that their shares had been validly forfeited, as they had not ceased to be members of the company for one year or upwards before the commencement of the winding up, they were contributories within the meaning of S. 166 and were entitled to present the petition as their shares had been held by them and registered in their names for more than 6 months during the 18 months preceding the commencement of the winding up. AIR (Vol 19) 1932 Lah 571: 33 PLR 754: 13 Lah 603: 138 Ind Cas 344.

——S. 158 — Conditional application for share.

If an application for shares is subject to a condition precedent, the applicant incurs no liability if the condition remains unfulfilled, more so when the company goes into liquidation before any share have been allotted to him. AIR (Vol 15) 1928 Lah 236: 107 Ind Cas 492.

——S. 158 — Condition for obtaining share.

A person who agrees to be a member of the company on some condition does not become a member if the condition is not fulfilled and cannot be placed on the list of contributories. AIR (Vol 15) 1928 Lah 234: 108 Ind Cas 192.

——S. 158 — Debtor.

A mere debtor of a Company in liquidation is not a 'contributory' of the company within S. 158. AIR (Vol 13) 1926 All 101: 23 ALJ 934: 6 LRA Civ 565: 89 Ind Cas 994.

——Ss. 158 and 269 — Contributory.

Contributory includes any person alleged to be contributory. Suit by a company in spite of an order for winding up after the commencement of the suit, can be brought against a contributory. AIR (Vol 7) 1920 Lah 43: 1 Lah 237: 57 Ind Cas 223.

——S. 158 — Fully paid share-holder — Contributory — Petition for winding up.

A fully paid up shareholder is a contributory within S. 158 and may apply for winding up of the company. AIR (Vol 3) 1916 Lah 78: 91 PR 1917: 36 Ind Cas 980.

——S. 158 — Informal transfer of shares invalid — Transferor remains a contributory.

A transfer of shares if not made according to the requisite formalities by a Director, is not bona fide and hence will not be recognized; hence a transferor nevertheless remains a contributory if the transfer is made informally. The Directors may and ought to refuse registration of transfer of shares when the company is insolvent though the winding up is not commenced. AIR (Vol 2) 1915 Lah 320: 162 PWR (1915): 31 Ind Cas 865.

——S. 159.

——S. 159 — Scope — Calls — Power of liquidator to make call on contributory — Power of Court.

All that S. 159 of the Companies Act does is to specify the nature of the liability of the contributory and the point of time at which that liability is crystallised. The nature of the liability is that it is a debt, and the point of time is the time which is specified in the calls. The section does not confer any power on the liquidator to make a call though it says "calls made by the Liquidator." S. 187 deals with the power of the Court to make calls and that power can be exercised either before or after the Court has ascertained the sufficiency of the assets of the company. The power can be exercised against all or any of the contributories; and the call has got to be made for the payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, etc., and for the adjustment of the rights of contributories among themselves. AIR (Vol 37) 1950 Bom 386: 52 Bom LR 559 (DB).

——S. 159 (1) — "Calls made by the liquidator" — Meaning of—See Companies Act, Ss. 156(1) and 159 (1). (1950) 1950-20 Com Cas 15 (Bom).

——S. 159 — Contributory failing in his case — Costs, liability for.

The costs of a contest by a person disputing his liability as a contributory and failing, must, except under very special circumstances, be paid by such contributory. There is no reason why the ordinary rule that a party failing must pay the costs, should not apply in this class of cases. The contributory must pay the costs of the Liquidator when taxed as between party and party. AIR (Vol 23) 1936 Bom 24: 37 Bom LR 904: 60 Bom 297: 160 Ind Cas 638.

——S. 159 (2) — Claim in respect of balance due in share — Jurisdiction of Small Cause Court.

A suit against a share-holder for balance due on his shares is not cognizable by a Small Cause Court in view of the provisions of S. 159 (2), and of the definition of the term 'contributory' in S. 158 of the Companies Act. AIR (Vol 19) 1932 Cal 716: 36 CWN 589: 59 Cal 1186: 140 Ind Cas 252.

——S. 159 — Fraud.

A share-holder cannot be relieved of his liability as a contributory in the winding up proceedings on the ground of fraud, once an application has been made for the compulsory winding-up of the concern. AIR (Vol 11) 1924 Lah 649: 75 Ind Cas 745 (DB).

——S. 160.

——S. 160 (1) — Legal heir and representative of contributory — Who are. See (1947) 2 MLJ 180: AIR (Vol 35) 1948 Mad 162: 1947 Com Cas 189.

——S. 160 (1) — Scope — Payment order against deceased, execution of.

Section 160 (1) does not deal with payment orders at all. A payment order against a deceased contributory is not executable. AIR (Vol 28) 1941 Lah 480: 43 PLR 650: ILR (1942) Lah 807: 199 Ind Cas 773 (DB).

——S. 160 — Winding up — Deceased applying for shares — His name placed on list of contributories — Death during winding up — Deposit of such person, if forfeited — Liability of his representative.

Where the deceased who had applied for shares of a company had been placed on the list of contributories, he does not cease to be a contributory and forfeit the deposit that he had made upon application so as to escape from the position of a contributory with future liability.

In such a case the matter of liability of the legal representatives is governed by S. 60 of the Companies Act itself and on the death of the member, the liability automatically falls upon the representatives. The fact that they were not substituted within 90 days of the death of the deceased is of no consequence for to such a case Limitation Act does not apply. AIR (Vol 25) 1938 Pat 287: 4 BR 352: 19 PLT 214: 173 Ind Cas 898 (1) (DB).

——S. 160 — Legal representative — Death of share-holder before settling of list of contributories — Inclusion of list — Order for payment of balance from legal representative of deceased share-holder — Proper proceedings.

Where in the case of a Company which has gone into voluntary liquidation, a share-holder dies before the list of contributories is settled and his name is included in the list in liquidation proceedings and the Court makes an order for payment of the balance, it is open to the Court to recover it from his legal representative and heir under S. 160. The proper remedy is to take proceedings in the due course of administration of the estate of the deceased, and not an application for order of payment against the legal representative personally. AIR (Vol 21) 1934 Bom 469: 59 Bom 558: 36 Bom LR 1002: 154 Ind Cas 178.

——S. 160 — Where the manager of the Hindu family consisting of his sons and nephews has agreed to take a certain number of shares in a company by signing the memorandum of the company, on his death his sons are liable under S. 160, only to the extent of the separate property of the father which has come into their hands. The shares in the joint family are not liable. AIR (Vol 20) 1933 All 334: (1933) ALJ 233: 55 All 417: 143 Ind Cas 762.

——S. 160 — Legal representative.

An order against a deceased contributory is a nullity and therefore in order to fix the contributory's estate with the liability, those persons who represent the contributory's estate should be brought on record before an effective order may be made. AIR (Vol 17) 1930 All 503: 124 Ind Cas 28: 1930 ALJ 373 (DB).

——S. 162.

1. General provisions.
2. "Inability to pay debts" Cl. (v)
3. "Just and equitable" Cl. (vi)
4. "Suspends its business" Cl. (iii)
5. "Special resolution." Cl. (i)
6. Winding up of insurance company.

1. General provisions.

——S. 162 (vi) — Winding up — Mere difference of opinion among majority directors and minority directors — If sufficient for compulsory winding up.

In the absence of evidence of misappropriation or malverisation of funds by the management, a company should not be wound up merely on account of differences of views between the majority directors and the minority directors. ILR (1950) Mad 59: 63 LW 1079: (1949) 19 Comp Cas 107: AIR (Vol 36) 1949 Mad 675: (1949) MWN 56: (1949) 1 MLJ 269 (DB).

——S. 162 — Winding up — Costs of creditor in support of — Discretion of Court.

The Court has a discretion to award costs to a creditor appearing in support of a winding up petition. ILR 1950 Mad 59: 63 LW 1079: (1949) MWN 56: (1949) 19 Comp Cas 107: AIR (Vol 36) (1949) Mad 675: (1949) 1 MLJ 269 (DB).

——S. 162 — Winding up — Dissolved company and one in liquidation — Distinction.

A company which has been dissolved no longer exists as a separate entity capable of holding property or of being sued in any Court; but a company in liquidation, although the administration of its affairs has passed to the Liquidator, retains its corporate existence. If the liquidation should be annulled, the company will resume its powers. AIR (Vol 26) 1939 Mad 318: (1938) MWN 1313: 183 Ind Cas 353.

——S. 162 — Creditor, when entitled to ask Court to convert voluntary winding up into compulsory winding up indicated. AIR (Vol 25) 1938 All 623: (1938) ALJ 898: 1938 AWR (HC) 576: ILR (1938) All 945: 178 Ind Cas 704.

——S. 162 — Application not bona fide.

Where it is clear that the action of the petitioning creditor in making the application for the winding up and in insisting upon further proceedings in liquidation is not bona fide, the entire costs of the liquidation should be paid by him. In the absence of a clear provision in the Companies Act, dealing with a case of this kind, the matter is governed by S. 35, Civil P. C. AIR (Vol 21) 1934 Lah 746: 37 PLR 360: 155 Ind Cas 852 (DB).

——S. 162 — All compulsory liquidation spells finality. AIR (Vol 19) 1932 Rang 75: 10 Rang 143: 137 Ind Cas 638 (DB).

——Ss. 162, 174 — Compulsory winding-up of Bank — Wishes of majority of creditors — Creditors' right — Ex debito justitiae, limitations to.

The Dawsons Bank mainly derived its capital from fixed deposits which were utilised in financing cultivators in Burma. Due to trade depression and the Rebellion in 1931, the directors feared that if the period of economic depression and the consequent fall in price of paddy were prolonged, the Bank

might find itself in an embarrassment and as a way out of the situation suggested a voluntary liquidation and reconstruction. On this creditors who had deposited 2-3/4 lakhs of rupees in the Bank filed a petition for the compulsory winding-up of the Bank and depositors to the extent of Rs. 11 lakhs out of a total of over 66 lakhs, opposed it:

Held, that the circumstances of the case did not justify a compulsory winding-up. Though the wishes of the majority of the creditors are not binding upon the Court in every case, the Court ought to give them serious consideration.

A creditor who is unable to obtain payment of his debt is entitled ex debitio justitiae, to an order for the compulsory winding-up of the company but he being a pari passu creditor can only sue on behalf of himself and all the other creditors. The Court is guided by the wishes of the majority and the circumstances of the case. AIR (Vol 19) 1932 Rang 75: 10 Rang 143: 137 Ind Cas 638 (DB).

——Ss. 162, 175 — Private company — Winding-up — Liquidator — Distribution of surplus assets to share-holders after paying dividend on debts to creditors, legality of.

A company, though a private company, is distinct from the persons composing it and the duties and responsibilities of the Liquidator are as serious in the liquidation of a private company as of any other. The Liquidators of a private company cannot as a normal course of liquidation, pay the creditors merely a dividend on their debts, when surplus assets, large in amount remain in hand and then allow the contributories without definition of their interests therein to take possession for themselves of these surplus assets.

Where certain assets of the company including a certain leasehold interest were distributed among the share-holders:

Held, that the so-called "distribution" without the execution by the company of any instrument of assignment did not make the so-called "share-holders", whatever else it may have achieved, the legal assigns of the original lessees, nor enable them to confer on any assignee a title which they did not themselves possess. AIR (Vol 18) 1931 PC 203: 134 Ind Cas 324.

——S. 162 — Reconstitution.

Some creditor's scheme of reconstitution illusory and amounting to voluntary liquidation out of Court cannot be accepted. AIR (Vol 17) 1930 Lah 777 (DB).

——S. 162 — Management in one family.

It is a good reason for making a winding up order that there is a justifiable lack of confidence in the conduct and management of the Company affairs owing to the management being held in one family which is in a position to dominate the other shareholders and monopolise the company affairs for its own individual benefit. AIR (Vol 12) 1925 Mad 633: 86 Ind Cas 914: 21 MLW 367: 48 MLJ 232 (DB).

——S. 162 — Winding up.

Where the object of a petition to wind the company is to bring pressure upon the company in order to make it pay the petitioner cheaply and expeditiously which the company desires to dispute in the Civil Court the petition is an abuse of the process of the Court and should be dismissed. AIR (Vol 12) 1925 Mad 199: 85 Ind Cas 333: 48 Mad 267: 21 MLW 136: 47 MLJ 710 (DB).

——S. 162 — Non-payment to creditors.

Where a company has a bona fide defence to a creditor's claim the creditor's application for its winding up must be dismissed. AIR (Vol 12) 1925 Rang 128: 84 Ind Cas 1021: 3 Bur LJ 326: 2 Rang 575 (DB).

——Ss. 162, 163 (1) — Application for winding up.

A creditor must file a suit instead of making an application under S. 163 (i) when the company is solvent and there is ground to suppose the existence of a bona fide dispute of the substantial part of the debt, which cannot be called a neglected one. The court has inherent jurisdiction to stay the proceedings amounting to an abuse of its process.

A creditor of a company, while two suits of certain claims were pending, filed an application in a court for the sake of winding the company's business. The company applied for its removel on the ground of the abuse of the court process and the ulterior object of the creditor being to force his terms of the settlement on the company. But the application was dismissed with permission to appeal against the order passed under S. 163 (i) under certain terms.

Held, (i) the appeal against the order was competent under clause 15, Letters Patent, having regard to the terms of the order giving effect to the judgment. (ii) The judge's dismissal of the application in toto was not right, as he could have properly stayed the proceedings of winding up till the final determination of the two suits. AIR (Vol 7) 1920 Cal 1004: 23 CWN 844: 58 Ind Cas 561 (DB).

2. "Inability to pay debts." Clause (v).

——S. 162 (v) — Inability of a company to pay a large sum lawfully due & payable as & for income-tax —— Right of the Governor-General in Council to apply for winding up of the company — Existence of disputes as to assessments — Resort to winding up proceedings, if an abuse of the process of Court.

Where it is not disputed that a company is unable to pay a very large sum lawfully due and payable by it as and for income-tax, the Governor-General in Council is entitled to apply for and obtain an order for the compulsory winding up of that company.

The mere existence of a dispute as to the assessments which had not been finally determined would not render an application for compulsory winding up, an abuse of the process of Court. The Court might postpone the operation of the winding up order, if the company was at least able and willing to furnish satisfactory security for the amount of taxes due. AIR (Vol 36) 1949 Mad 73: ILR (1949) Mad 99: 61 LW 459: 1948 MWN 371: (1948) 18 Com Cas 163: (1948) 16 ITR 169: (1948) 1 MLJ 407 (DB).

——Ss. 162 and 153 — Creditor bound by scheme — If may present winding-up petition.

It may be that a creditor who is bound by a scheme sanctioned by Court under S. 153 of the Companies Act will not be entitled to present a winding-up petition on the ground that the company is unable to pay its debts or has failed to pay after having been served with a statutory notice under S. 163 of the Act.

But there is no reason why such a creditor should not be entitled to present a winding-up petition if default is made in filing the statutory report or in holding the statutory meeting or if there be grounds

which the Court may consider to be just and equitable that the company should be wound up. (1947) 51 CWN 791: (1947) 17 Comp Cas 206.

——S. 162 (v), (vi) — Winding up on ground that company cannot meet its debts — Question to be considered.

When the Court is asked to wind up a company on the ground that it cannot meet its debts, what has to be ascertained is not whether the company, if it converted all its assets into cash, would be able to discharge its debts but whether in a commercial sense the company is solvent. The company is entitled to regard the money which it is entitled to call up on account of shares from the contributories as money available for the discharge of its debts. AIR (Vol 28) 1941 Pat 603: 8 BR 443: 23 PLT 23: 20 Pat 538: 198 Ind Cas 667.

——S. 162. — Heavy losses.

Where there is no trace of any mala fides, and the object of the creditor is simply to recover his debt out of such assets as may be available and the company is not in a position to pay the debt, the creditor is prima facie entitled to an order of winding up. A shareholder who was also the principal creditor of a company applied for winding up the company. Before presenting the application he had served on the company a notice of demand requiring the company to pay his debts, but the company had neglected to pay the same. The company was in a moribund condition. The main assets consisted of the stock of Ayurvedic medicines which were of no value at the time. The company had suffered also heavy losses.

Held, that the creditor was entitled to an order of winding up. AIR (Vol 16) 1929 Lah 651: 117 Ind Cas 78: 11 Lah 80: 11 Lah LJ 239 (DB).

——S. 162 — Where there is bona fide dispute as to the company's liability to pay the debt, Courts will not allow creditors of a company to invoke the assistance of the Comp. Act for getting payment of their debt; they must be referred to a suit. Mere failure to comply with statutory demand does not entitle the creditor to come before the Court and ask as a matter of right for the winding up of the company. AIR (Vol 16) 1929 Mad 265: 106 Ind Cas 423.

——S. 162 — Fraud and misrepresentation.

Mere fact of there having been fraud in the promotion or fraudulent misrepresentation in the prospectus, will not be sufficient to found a winding up order, for, the majority of the shareholders may waive the fraud. AIR (Vol 9) 1922 Cal 365: 69 Ind Cas 241: 49 Cal 399 (DB).

——Ss. 162, 166 — (1882), Ss. 128 (d), (e), 129 (c) 130, 131.

The word 'debt' as defined in S. 130 of the Companies Act is not limited to a debt actually due. A 'creditor' in S. 131 of the Act is not restricted to a person to whom a debt is due at present and who can demand immediate payment from the company. If the court is satisfied that the company is unable to pay the debts falling due hereafter, that would be a reason of a like nature as under clause (d) of S. 128. (1909) 34 Bom 533 (536): 11 Bom LR 1302: 4 Ind Cas 591.

——Ss. 162, 228, 166 — (Ss. 128 (d), 130, 131 of 1882 Act) — Creditor — Debts — Interpretation — Winding up order.

The term "creditor" as used in S. 131 of the Indian Companies Act, 1882, means a creditor to whom money is owed by the company; whether he can claim immediate payment of that debt or whether his right to demand payment is deferred by his agreement with the company to a future time, he still remains a creditor. It is by no means limited to a creditor to whom a debt is due at the date of the petition and who can demand immediate payment from the company. The term "debts" as used in S. 128, Cl. (d) of the Indian Companies Act, 1882, is not used in the restricted sense which is given to it by S. 130 of the Act. When a petitioner satisfies the Court that the company on a general perusal of its balance-sheet cannot pay its debts, in other words that its assets are not sufficient to satisfy its liabilities, the court may order the winding up of the company. (1909) 11 Bom LR 1302 (1304, 1305): 34 Bom 533.

3. "Just and equitable."

Cl. (vi)

(a) General.
(b) Court, discretion and duty of.
(c) Test of.

(a) General.

——S. 162 (vi) — Winding up of Company — When just and equitable.

It may be just and equitable to wind up a Company where it is carrying on business at a loss and its remaining assets are insufficient to pay its assets. If a Company has not got enough credit in the market and his not got sufficient means even to pay its employees, it cannot carry on its business with any expectations of profit. AIR (Vol 37) 1950 EP 142.

——S. 162(vi) — "Just and equitable assets" — sums due to company, consideration of.

In considering whether company should be wound up under just and equitable clause, the sums due to the company from its debtors, agents and policy-holders and the value of its tangible assets in the form of furniture, motor cars, books, stationery, etc., should be taken into account. AIR (Vol 28) 1941 Pat 603: 20 Pat 538: 8 BR 443: 23 PLT 23: 198 Ind Cas 667.

——S. 162 — Mismanagement — Defalcation — Winding up by Court more proper.

Where it appears from the auditor's report that there had been defalcation of certain funds and that attempts were made to cover up the defalcation by various devices and charges of dishonesty and mismanagement are levelled against one another by the different parties, the case is one in which the conduct of some officers of the company would require investigation and as this can only be obtained in winding up by the Court, considerations of justice and equity are more in favour of a compulsory winding up than voluntary liquidation. AIR (Vol 24) 1937 Oudh 377: 1937 OWN (CC) 627: 168 Ind Cas 185.

——S. 162(vi) — Grounds for winding up — Just and equitable clause — Winding-up — Considerations — Business problem — Parent and subsidiary companies.

The decisive question in respect of a winding up of a company under the 'just and equitable' clause must be the question whether at the date of the presentation of the winding-up petition, there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed, could be attained. In considering that question, the guarantee of the preference shares should be left out

of sight, except in so far as it may have biased the evidence on either side.

Where there is no question of a deadlock, nor is there any question of share-holders who have the voting power using that power for their own commercial interests outside the company in disregard of the interests of a minority, nor again, is there any question involved of an improper management of the company by the directors who are in control and the problem involved is of the nature of a business problem and if there was at the relevant time a reasonable hope of tiding over the period of deep depression and of emerging into a region in which the company might reasonably expect to carry on at a profit.

There would be no sufficient reason why the Court, regard being had to the essential character of the bargain made between the parties on the formation of the company, and considering the matter from much the same stand point as if the company were a private partnership, should wind up the company under the just and equitable clause.

There is obviously a great difference between a question of positive fact such as the pecuniary position of a trading company at a particular date, and a question of the prospects of such a company in the future, a matter which much depends on all sorts of views as to the state of world trade, the confidence of the public, the price at which articles can be sold — a matter which depends very largely upon the number of such sales — and an infinity of other considerations very difficult either to summarise or to define.

It is not the function of a Court to determine such a matter on its own views as to probable success or failure, but to form the best opinion it can upon the evidence given by persons with a practical knowledge of trade in question and the local conditions where these affect the matter.

No doubt the views of persons who have not taken the trouble to consider the problem are worth little, and the views of those who have an interest in a particular direction must be considered in the light of the bias thereby occasioned. AIR (Vol 23) 1936 PC 114: 161 Ind Cas 539.

——S. 162 — Company for raising of funds for charitable purposes — Offer of cash bonuses to donors by drawing lots — Winding up:

Held, that as a very substantial part of the business carried on by the company was illegal, there was sufficient ground for ordering the compulsory winding up of the company. The fact that the company was formed for benefiting charities and the lottery was merely annexed to the original business did not make the business of the company a legal one. AIR (Vol 20) 1933 Mad 16: (1932) MWN 904: 63 MLJ 554: 36 MLW 610: 56 Mad 26: 33 Cr LJ 792: 139 Ind Cas 644 (DB).

——S. 162 — Non-compliance with statutory demand — Company in moribund condition — Prima facie right of creditors.

Where the undisputed facts show clearly and unmistakably that the affairs of the company are in a moribund condition, and that there is no doubt that it is unable to pay its debts, statutory demand made by the petitioners in accordance with the provisions of S. 163(1) has not been complied with, the company has not got any cash in hand, and all efforts to raise money have failed, the employees including those who had been engaged on daily wages have not been paid for some months, the machinery has ceased to operate, and there is no reasonable prospect of work being resumed within any appreciable length of time, the petitioners are prima facie entitled to an order for winding up. AIR (Vol 17) 1930 Lah 777 (DB).

——S. 162 — Winding up when ordered.

A press which was a limited concern was leased to a certain person who subsequently sub-leased it to another at large profits. Numerous shareholders had also to file suits against the company for recovering the dividends to them. The Chairman of the press was found not authorized by the persons whose names appear on the dividend warrants to give an acquittance or receipt on their behalf.

Held, that under S. 162, Cl. (6) it was just and equitable that the company should be wound up. AIR (Vol 17) 1930 Mad 240: 57 MLJ 426: 120 Ind Cas 372: 1929 MWN 605: 30 MLW 717: 53 Mad 38 (DB).

——S. 162 — Controlling partner insolvent.

Where a person who had been adjudicated insolvent transferred large estates to a private limited company in which he had 90 per cent. of shares and over which he had complete control.

Held, that it was just and equitable that the company should be wound up. AIR (Vol 15) 1928 Rang 36: 5 Rang 685: 107 Ind Cas 860 (DB).

——S. 162 — Domination and non-payment of dividends — Clause 6 not ejusdem generis with Cls. 1 to 5 — Directors dominating minority — Balance sheet not supplied — Dividends not paid — Winding up proper.

Clause 6 provides that a company may be wound up if the Court is of opinion that it is just and equitable that the company should be wound up. The reasons for a Court considering it to be just and equitable that a company should be wound up are not necessarily ejusdem generis with the reasons given in Cls. 1 to 5. Where the directors of a company were able to exercise a dominating influence on the management of the company and the managing director was able to outvote the minority of the share-holders and retain the profits of the business between the members of the family, and there were several complaints that the shareholders did not receive a copy of the balance sheet, nor was the auditor's report read at the general meeting or attached to the balance sheet, as required by S. 131 of the Act and that dividends were not regularly paid and the rate of dividend had been steadily diminishing.

Held, that there were sufficient grounds to allow a winding up application and to call upon the directors to enter upon defence. AIR (Vol 12) 1925 Mad 489: 86 Ind Cas 135: 48 Mad 448: 21 MLW 359: 48 MLJ 118 (DB).

——S. 162 — Though S. 162(6) need not be construed ejusdem generis with cls. (1) and (5) of the section it will yet require grounds of like magnitude before acting under the clause and it is only in extreme cases that a Court will at the suggestion of the minority disregard the wishes of the domestic forum and condemn the Company to extinction. AIR (Vol 6) 1919 LB 29: 59 Ind Cas 524: 13 Bur LT 51.

——S. 162 — Winding up by Court, grounds for — Interference in internal management of the company.

Section 162, clause (6) of the Act is not ejusdem generis with clauses (1) to (5) but gives the court power to order the winding up of a company if it is just and equitable to do so. A court has no jurisdiction to interfere with the internal management of a company acting within its powers. Winding up is an extraordinary remedy to be resorted to in extreme cases. Internal fraud or unscrupulous conduct of the Directors in managing the affairs of the company does not entitle a minority of the shareholders to have a winding up. AIR (Vol 6) 1919 LB 29: 59 Ind Cas 524: 13 Bur LT 51.

——S. 162 — (1882), S. 128 — Company winding up — Grounds for.

Section 128, clause (a) must be construed as ejusdem generis with clauses (a) to (d). A shareholder's petition for winding up should be scrutinized more closely than a creditor's petition and it must allege one of the grounds under clauses (a) to (c) of S. 128. There is nothing in the Act to fetter the Court's discretion in admitting or rejecting a petition for winding up. AIR (Vol 1) 1914 Bom 190: 39 Bom 16: 16 Bom LR 508: 25 Ind Cas 264.

(b) Court discretion and duty of.

——S. 162 — Compulsory liquidation — Duty of Court.

The Court affords in liquidation proceedings, a much easier and less expensive way of collecting debts. A Liquidator under the orders of the Court is much more likely to collect the balance of the debts which are due to the company than the directors.

It is particularly the duty of the Courts in India to see that directors and other officers of limited liability companies carry out their duties honestly and to punish them if they do not. Compulsory liquidation under the Court affords the best opportunity of performing this duty when there is a prima facie case of dishonesty against the officer of a company. AIR (Vol 22) 1935 Lah 779 : 16 Lah 1029 : 38 PLR 166 : 158 Ind Cas 816 (SB).

——S. 162 — Loss due to previous mismanagement — Chance of producing profits — Winding up not justified

Under S. 162 (6) Court has jurisdiction in an extreme case to wind up a company at the instance of a share-holder, notwithstanding that he is not supported by a majority of the shareholders. The discretion of the Court under this clause is not limited by the application of the ejusdem generis rule. But the Court would not be justified in interfering, so long as the company has with the capital which remains, whether already paid up or still uncalled, a chance of producing profit in the way in which it was intended to be produced. A company incurred heavy losses and lost five lacs out of its total paid up capital of about 7 lacs. A share holder petitoned the Court to wind up the company. He was opposed by a great majority of the shareholders. The loss was mainly due to the previous mismanagement of the company's affairs. But under the new management the company showed reason to believe that it would shortly be in a sounder position.

Held, that under the circumstances it was not proper for the Court to interfere and wind up the company. AIR (Vol 16) 1929 Bom 8: 114 Ind Cas 849: 30 Bom LR 1509.

——S. 162 (vi) — Liquidation — Power of Court.

The power of court to wind up a company given to a court by this section should not be exercised unless there is very strong ground for acting upon it because the Indian companies are governed by a majority of their own members and where there is a domestic tribunal which has powers to decide upon a question, it should, if possible, be left to that domestic tribunal. If a company is not conceived and brought forth in fraud, or is not one whose substratum is gone, the mere fact the applicants apprehend a loss from a further working is no ground for winding up the company under this clause. AIR (Vol 4) 1917 All 347: 39 All 334: 15 ALJ 193: 39 Ind Cas 570.

——S. 162 — (S. 128 of 1882 Act) — Company — Winding up order — Court's discretion to make the order — 'Just and equitable'.

When the law requires the fulfilment of one or more of several conditions before an order can be made, the part fulfilment of two or more of such conditions cannot be taken as having a cumulative effect justifying the order. If the court comes to the conclusion that the main original object for which the company was formed has substantially failed, or that the substratum of the company is gone, it will consider that it would be just and equitable to wind up the company, and will make an order for its compulsory winding up. The court will not be justified in making a winding up order merely on the ground that the company had made losses and is likely to make further losses. (1908) 10 Bom LR 107: 32 B 415 (420, 421).

(c) Test of.

——S. 162 (v) — Commercial insolvency — Test.

A company is commercially insolvent if its assets and its existing liabilities are such as to make it reasonably certain as to make the Court feel satisfied that the existing and probable assets would be insufficient to meet the existing liabilities. AIR (Vol 37) 1950 EP 142.

——S. 162 (vi) — Grounds for winding up — Substratum of company, when must be deemed to be gone — Tests.

It is for the petitioner to prove that the test is satisfied in the case of the particular company which he asks the Court to wind up. The substratum of the company is deemed to be gone when (a) the subject-matter of the company is gone, or (b) the object for which it was incorporated has substantially failed, or (c) it is impossible to carry on the business of the company except at a loss which means that there is no reasonable hope that the object of trading at a profit can be attained, or (d) the existing and probable assets are insufficient to meet the existing liabilities. When none of these four tests can apply to the facts of the case, the company cannot be wound up.

The subject-matter of a film company cannot be said to be gone or the object for which the company was formed cannot be said to have failed when the company is actually in the course of producing three films. Nor can it be said that it is impossible to carry on the business of the company except at a loss when, according to the company, it is going to produce three films which are likely to realize as much as Rs. 11,00,000.

(The existing and probable assets of the company held could not be said to be insufficient to meet the existing liabilities.) AIR (Vol 29) 1942 Bom 231: 44 Bom LR 487: 203 Ind Cas 116.

——S. 162 (vi) — Grounds for winding up — 'Commercially insolvent' explained.

In determining whether a company should be wound up, the test is to see whether the company

is 'commercially insolvent'. The term 'commercially insolvent' means that the existing assets and liabilities of the company are such as to make it reasonably certain as to make the Court satisfied that the existing and probable assets would be insufficient to meet the existing liabilities.

The other test is whether at the date of the presentation of the winding up petition there was any reasonable hope that the object of trading at a profit, with a view to which the company was formed could be attained. A I R (Vol 29) 1942 Bom 231: 44 Bom LR 387: 203 Ind Cas 116.

——S. 162 — Winding up — Grounds — Misconduct of directors or business running at loss.

The misconduct of the directors and that the business has been carried on at a heavy loss, are per se not grounds on which the Court would order a winding up of the company. AIR (Vol 29) 1942 Bom 231: 44 Bom LR 387: 203 Ind Cas 116.

——S. 162 (vi) — Grounds for winding up — Just and equitable ground — Decisive question to be considered — Onus of proof — Question of future prospects of company, determination of — Insurance company — No evidence of future prospects — Fact that Insurance Superintendent has not intervened under S. 33, Insurance Act, consideration of.

On an application to wind up a company on the ground that it is just and equitable to do so, the decisive question to be considered is whether at the date of the presentation of the petition there was any reasonable hope that the object of trading at a profit was attainable. The onus of proof rests upon the petitioner.

It is not the function of the Court to determine the question of the prospects of the company in future on its own views as to probable success or failure but to form the best opinion it can upon the evidence given by persons with a practical knowledge of the trade in question and the local conditions where they affect the matter.

Where, at the relevant time there is reasonable hope of tiding over a period of difficulty and emerging into a region in which the company might reasonably expect to carry on at a profit, there is no sufficient reason why the Court should wind up the company under the just and equitable clause.

Where, however, the insurance company is sought to be wound up under the just and equitable clause and there is no evidence of the future prospects of the company before the Court, the fact that the Superintendent of Insurance has not taken action under S. 33, Insurance Act to wind up the company, deserves consideration though it is not a deciding factor in determining whether the company should be wound up or not. AIR (Vol 28) 1941 Pat 603: 20 Pat 538: 23 PLT 23: 8 BR 443: 198 Ind Cas 667.

——S. 162 (v) — Grounds for winding up — Debts, nature of.

For a winding-up order the debt must be presently payable and the title of the petitioner complete. The law requires that a demand must be made for a debt that is due and it is not permissible to support a petition by alleging that something else is due. AIR (Vol 23) 1936 Cal 628: 62 Cal 294: 163 Ind Cas 845.

——Ss. 162, 163 (2) — 'Commercially insolvent, meaning of — Winding up order, when to be passed — Balance-sheet — Duty of company to issue.

In petitions under S. 162, the Court has to see whether the company is commercially insolvent, i.e., whether it is unable to meet its current demands, although the assets when realised including uncalled capital exceed its liabilities. If it has not assets available to meet its current liabilities, it is commercially insolvent and may be wound up.

Where a company has not complied with the statutory demands made under S. 163 (2) by its creditors, is unable to meet its current demands, has ceased to function and its affairs are in a moribund condition, it has no cash in hand nor does it possess the necessary equipment to carry out the objects for which it was incorporated and there are no prospects of its being able to resume its activities within a reasonable time, a petition under S. 162, for compulsorily winding-up the company should be passed.

Under the law it is obligatory on every limited liability company to get prepared and issued to every member a duly audited balance sheet at least once in every year and at intervals of not more than fifteen months. Existence of disputes regarding amounts due to the company does not relieve the company from this duty. AIR (Vol 20) 1933 Lah 301: 143 Ind Cas 135.

——S. 162 (vi) — Grounds for winding-up — 'Just and equitable rule', application of.

The fact that a Managing Director has a preponderating voice in the company by reasons of his owning or controlling a large number of shares or that the dividends have not been paid regularly is by itself no reason for winding-up a company.

To justify a winding-up order on the 'just and equitable' rule it is necessary to prove a lack of confidence in the conduct and management of the company's affairs by the directors.

An order for winding-up a company even if not justified, may be maintained on the ground of lapse of time and intervening events.

An ultra vires transaction on the part of directors is of itself not sufficient reason for a winding-up order since other remedies are available to aggrieved share-holders. AIR (Vol 19) 1932 PC 1: 61 MLJ 783: 35 MLW 1: 54 CLJ 439: 36 CWN 54: (1932) MWN 171: 34 Bom LR 321: 58 IA 416: 55 Mad 180: (1932) ALJ 825: 136 Ind Cas 114.

——S. 162 — Grounds for winding up.

Where on an application for the compulsory winding-up of a Bank, it appeared inter alia, that the Bank had no properly constituted directorate, that it had not issued any balance-sheet for more than five years, that its accounts had not been properly audited, that the cash balance had dwindled and business was almost at a standstill and that meetings of the share-holders were not regularly held:

Held, that the petitioners had made out a case for an order for the compulsory winding up of the Bank under the 'just and convenient' clause. AIR (Vol 19) 1932 Lah 571: 33 PLR 754: 13 Lah 603: 138 Ind Cas 344.

——S. 162 (vi) — Applicability.

To bring a company within the "just and equitable" clause it must be shown that the substratum of the company has gone or that a deadlock has arisen in the sense that it is not possible for the company to carry out the objects for which it was formed:

Held, on the facts that an order for winding up was not called for. AIR (Vol 18) 1931 Cal 692: 58 Cal 716: 133 Ind Cas 321.

4. "Suspends its business" cl. (iii).

——S. 162 — Company — Winding up — Temporary suspension of business — Deadlock — Directors.

Where there has been a suspension of business of a company the power of the Court to wind

up the company will be exercised only when there is a fair indication that there is no intention to carry on the business; if the suspension is satisfactorily accounted for and appears to be due to temporary causes, the order may be refused.

If there are ample indications that it is possible to carry on the business of the company, it is not possible to hold that there is a complete deadlock which most be got rid of, by compulsory winding up.

The Act creates as between shareholders a domestic tribunal and unless a clear case is made out, the court will be slow to withdraw from it the decisions whether the company's business shall or shall not be carried on.

Where the objects of a company as set out in the Memorandum of Association can be fulfilled in other ways or by the employment of other agencies, it cannot be rightly held that the substratum was gone and the court will not grant an application for winding up cases discussed. AIR (Vol 7) 1920 Cal 722 : 47 Cal 654 (DB).

S. 162 — Discretion.

The Companies Act creates as between the shareholders a domestic tribunal, and unless a clear case is made out, the Court will be slow to withdraw from it the decision whether the company's business shall or shall not be carried on. When an application to wind up a company is supported on the ground that the company has suspended business for a whole year, the power granted by the law to the Court to use its discretion while deciding whether such application should be refused or granted, should be exercised only when there is a fair indication that there is no intention to carry on business.

If the suspension is satisfactorily accounted for and appears to be due to temporary causes, the order may be refused. Where the firm of managing agents of a company is dissolved, the fact that steps were taken since the dissolution, at extraordinary general meetings to appoint new managing agents is sufficient to indicate that it is possible to carry on the business of the company and there is no complete deadlock, necessitating the compulsory winding up of the Company.

The principle of 'substratum gone' cannot be applied to a case where it is not proved that the object of the company as set out in the memorandum cannot be fulfilled in other ways or by the employment of other agencies. AIR (Vol 7) 1920 Cal 722 : 59 Ind Cas 542 : 47 Cal 654 (DB).

5. "Special resolution" cl. (i).

——S. 162 — Winding up order.

Winding up order consequent upon conditional resolution at extraordinary meeting convened within 14 days of issue of notice is not without jurisdiction. AIR (Vol 17) 1930 Lah 721.

6. Winding up of insurance company.

——S. 162 — Winding up — Insurance company — Winding up of — Company working at loss — Ground for winding up.

The fact that the company is working at a loss is no ground for winding it up, especially when not a single share-holder has come forward to support the petition for winding up. AIR (Vol 30) 1943 Lah 109 : 45 PLR 49 : ILR (1944) Lah 47 : 208 Ind Cas 170 (DB).

——S. 162 — Grounds for winding up — New insurance company — Reckless expenditure.

The amount spent by a comparatively new company formed for the purpose of carrying on the business of an insurer, in making contract with the public and building up public confidence, cannot be described as "reckless" expenditure. To some extent at least it represents the goodwill which the company is building up and which is an asset. (AIR (Vol 28) 1941 Pat 603 : 8 BR 443 : 20 Pat 538 : 26 PLT 23 : 198 Ind Cas 667.

——S. 162 — Where, however, the insurance company is sought to be wound up under the just and equitable clause and there is no evidence of the future prospects of the company before the Court, the fact that the Superintendent of Insurance has not taken action under S. 33, Insurance Act to wind up the company, deserves consideration though it is not a deciding factor in determining whether the company should be wound up or not. AIR (Vol 28) 1941 Pat 603 : 20 Pat 538 : 23 PLT 23 : 8 BR 443 : 198 Ind Cas 667.

——S. 163.

——S. 163(1) (i) — Neglect to pay—Refusal to pay by debtor company believing wrongly that it is justified.

When a debtor company believes even wrongly that it is justified in law to refuse to pay, such a refusal cannot be regarded as neglect to pay as contemplated by S. 163(1)(i) of the Companies Act. AIR (Vol 36) 1949 Assam 45 : 1949 Comp. C. 15 : 52 CWN 891.

——S. 163 — Inability to pay debts — Onerous contract with creditor — Company unable to carry on business and pay its debts — Company should be wound up.

Where as a result of an onerous contract with a creditor, the company loses its identity and the creditor becomes de facto the company with a power to bring it to an end whenever it suited him and in accordance with the stipulations of the contract seizes the machinery and plant of the company with the result that the company is unable to carry on its business and to pay its debts, it is just and equitable to wind up the company. AIR (Vol 28) 1941 PC 106 : 8 BR 187 : 1941 AWR (HC) 51 : 197 Ind Cas 118.

——S. 163 Debts — Items to be considered in ascertaining debts and assets, stated.

In ascertaining the debts of the company, the sums under items such as "calls in advance", "share suspense", "forfeited shares account" and "deposit against premium" which the company could not be called upon to pay immediately cannot be taken into account. The items such as "loans", "advances" and "outstanding liabilities" must, however, be considered. AIR (Vol 28) 1941 Pat 603 : 20 Pat 538 : 23 PLT 23 : 8 BR 443 : 198 Ind Cas 667.

——S. 163 — Applicability — Notice of demand defective — Company neglecting payment of debt — Presumption — Manager of company, demand by — Solvent company having bona fide dispute regarding debt — Winding up order, whether justified.

A limited liability company must necessarily act through its officers and authorized agents. A demand of debts due to company under the hand of its manager must, therefore, be deemed to be a demand under its hand within S. 163 (1).

The mere service of a notice by a creditor on a solvent company does not entitle the creditor to a winding up order if the company bona fide disputes the existence of the debt. The reason for this rule is obvious. If a company is solvent and there is a genuine dispute about an alleged debt the resort by the creditor to the summary proceedings of serving on the company a notice under S. 162, and following the same by petition for winding up, is ordinarily referable to a desire on the part of the creditor to bring pressure on the company in order to induce the company to pay the debt, without having the dispute settled by

the Civil Court, by which Court the dispute ought to be ordinarily settled. To make an order for winding up in such a case, would deprive the company of its right to have the question between it and the petitioning creditor decided in the normal way by the Civil Court constituted for the purpose, and this would be opposed to public policy. An application for winding up in such a case must,, therefore, be regarded as a vehicle of oppression and an abuse of the process of the Court and be dismissed; an order for the compulsory winding up of a company is a very extreme step to take and, such an order ought not to be lightly passed.

Clause (i), S. 163, is general in its terms and has application to all sorts of debts, be it a simple money debt, a mortgage-debt or a judgment-debt; in the case of a judgment-debt, if execution for the recovery of that debt has been taken and has remained unsatisfied, the Court is, in accordance with Cl. (ii), S. 163, bound to presume that the company is unable to pay its debts. Nevertheless, the decree-holder is not debarred from making a demand for the payment of the judgment-debt by a notice in accordance with Cl. (i) without having recourse to execution proceedings. In such a case if the demand remains unsatisfied for three weeks, the presumption enjoined by S. 163 necessarily follows. AIR (Vol 23) 1936 All 840 : 1936 AWR (HC) 1113 : ILR (1937) All 210 : 166 Ind Cas 238.

——S. 163 — Compliance must be literal.

The statutory demand under Cl. (1), S. 163, must be in strict compliance with the provisions of that clause, and if those provisions are not literally complied with, the demand, though followed by neglect of the company to pay the debt cannot be made the basis of presumption that the company is unable to pay its debts. Clause (1), S. 163, imposes a penal obligation upon the company, and has, therefore, to be strictly construed. AIR (Vol 23) 1936 All 840 : 1936 AWR (HC) 1113 : ILR (1937) All 210 : 166 Ind Cas 238.

——S. 163 (1) — Winding up — Statutory demand — Service — Strict compliance with law, necessity of — Inability to pay debts — Bona fide dispute as to debt — Effect.

The statutory notice under S. 163(1), is a highly formal and important document and the provisions of the Act as to its service upon the company must be strictly observed. The notice should under ordinary circumstances be served at the registered office of the company.

But though a statutory notice under S. 163(i), has not been properly served, the petitioners for winding-up can show aliunde that the company is unable to pay its debts; and failure to pay as undisputed debt would be, as a rule conclusive of this.

Where there is a bona fide dispute as to the creditor's claim, the debt cannot be a ground for an order for compulsory winding-up. AIR (Vol 18) 1931 Cal 692 : 58 Cal 716 : 133 Ind Cas 321.

——S. 163(1) — Demand by creditor — Demand not signed by creditor personally — Validity — 'Under his hand', meaning of — Mala fide petition — Power to dismiss.

The words 'under his hand' in S. 163(1), are precise and a demand which is not signed by the creditor personally but by his agent does not comply with the requirements of the said clause.

Quaere:—Whether the agent's signature would be sufficient where the creditor through illness or otherwise is unable to sign the demand personally?

A petition for winding-up made by the creditor may be dismissed by the Court if it is satisfied that the petition was not presented bona fide for collection of his debt but for the purpose of ruining the company. AIR (Vol 18) 1931 Rang 306 : 9 Rang 323 : 133 Ind Cas 483 (DB).

——S. 163 — Demand.

A demand by the solicitors of a creditor is not sufficient. AIR (Vol 14) 1927 Cal 625 : 103 Ind Cas 629 : 54 Cal 345 (DB).

——S. 163 — Object.

Sub-section (1) to S. 163 means that the company to be served must, at the time of the service, be in default and that being in default, it is to be served with a demand under rather special precautions so that if it makes further default for a period of three weeks the question of its inability to pay the debts is set at rest. AIR (Vol 14) 1927 Cal 625 : 103 Ind Cas 629 : 54 Cal 345 (DB).

——S. 163 — A notice of demand issued by the advocate under the hand of the advocate cannot be deemed to be equivalent to a notice of demand issued by the creditor under his own hand. AIR (Vol 14) 1927 Rang 306 : 105 Ind Cas 534 : 5 Rang 483.

——S. 163 — Scope — Section merely provides a rule of evidence.

The grounds for ordering a company to be wound up are given in S. 162 and one of such grounds is the inability of the company to pay its debts. S. 163 of the Act merely provides when a company is to be deemed unable to pay its debts and according to that section, besides the ordinary modes of proving the inability of the company a special rule of evidence is introduced, the effect of which is that, if the notice provided for by cl. (1) of S. 163 is given and default is made, then the company is conclusively presumed to be unable to pay its debts. Once a notice is properly given and default is made it is not open to the debtor to show that, in spite of the non-payment of the debt, he is in a position to pay his debts as, for example, where on account of a temporary embarrassment, he is unable to meet the particular liability, though he has ample assets in his hands. AIR (Vol 14) 1927 Rang 306 : 105 Ind Cas 534 : 5 Rang 483.

——S. 164.

——S. 164 — Attachment beyond jurisdiction — District Court.

Under S. 164, Companies Act, the District Judge is for the purpose of winding up a Company deemed to be the "Court" within the meaning of Act and has, for purposes of such winding up, all the jurisdiction and powers of the High Court and therefore he has power to order attachment before judgment of property situate beyond his jurisdiction. AIR (Vol 15) 1928 Lah 376 : 106 Ind Cas 808.

——S. 164 — Orders in winding up.

The Additional District Judge has jurisdiction to make all orders which the District Judge can make in the winding-up of a company. AIR (Vol 9) 1922 PC 361 : 69 Ind Cas 356 : 32 MLT 15 : 27 CWN 509 : 1923 MWN 388 : 47 MLJ 322.

——Ss. 164 and 200 — Winding up — Reference to District Court — Contributories elsewhere.

An order for the winding up of a company was made up by the Chief Court and under S. 164 of the Companies Act subsequent proceedings were taken in the Court of the District Judge of Lahore against contributories residing in districts within the jurisdiction of the Allahabad High Court for enforcing these orders.

Held, that the High Court had jurisdiction to enforce the orders by proceedings in execution before itself or to authorize the official liquidator to apply to the various District Courts in respect of each of the persons against whom orders for con-

tribution had been passed according to the balance of convenience in each case. AIR (Vol 6) 1919 All 25 : 1 UPLR (HC) 182 : 54 Ind Cas 384 (DB).

——S. 166.

——S. 166 — **Winding up order — Right of creditor.**

Per Chatterjee, J. :—A winding up petition is a legitimate method of enforcing payment of a just debt. A petitioning creditor who cannot get paid a sum presently payable has, as against the company, a right ex debito justitiae to a winding up order. It is a mode of execution which the Court gives to a creditor when the company is unable to pay its debts. It is also settled law that a petition for winding up with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed. Non-payment of a disputed debt is no proof of insolvency. The right of a creditor to a winding up order is, however, not his individual right but a representative right. (1950) 54 CWN 514 (DB).

——S. 166 — **Petition for winding up by judgment-creditor — Power of Court to go into validity of judgment-debt.**

Upon the hearing of a winding-up petition presented by a judgment-creditor the Court is entitled in a proper case to go into the question whether the judgment-debt is a good and valid debt which entitles the petitioning creditor to a winding-up order. (1950) 54 CWN 514 (DB).

——Ss. 166 and 3 — Application by Government for winding up of company based on arrears of income-tax due by it — Jurisdiction of High Court — Quantum of tax disputed by company — Appeals against orders of assessment pending — Proper order to be passed on application. See (1950) 54 CWN 514 (DB).

——S. 166 — **Locus standi to apply — Fully paid up share-holder.**

If a person who holds fully paid up shares presents a petition for winding up of a company, as a contributory, he must allege and prove, at least to the extent of a prima facie case, that there are assets of such amount that in the winding up he will have a tangible interest. AIR (Vol 3) 1950 EP 328 : 1950 Comp C 246 : 52 PLR 415.

——S. 166 — **Application for winding up — Locus standi to apply — Creditor whose debt not disputed on bona fide grounds.**

A creditor whose debt has not been disputed on any bona fide grounds by the Company which sets up some kind of a counter claim which is of a very nebulous character and about which no evidence is adduced by it, has locus standi to bring an application for winding up of the Company. AIR (Vol 37) 1950 EP 142.

——S. 166 — **Application for winding up — Appointment of provisional liquidator — When to be made — Grounds for such appointment — Prima facie case for winding-up and serious allegations against company — Sufficiency.**

The fact that very serious allegations are made against a company in an application for winding up the company would not by itself be any justification for the Court to appoint a provisional liquidator. It cannot be held as a matter of law that all that is necessary for an order appointing a provisional liquidator is to show and satisfy the Court that a prima facie case for winding up exists. A more detailed enquiry is necessary before the Court can decide the matter and come to a conclusion on the point. AIR (Vol 36) 1949 Lah 9 : (1947) Comp Cas 210.

——S. 166, **First Proviso — Scope — Contributory — Failure to pay further call — If bar to petition for winding up.**

A contributory's failure to pay a further call cannot, by itself, debar him from maintaining a petition for winding up a company. The first proviso to S. 166 of the Companies Act definitely specifies the conditions which would disqualify a contributory from maintaining such a petition, and the failure to pay a call is not one of those conditions. A contributory's petition for winding up cannot therefore be held to be not maintainable merely because the petitioner has not paid a further call. AIR (Vol 36) 1949 Lah 9 : (1947) Comp Cas 210.

——S. 166 — **Winding up — Petitioner holding small number of shares — Main considerations in winding up.**

The mere fact that the petitioner only holds five shares out of a total if 1696 shares should not by itself prevent the Court from making a winding up. But in coming to the conclusion whether the Court should wind up the company or not, the main consideration is the interests of both the share-holders and the creditors, and the fact that the overwhelming majority of the share-holders are opposing the petition and a large number of the creditors are also doing the same and the rest are taking no part is a fact which must bear with the Court in coming to its decision. AIR (Vol 29) 1942 Bom 231 : 44 Bom LR 387 : 203 Ind Cas 116.

——S. 166 — **Petition for winding up — Decision as to probable success of company.**

In a petition for winding up a company, the Court will refuse to give decision as to the probable success or non-success of the company as a commercial speculation. AIR (Vol 29) 1942 Bom 231 : 44 Bom LR 387 : 203 Ind Cas 116.

——S. 166 — **Petition for winding up — Contents.**

The petitioner applying for the winding up of the company has got to make out a case for winding up on the petition and he cannot be allowed to fish out case by cross-examination of the deponents of the company who have made affidavits or by inspection of the accounts of the company. AIR (Vol 29) 1942 Bom 231 : 44 Bom LR 387 : 203 Ind Cas 116.

——Ss. 166, 162 — **Petition for winding up — Shareholder alleging gross mismanagement on part of exmanaging director — Directors already appointing auditors to investigate matter — Winding up petition, stay of, till completion of audit.**

One of the share-holders of a company filed a petition for winding up of the company alleging gross mismanagement on the part of the ex-managing director. The directors of a company stated that they had already appointed Registered Auditors to investigate into the management and affairs of the ex-managing director. The petitioner knowing that the petition as it stood must fail, applied that his petition for winding up should be allowed to stand over till the investigation by the auditors was complete.

Held, that the petition for winding up could not be allowed to stand over as prayed for. The petitioner must succeed or fail on the petition as it stood on the date of its filing on the materials adduced before the Court. If after the auditors had made their report, the company and the directors failed to take necessary steps if any steps were called for, it would always be competent to the petitioner to present a fresh petition on such materials as he might have succeeded in gathering by that time. AIR (Vol 29) 1942 Bom 231 : 44 Bom LR 387 : 203 Ind Cas 116.

——S. 166 — **Share-holder's petition — Duty of Court.**

A share-holder applying for winding up of a company is under no disability as compared with

a contributory, nor is he under any obligation, to satisfy the Court that on a winding up, there would be surplus assets. But a share-holder's petition must be scrutinized much more carefully than a contributory's. AIR (Vol 29) 1942 Bom 231 : 44 Bom LR 387 : 203 Ind Cas 116.

——**S. 166 — Duty of Court — Winding up — Special rule to be observed by Court exercising discretion in winding up stated.**

There is a special rule that the Courts have laid down in exercising their discretion in winding up a company on the petition of a share-holder. The Court constantly bears in mind that the internal management of the company is its own concern, and it is a much better judge of business prospects of a trading venture than the Court can ever hope to be. If, therefore, the majority of the share-holders show confidence in the management of the company and have faith in its future prospects, the Court will rarely interfere. AIR (Vol 29) 1942 Bom 231 : 44 Bom LR 387 : 203 Ind Cas 116.

——**S. 166 — Person holding power-of-attorney from executor of deceased share-holder — Such person's name entered in share ledger — Competency to apply for winding up as contributory.**

A person holding a power-of-attorney from executor appointed under the will of a deceased share-holder who has obtained letters of administration to the estate of the deceased and has since been elected director, represents the legal estate in the shares forming part of the assets of the deceased and as such must be regarded as a contributory in winding up, and he can file an application for winding-up of the company. A note made in the share ledger in the name of the deceased to the effect that the applicant was the administrator under letters of administration, constitutes sufficient compliance with the condition about the share being registered in his name. AIR (Vol 24) 1937 Oudh 377 : 1937 OWN (CC) 627 : 168 Ind Cas 185.

——**S. 166 — Application for liquidation — Costs.**

Creditor's application for winding-up and his insisting upon further proceedings in liquidation not bona fide — He can be ordered to pay costs under S. 35 read with S. 141, Civil P. C., in the absence of provision in the Companies Act. AIR (Vol 21) 1934 Lah 746 : 37 PLR 360 : 155 Ind Cas 852 (DB).

——**S. 166 — (S. 131 of 1882 Act) — Application for winding up by depositor — Joining of other creditors and contributories — Withdrawal of original application by depositor, effect of — Non-verification.**

Where a depositor in a company applies under S. 131 of the Companies Act 1882 for the winding up of the company and subsequently other creditors and contributories were also allowed to join in the application the withdrawal of the original application by the depositor will not operate to extinguish the application altogether, i.e., so far as the others who subsequently joined are concerned, even though they had omitted to verify their petitions. (1903) 31 Cal 106 (110) (DB).

——**S. 168.**

——**Ss. 168 and 227 (2) — Winding-up order — Effect of — Contracts of company — Validity.**

Once the winding-up order was made, the company becomes as from the date of the petition incapable of entering into contracts without the sanction of the Court. Gosling v. Gaskell, (1897) A. C. 575 (H L), followed.

The effect of a winding-up order is to avoid all dispositions of property between the date of petition and the date of the order. It equally avoids payments made by the company. S. 227 (2) does not in terms apply to a contract for purchase of goods which, if made honestly and in the ordinary course of business, may be sanctioned by the Court. AIR (Vol 17) 1930 Mad 1012 : 59 MLJ 826.

——**S. 168 — Petition by creditors for winding-up — Voluntary liquidation.**

Where a company went into voluntary liquidation during the pendency of a petition by the creditors for winding up the liquidators appointed by the company Pendante Lite cannot contest the order directing the compulsory winding up, in pursuance of the petition. AIR (Vol 1) 1914 Lah 36 : 73 PR 1914 : 279 PLR 1914 : 25 Ind Cas 553 (DB).

——**S. 169.**

——**S. 169 — Winding up order passed — Power of Court to issue injunction.**

After a winding up order has been made, the Court has no power to issue an injunction under S. 169, Companies Act. AIR (Vol 37) 1950 EP 210 : 1950-18 ITR 951.

——**S. 169 — Voluntary liquidation.**

Under Ss. 207 and 215, read with S. 169, the Court has power, in order to protect the assets of the bank for its other creditors even in cases of voluntary liquidation, to stay the execution of the decree for costs passed against the bank after liquidation, in a suit by the bank prior to its going into liquidation. AIR (Vol 12) 1925 Oudh 630 : 91 Ind Cas 1053 : 28 OC 197 (DB).

——**S. 169 — Review by liquidation judge of his order — Legality.**

A judge conducting the liquidation is not precluded from recalling a wrong order and rectifying a mistake. S. 169 of the Act was not intended to refer to cases in which a judge upon the discovery of fresh matter considers it expedient to pass a fresh order in the place of an order passed by him. AIR (Vol 6) 1919 Lah 255 : 13 PLR 1919 : 51 Ind Cas 723.

——**Ss. 169, 175 — (S. 134 of 1882 Act) — Liquidation inevitable — Company's suspending business — Provisional liquidator — Appointment justifiable.**

Where a company suspended business and is plainly, commercially and technically insolvent, a court is justified in appointing a provisional liquidator under S. 134, Companies Act of 1882. AIR (Vol 1) 1914 Lah 117 : 337 PLR 1913 : 206 PWR 1913 : 31 PR 1914 : 21 Ind Cas 577.

——**S. 171.**

1. **Applicability and scope.**
2. **Distinction between S. 232.**
3. **Leave for suits, necessity.**
4. **Leave for appeal and revision.**
5. **Leave, subsequent to institution of suit.**
6. **Powers of Court.**
7. **Proceedings under S. 145, Cr. P. C.**
8. **Waiver.**

1. Applicability and scope.

——**S. 171 — Leave to sue — Grant of — Secured creditors — Outsiders involved in dispute with company in liquidation.**

Under S. 171, Companies Act, secured creditors are as a matter of course given liberty to proceed with any action for enforcing their securities against a company in liquidation. Liberty to proceed is also often given where outsiders are involved in some dispute with the company, and it is desirable that the dispute should be decided in an action by the

ordinary tribunals. AIR (Vol 38) 1951 Sau 292: 1950 Comp Cas 242.

——Ss. 171, 169 and 232 — "Or other legal proceeding" — Meaning of — Expression is not confined to original proceedings analogous to suit — Expression covers any proceeding by revenue authorities under S. 46 (2), Income-tax Act — Income-tax Department should apply under S. 171 before forwarding requisite certificate under S. 46 (2) to Collector.

The expression "or other legal proceeding" in S. 171 need not, and, therefore, should not, be confined to original proceedings in a Court of first instance analogous to a suit initiated by means of a petition similar to a plaint. Section 171 must be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act.

—The reference of "distress" in S. 232, which appears to be supplementary to S. 171, indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of Law. Moreover the scheme of the application of the company's property in the pari passu satisfaction of its liabilities, envisaged in S. 211 and other sections of the Act, cannot be made to work in co-ordination unless all creditors (except such secured creditors as are outside the winding up) are subjected as to their actions against the property of the company to the control of the Court. Accordingly no narrow construction should be placed upon the words "or other legal proceeding" in S. 171.

The words can and should be held to cover distress and execution proceedings in the ordinary Courts. Such proceedings are other legal proceedings against the company, as contrasted with ordinary suits against the company.

Clearly action under S. 46, Income-tax Act, is not a proceeding in an ordinary Court of Law. But there is no reason why in British India no "legal proceeding" can be taken otherwise than in an ordinary Court of Law, or why a proceeding taken elsewhere than in an ordinary Court of Law, provided it be taken in a manner prescribed by law and in pursuance of law or legal enactment cannot properly be described as a "legal proceeding."

Accordingly the words "other legal proceeding" in S. 171 comprise any proceeding by the Revenue Authorities under S. 46 (2), Income-tax Act, and before forwarding the requisite certificate under S. 46 (2) to the Collector, which would put the machinery for the collection of the arrears of income tax as arrears of land revenue into motion, the Income-tax Department should apply in the liquidation under S. 171 for leave of the winding up Court. AIR (Vol 33) 1946 FC 16: 50 CWN 10: (1946) 9 FLJ 29: (1946) MWN 292: 224 Ind Cas 94.

——S. 171 — "Proceedings", meaning of — Bank puisne mortgagee made party to mortgage suit and execution proceedings — Subsequently bank going into liquidation — Sanction necessary to continue execution against bank.

In a suit to enforce a mortgage, the bank which was a puisne mortgagee was impleaded as a defendant. The bank was also made a party to the execution proceedings. Subsequent to the filing of the execution petition by the decree-holder the bank went into liquidation:

Held, that: (1) the bank was not a mere pro forma defendant to the mortgage suit. As a puisne mortgagee, it was liable to pay the amount due under the mortgage-decree. Hence it could not be said that the bank was not a defendant against whom a relief was granted under the decree so as to render the sanction under S. 171 to continue the execution proceedings against it unnecessary:

(2) the word "proceedings" need not necessarily relate to independent originating proceedings but may also relate to supplemental proceedings and, therefore included execution proceedings. Consequently, the sanction of the Court under S. 171 to continue the execution proceedings taken against the bank after a winding up order had been made and a provisional Liquidator had been appointed, was necessary. AIR (Vol 31) 1944 Mad 84: (1943) 2 MLJ 448: 56 MLW 644: 1943 MWN 702: 215 Ind Cas 271.

——S. 171 — Scope — Winding up order — No bar to proceedings against servant of company.

Under S. 171, when a winding up order has been made no suit or other legal proceedings shall be proceeded with or commenced against the company except by leave of the Court. There is nothing in this section which precludes action being taken against servants of the company. The servants of the company are not the company itself. AIR (Vol 31) 1944 Oudh 147: 19 Luck 385: 1943 OWN (CC) 339: 45 Cr LJ 333: 211 Ind Cas 220.

——S. 171 — Construction.

The words used in S. 171, Companies Act were borrowed from English Law, where they had a recognised legal meaning attached to them, and it should be assumed that the same meaning was assigned to those words by the Companies Act which borrowed the language of the English Statute AIR (Vol 29) 1942 Lah 289: ILR (1942) Lah 517: 204 Ind Cas 74 (FB).

——S. 171 — "Suit" and "action" — Meaning of.

Per Ram Lall, J. — "Suit" and "action" are interchangeable terms so far as procedure in India is concerned. AIR (Vol 29) 1942 Lah 289: ILR (1942) Lah 517: 15 RL 239: 204 Ind Cas 74 (FB).

——S. 171 — "Suit" and "legal proceeding" — Meaning of.

"Suit" in S. 171, means as stated in S. 26, Civil P. C., a proceeding under the Code, which is instituted with the presentation of a plaint in a Court of original jurisdiction.

—The expression 'legal proceeding' in S. 171 is coupled with suit and obviously means proceedings ejusdem generis, that is to say, original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint. It does not include proceedings taken in the course of the suit nor proceedings arising from the suit and continued in a higher Court like an appeal from an interlocutory or final order passed in the suit. AIR (V 28) 1941 Lah 392: 43 PLR 505: ILR (1941) Lah 760: 197 Ind Cas 1 (FB).

——S. 171 — Voluntary liquidation — Stay of execution.

In cases of voluntary liquidation the general practice is to grant an order staying execution and it is only in very special circumstances that the Court will depart from that general practice. (1937) 41 CWN 597: ILR (1937) 1 Cal 632.

——S. 171 — Pending proceedings — Claim against Company — Liquidation — Subsequent termination of liquidation — Company, how to be represented.

Where a limited Company is defendant in a suit, the liquidation of the Company cannot make any difference. The change brought about by the liquidation in regard to the suit is merely that in the conduct of its defence, the Company before liquidation will act through the directors but during liquidation through the Liquidators and after the termination of the liquidation through the directors once more. AIR (Vol 22) 1935 PC 79: 1 BR 463: (1935) MWN 442: 1935 OWN (CC) 599: 7 RPC 181: 1935 AWR (CC) 630: (1935) ALJ 593: 41 MLW 764: 39 CWN 657: 37 PLR 323: 13 Rang 256: 61 CLJ 239: 68 MLJ 725: 37 Bom LR 544: 62 IA 100: 155 Ind Cas 1.

——S. 171 — Voluntary liquidation — Liquidation — Stay of proceedings.

The execution proceedings in a decree-holder's suit against the company had been started before the company went into voluntary liquidation and the voluntary Liquidator's objections also were unsuccessful in the executing and in the Appellate Courts:

Held, that the mere fact that the company went into voluntary liquidation was in itself no bar to the progress of the execution proceedings and the proper course for the voluntary Liquidator to take was to obtain an order of stay of proceedings from High Court before the sale was completed. Having been unsuccessful in the executing Court and also in the Appellate Court, the voluntary Liquidator could not approach the liquidating Court and ask for a declaration that the auction-sale was invalid. AIR (Vol 22) 1935 Lah 991.

——S. 171 — Secured creditor.

No secured creditor need or can be forced to prove his debt, and such a creditor can stand wholly outside the winding up proceedings if he so elects and rely upon his security or his decree if he as obtained one, provided he has obtained leave to proceed from the winding up Judge. AIR (Vol 16) 1929 All 353: 119 Ind Cas 273: 1929 ALJ 811: 51 All 695 (FB).

——S. 171 — Applicability.

Section 171 applies to liquidation under Court's supervision as well as to liquidation by the Court. AIR (Vol 15) 1928 All 165: 109 Ind Cas 22: 50 All 419: 26 ALJ 131.

——S. 171 — Limitation.

The liquidator of a company which is in liquidation being a trustee for the creditors, time to recover a debt due from the company does not run after an order or resolution for winding up. The date for testing the liability is the commencement of the winding up. AIR (Vol 14) 1927 All 161 : 101 Ind Cas 224 : 25 ALJ 277 : 49 All 520 (FB).

——S. 171 — Crown's prerogative.

The effect of S. 171 is not to restrict any of the rights to recover debts due to the Crown which the Crown may possess in virtue of its prerogative. AIR (Vol 13) 1926 Cal 781: 96 Ind Cas 37: 53 Cal 328.

——S. 171 — S. 130.

A court only, or, with its leave, others, can institute suits or applications under the Act to wind up a company's business. The principal court with original civil jurisdiction at the company's business place, is the court to deal with the matter. AIR (Vol 7) 1920 All 257: 18 ALJ 296: 2 UPLR All 82: 58 Ind Cas 607.

2. Distinction between Section 232.

——Ss. 171, 230 and 232 and Income-tax Act (XI of 1922), S. 46 — Assessment made after winding up order — Competency of Income-tax Department to proceed under S. 46 of the Income-tax Act for its recovery without leave under S. 171 of the Companies Act — Crown debts — Preference in the winding up —"Other legal proceeding" in S. 171—Meaning of — Government of India Act (1935), S. 226 (1) — Interpretation — Exclusion of jurisdiction of High Court — Principle governing.

An order for assessment of income-tax of a company was made on 25th February, 1943 for the year of assessment 1941-42 and the tax was fixed at a particular amount. But in the meanwhile, the company had been ordered to be wound up a very considerable time before the assessment was made. The income-tax authorities decided to adopt the procedure provided by S. 46 of the Income-tax Act and forwarded a recovery certificate under sub-S. (2) of S. 46 to the Collector who in turn made a demand for the recovery of the amount assessed as arrears of land revenue. On an application by the liquidators of the company under Ss. 171, 228 and 233 of the Companies Act, it was directed that under S. 169 of the Act, the income-tax authorities should be restrained from proceeding without leave of the Court with the subsisting proceedings. It was in effect held that the Crown was not entitled to any priority or preference, that leave of the Court under S. 171 of the Companies Act was required prior to taking steps to put into action the machinery of S. 46 of the Income-tax Act and that the High Court was free to deal with this matter and its jurisdiction was not in any way affected by S. 226 of the Constitution Act. On appeal.

Held, in S. 230 of the Companies Act a modified priority is expressly provided for a certain limited class of Crown debts. The priority expressly so given to Crown debts is not confined solely to Crown debts. The Crown is bound by the provisions of the Indian Companies Act, and is bound in regard to the provisions relating to the liquidation of companies, "to a statutory scheme or administration wherein the prerogative right of the Crown to priority no longer exists."

The Crown is accordingly not entitled to any prerogative priority, or preferential rights or treatment, save those expressly conferred and limited by the Act itself, in particular by S. 230 and sub-S. (2) of S. 232.

The particular arrears of income-tax which the Income-tax authorities had endeavoured to collect through the machinery of S. 46 of the Income-tax Act do not come within the prescribed class of taxes for which the Crown can claim even the limited priority given by S. 230 of the Companies Act. In respect of them, the Crown ranks as an ordinary unsecured creditor. S. 171 of the Companies Act must be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act. No narrow construction should be placed upon the expression "or other legal proceeding" in that section.

It need not and therefore should not be confined to "original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to plaint". The words can and should be held to cover distress and execution proceedings in the ordinary Courts. Accordingly the words "other legal proceeding" in S. 171 comprise any proceeding by the revenue authorities under S. 46 (2) of the Income Tax Act and before forwarding the requisite certificate under S. 46 (2) to the Collector, which would

put the machinery for the collection of the arrears of income-tax as arrears of land revenue into motion, the Income-tax authorities should have applied in the liquidation under S. 171 of the Companies Act for leave of the winding up Court. S. 226 of the Constitution Act applies to the jurisdiction conferred on the Allahabad High Court by the Companies Act.

In the circumstances, by reason of the making out and forwarding to the Collector of a certificate in the form and manner prescribed by S. 46 (2) of the Income-tax Act, thereby putting into operation the machinery of S. 46 for the collection of the arrears of income-tax in question as arrears of land revenue, an act was done in the collection of revenue, and in granting the injunction the High Court was exercising original jurisdiction in a matter concerning an act done in the collection of the revenue.

The last words of sub-s. (1) of S. 226 "according to the usage and practice of the country or the law for the time being in force" can only qualify the words immediately preceding "concerning an act done or ordered in the collection thereof." In the circumstances, it cannot be said that at the stage when the procedure unauthorised by law was in fact put in force, the officials concerned were not acting bona fide or were acting absurdly.

Accordingly it must be held that S. 226 (1) of the Constitution Act applies to the case, & that in granting the injunction appealed against the High Court was purporting to exercise original jurisdiction concerning an act ordered or done in the collection of the revenue bona fide & not absurdly believed to be according to the law for the time being in force, and that by reason of S. 226 (1) and the decision in Spooner v. Jadow, (1850) 4 MIA 353, the High Court had no jurisdiction in the matter and their order was ultra vires and void. Anomalies in S. 226 commented upon. 224 Ind Cas 94: 81 CLJ 41: 12 BR 536: 48 Bom LR 482: 1946 Comp Cas 71: 1946 ITR 248: 1946 MWN 292: 50 CWN (FR) 10: (1946) FLJ 29: AIR (Vol 33) 1946 FC 16: ILR (1946) Kar (FC) 7: (1946) 1 MLJ 415 (FB).

——**Ss. 171, 232 (2) — Bihar and Orissa State Aid to Industries Act, S. 15 — Industrial loan—Guarantee for over-drafts — Failure to pay — Government, whether entitled to recover before payment to Bank — Government claim whether entitled to priority in winding-up — Necessity of leave to proceed with execution — Leave cannot be granted so as to give undue priority.**

Section 15, Bihar and Orissa State Aid to Industries Act, 1923, merely puts the Govt. into the position that it should be able to recover the amount paid by it under a guarantee in the same way as it might recover the amount of a loan but it does not have the effect of giving the Government power to recover the amount of guaranteed over-draft from the principal debtor unless the Government has been obliged to fulfil the terms of its guarantee.

The fact that the Government endorses a promissory note payable on demand executed by a company in its favour to the Bank does not amount to a payment of debt to the bank.

There is no exception to S. 171, Companies Act, and the leave of the Court is essential for the purpose of proceeding to execution even in case of decree obtained by the Government.

A judgment obtained by the Government in a certificate proceeding under the Bihar and Orissa State Aid to Industries Act has no priority over other debts and it was not the intention of the Legislature that the Court should be given discretion to permit proceedings which would have the effect of giving to any particular creditor a priority to which he is not otherwise entitled and which would have the effect of absorbing all the available assets. There may, however, be exceptional cases in which the discretion undoubtedly given to the Court may be wisely exercised. AIR (Vol 19) 1932 Pat 1: 134 Ind Cas 429 (DB).

3. Leave for suits, necessity.

——**S. 171 — Company in winding up attaching property in execution of decree in its favour — Claim petition by third party — If other "legal proceeding" for proceeding with which leave of Court is essential.**

When a company in winding up attaches certain property in execution of a decree in its favour as that of its judgment-debtor any claim petition by a third party cannot be regarded as "other legal proceeding" within the meaning of S. 171 of the Companies Act. Hence such claim petition can be proceeded with against the company without leave of the Court.

It will be more inequitable that a company in liquidation should institute execution proceedings and rely upon S. 171, Companies Act, to debar persons from defending their property in those execution proceedings. 1950 MWN 623: 63 LW 852: 1950 Comp Cas 156: (1950) 2 MLJ 450: AIR (Vol 38) 1951 Mad 348.

——**S. 171 — Custodian taking possession of evacuee property — Leave of Court — If necessary — Administration of Evacuee Property Ordinance, 1949.**

The action of the custodian in taking possession of the evacuee property under the Administration of Evacuee Property Ordinance is a purely executive act, and it cannot be termed as legal proceedings within the meaning of the phrase as used in S. 171, Companies Act. Leave of the Court is, therefore, not necessary. 52 PLR 185: AIR (Vol 37) 1950 EP 204: 1950 Comp Cas 141 (DB).

——**S. 171 — Applicability — Prosecution of directors for contravention of Ss. 32 and 134 — Subsequent liquidation proceedings — Leave of Court — Necessity.**

The fact that after a prosecution has been instituted against the directors of a company for breach of the provisions of Ss. 32 and 134 of the Companies Act, the company has gone into liquidation, does not render the leave of the Court necessary under S. 171 of the Act. S. 171 would not operate as a bar to the prosecution in such cases. 1947 Comp Cas 93: 229 Ind Cas 109: AIR (Vol 35) 1948 Cal 42: 48 Cr LJ 236.

——**S. 171 — Applicability — Sale in execution proceedings started by company in liquidation as decree-holder — Application by auction-purchaser to set it aside — Leave of Court, if necessary.**

Section 171 of the Companies Act does not apply to appeals or applications by unsuccessful parties to a litigation brought by a company.

An application by an auction-purchaser at a sale held in execution proceedings started by a company in liquidation as decree-holder, to set aside that sale on the ground that the judgment-debtor had no saleable interest in the property, is a defensive application which does not require any leave of the Court such as is contemplated by S. 171 of the Act. AIR

(Vol 35) 1948 Pat 398: 1948 Comp Cas 279: 26 Pat 470 (DB).

——S. 171 — Suit under O. 21, R. 63, Civil P. C., against company in liquidation, if suit within S. 171 — Sanction of Court which ordered winding up, if essential.

A suit under O. 21, R. 63 against a company in liquidation being a suit within the meaning of S. 171, Companies Act, cannot be commenced without the leave of the Court which had ordered the winding up. AIR (Vol 28)1941 Lah 392: 43 PLR 505: ILR (1941) Lah 760: 197 Ind Cas 1 (FB).

——S. 171 — Action by company — Defendant wanting to take defensive proceedings — Leave, if necessary.

When an action by the company itself has been proceeded with there is no necessity for the defendants, in the action, to obtain leave for any defensive proceeding on their behalf, since the defendants cannot be said to proceed with or commence any legal proceedings against the company. AIR (Vol 24) 1937 Lah 926: 176 Ind Cas 206 (DB).

——S. 171 — Crown debts — Priority to recover — Prerogative of Crown.

The Crown is bound by the Companies Act and S. 171, restricts any rights to recover debts due to it which the Crown might possess in virtue of its prerogative. AIR (Vol 19) 1932 Cal 430: 59 Cal 327: 137 Ind Cas 870.

——S. 171 — There is no exception to S. 171, Companies Act, and the leave of the Court is essential for the purpose of proceeding to execution even in case of decree obtained by the Government. AIR (Vol 19) 1932 Pat 1: 134 Ind Cas 429 (DB).

——S. 171 Allegations of fraud.

The practice is that a heavy contested money claim against the company and its agents where the allegations are that the large debt in question was really a personal debt of the agents which they fraudulently attempted to foist on to the company and that the company are in no wise liable for that debt is usually, if not invariably, left to be decided by a suit in the ordinary way. AIR (Vol 14) 1927 Bom 167: 101 Ind Cas 144: 29 Bom LR 253 (DB).

——S. 171 — Leave under — Meaning of C. P. C., S. 47.

Leave under S. 171 of Companies Act means leave by the winding up Court and when once given includes all subsidiary legal proceedings. An application by a transferee of a decree against a company since gone into liquidation, for substitution of his name as decree-holder, must be made under S. 47 (3) C. P. C., to the executing court and not to the winding-up Court. AIR (Vol 6) 1919 All 337: 41 All 432: 17 ALJ 464: 50 Ind Cas 115 (DB).

——S. 171 — S. 136 — Unsuccessful claimants — Suit — C. P. Code O. 21, R. 63.

A suit by unsuccessful claimants against a company in liquidation must commence after obtaining leave of the liquidation judge. AIR (Vol 6) 1919 Lah 200: 4 PWR 1919: 31 PLR 1919: 70 PR 1919: 50 Ind Cas 645 (DB).

——S. 171 — Suit — Against liquidators after winding-up order.

After a Court's order for winding-up a Bank, no suit can be brought against the voluntary and official liquidators without leave of the Court conducting liquidation proceedings, under S. 171 of the Act which applies to such a case. AIR (Vol 14) 1917 Oudh 322: 3 OLJ 641: 37 Ind Cas 427.

4. Leave for appeal and revision.

——S. 171 — Appeal against decree in favour of Bank filed within time — Bank going into liquidation before filing of appeal — Application for leave to continue appeal, one to "commence" and not to "continue."

An appeal is a proceeding within S. 171, and it is not valid and effective if it is without leave under S. 171. Where an appeal against a decree in favour of a Bank is filed within time but before the filing of the appeal, the Bank had gone into liquidation, an application under S. 171 to continue the appeal which was not valid and effective being without leave, must be taken to be one to "commence" and not "continue" the appeal. AIR (Vol 28) 1941 All 335: (1941) ALJ 385: 1941 OWN (HC) 838: 1941 AWR (HC) 237: 1941 RD 557: ILR (1941) 565: 196 Ind Cas 274.

——S. 171 — Appeal time-barred — Leave to "commence" appeal should not be given.

Leave under S. 171 to commence an appeal after the expiry of limitation should not be granted inasmuch as such leave cannot have the effect of reconstituting the appeal as valid appeal. AIR (Vol 28) 1941 All 325: (1941) ALJ 385: 1941 OWN (HC) 237: 1941 RD 557: ILR (1941) All 565: 196 Ind Cas 274.

——S. 171 — Decree in favour of company — Appeal by judgment-debtor — Company wound up — Leave of Court, necessary.

Where a decree has been passed in favour of a company and the judgment-debtor has appealed from the decree and goes on with his appeal at the date of the winding up of the company, he should be regarded as proceeding with legal proceedings against the company and this he cannot do without the leave of the Court. AIR (Vol 28) 1941 All 154: (1941) ALJ 23: 1941 OWN (HC) 200: 1941 AWR (HC) 1: ILR (1941) All 175: 194 Ind Cas 57.

—S. 171 — Scope — Appeal or revision arising out of action by company — Leave.

An appeal or an application for revision arising out of an action brought by a company does not come within the purview of S. 171, and such appeal or application can be instituted, or proceeded with, without the leave of the Liquidation Court. AIR (Vol 25) 1938 Lah 754: 41 PLR 91: 179 Ind Cas 376.

——S. 171 — Original proceedings began by company — Subsequent appeals or revision — Leave not necessary.

Where the original proceedings have been begun by a company, as the plaintiff and decree-holder, no permission of the liquidating Court is necessary for appeals or revisions which may be presented by the unsuccessful defendants or judgment-debtors against orders passed in the proceedings. AIR (Vol 23) 1936 Pesh 97: 162 Ind Cas 416.

——S. 171 — Appeal suit brought by Company — Leave of liquidating Court — Necessity.

An appeal or application brought by a company does not come within S. 171 of the Act and can be instituted or proceeded with, without the leave of the Court. 91 PR 1916, diss. AIR (V 5) 1918 Lah 181: 62 PR 1918: 32 PLR 1918: 186 PWR 1918: 47 Ind Cas 392 (FB).

——Ss. 171, 175 — (Ss. 136 and 141 of 1882 Act) — Company, winding-up order — Effect — Discharge of servants of company — Appeal against order appointing Official Liquidator — Managing Director, if can appeal on company's behalf.

A Director of a company cannot institute proceedings for the company after a winding-up order has been made. Managing Director of a Company which has been wound up cannot appeal against an order appointing an Official Liquidator and an order order refusing re-hearing of the appointment proceedings. AIR (Vol 4) 1917 Mad 260: 40 Mad 706: (1916) 2 MWN 250: 4 LW 226: 36 Ind Cas 617.

——S. 171 — S. 136 — Revision against decree in favour of a bank which became insolvent pending revision — Leave of Court.

The People's Bank of India, Ltd., sued the petitioner for a certain sum due to the company and obtained a decree which was confirmed on appeal. Petitioner then filed a revision in the Chief Court. Pending determination of his petition the bank became insolvent, and the District Judge passed a winding up order. Held, that the revision proceeding against the decree was a proceeding against the 'company' as under S. 136 Court's leave must be obtained. AIR (Vol 2) 1915 Lah 24: 91 PR (1916): 80 PLR 1917: 36 Ind Cas 618 (DB).

5. Leave, subsequent to institution of suit.

——Ss. 171, 229 — Application for leave to proceed with suit or other proceedings — Winding up Judge, if can adjudicate upon question of title.

On an application under S. 171, the winding up Judge has power to adjudicate upon a question of title raised by an unsecured creditor whose claim is disputed by the Official Liquidator, the question being expressly covered by S. 229. AIR (Vol 29) 1942 Oudh 417 : 1942 OWN (CC) 319 : 18 Luck 110 : 200 Ind Cas 485 (DB).

——S. 171 — Winding up order — Subsequent suit without leave — Jurisdiction of Court to grant leave to continue suit — Jurisdiction of Court to dismiss suit on application for leave.

Under S. 171, leave to proceed with a pending legal proceeding can only be granted where that proceeding has been instituted prior to the winding up order. The Court has no jurisdiction to give the plaintiff leave to continue a suit instituted without leave subsequent to the winding up order. The Court has inherent jurisdiction to dismiss a suit on an interlocutory application for leave to continue the suit. AIR (Vol 27) 1940 Cal 166 : ILR (1939) 2 Cal 425 : 187 Ind Cas 880.

——S. 171 — Suit instituted without leave — Leave applied for before but granted after limitation — Dismissal improper.

A suit instituted against a company in liquidation without leave under S. 171, should not be dismissed on that ground alone. Where a plaintiff institutes a suit against a company in liquidation without the leave of the Court and subsequently applies for such leave within the period of limitation of the suit and the leave is granted only after the period of limitation has expired, the suit should not be dismissed and the limitation should be calculated in the same way as if the suit had originally been instituted with leave. AIR (Vol 29) 1942 Lah 289 : ILR (1942) Lah 517 : 204 Ind Cas 74 (FB). (Overrules AIR (Vol 23) 1936 Lah 401 : 38 PLR 1104: 164 Ind Cas 136.)

——S. 171 — Leave pending suit.

When leave has been granted pending the suit, the leave is not be treated as a nullity and the suit cannot be dismissed on the ground that before it commenced no leave had been obtained. 124 Ind Cas 28 : 1930 ALJ 373 : AIR (V 17) 1930 All 503 (DB).

——S. 171 — Liquidation — Leave to continue suit against company.

Under S. 171 of the Companies Act, leave to continue an action should as a general rule be given only where some question arises which cannot satisfactorily be determined in the winding-up proceedings. 93 PR 1918 : 101 PLR 1918 : 170 PWR 1918 : 47 Ind Cas 1005 : AIR (V 5) 1918 Lah 364.

6. Powers of court.

——S. 171 — Suit instituted against company in liquidation without leave — Jurisdiction of Court to grant leave to proceed with suit.

A suit instituted against a company in liquidation without leave under S. 171 of the Companies Act should not be dismissed on that ground alone. The Court has jurisdiction to give leave to proceed with a suit or other legal proceeding against a company in liquidation, even though such leave was not obtained before its commencement. (1950) 54 CWN 832 (DB).

——S. 171 — Creditor not required to prove claim against liquidated company — Subsequently allowed to prove by suit — No suit filed within time granted — Application to have his claim proved in liquidation proceeding on basis of subsquent decision should be dismissed.

A creditor of a company in liquidation was required by the Official Liquidator to prove his claim and the Court decided that it would not enter into an adjudication of the matter in liquidation and directed the creditor to take such step as he deemed necessary to enforce the claim. This he failed to do within the time granted. He was also allowed further time. Eventually he asked to be allowed to prove his claim by a suit and this application was granted on terms which were not fulfilled in time and the Court refused to grant any further extension. No appeal was filed against this order and so no suit was filed. The creditor relying on a later decision (reported in 193 Ind Cas 818) applied again to the Court to have his claim inquired into and adjudicated in the liquidation proceedings itself. The Court dismissed it on the ground that it did not lie, because the creditor had failed to prove the claim within the time allowed :

Held, in appeal, that the suit not having been filed within the time allowed by the Court and the Court having refused to grant a further extension which order had become final, the order amounted to a dismissal of the claim.

If the creditor had at the beginning insisted on the Court adjudicating on his claim without recourse to a suit, the case might have fallen within the judgment (193 Ind Cas 818) but he preferred to have his claim decided in a suit and it was far too late in the day to allow him to turn round and ask the Court to change the procedure which he himself had considered to be proper. AIR (Vol 28) 1941 Mad 855 : 54 MLW 275 : (1941) 2 MLJ 417 : 200 Ind Cas 603 (DB).

——S. 171 — Secured creditor's rights.

Under S. 171 the Court has a wide discretion in the matter. But in the exercise of this discretion, the Court cannot act arbitrarily or capriciously.

A person claiming to be secured creditor cannot be enforced to prove his debt in liquidation, but he can stand outside the winding up proceedings, and rely upon his security, for whatever it is worth. When such a person asks for leave to sue, the prayer should ordinarily be granted, unless there are special grounds to support the contrary course. AIR (Vol 19) 1932 Lah 475 : 33 PLR 555 : 139 Ind Cas 504 (DB).

——S. 171 — Objection to leave.

No Court except the appellate Court can object or question grant or withholding of leave under S. 171 by Company Judge. 124 Ind Cas 28 : 1930 ALJ 373 : AIR (Vol 17) 1930 All 503 (DB).

——S. 171 — Leave when granted.

Leave can be refused absolutely — Winding up Judge, however, cannot annual secured creditor's security or decree — Except in exceptional cases leave should be refused only for such time as would be necessary to make up his mind either one way or other. 119 Ind Cas 273 : 51 All 695 : 1929 ALJ 811 : AIR (Vol 16) 1929 All 353 (FB).

——S. 171 — Unsecured creditor.

An unsecured creditor cannot be turned into a secured creditor after winding up by granting him specific performance of an agreement to create a charge. A rigid line is drawn at the winding-up and creditors should not be allowed to change their position after that date. 101 Ind Cas 144 : 29 Bom. LR 253 : AIR (Vol 14) 1927 Bom. 167 (DB).

——S. 171 — Stay of previously permitted suits — Principle explained.

Where sale of the property by the winding up Court was a proceeding, which was carried out for the sake of convenience and with the object of getting the property sold at a time and in a place where a good price might be obtained for it and it was not intended that secured creditors should thereby be debarred from enforcing their rights in the usual way if they were so advised.

Held, that suits which such secured creditors had previously been granted leave to prosecute should not be stayed pending the adjudication on priority among the creditors by the winding up Court.

Per Buckland, J. — The argument that the Court has no power to recall leave once granted or that the machinery at the disposal of the Judge in the winding up would be inadequate to enable him to decide the questions which may arise in the mortgage suits should they come before him is not impressive. 88 Ind Cas 754 : 29 CWN 715 : AIR (Vol 12) 1925 Cal. 916 (DB).

——Ss. 171, 225 — Permission to institute suit against company after winding-up — Interference by Appellate Court.

An order giving permission to continue a suit against a company, after the winding-up order has been made, does not amount to a permission to institute the suit. Unless the lower court's order is altogether wrong, its discretion in permitting an action to be continued against a company which is being wound up will not generally be disturbed by the Appellate Court. 13 PR (1917) : 29 PLR (1917) : 37 Ind Cas 791 : AIR (Vol 14) 1917 Lah 391.

——S. 171 — (S. 136 of 1882 Act) — Attaching decree-holder of decree against company in liquidation.

It will not be equitable for courts to prevent a decree-holder who has attached a decree obtained by his jugment-debtor against a company from executing the decree against the company, without securing that his rights are respected in liquidation. The attaching dercee-holder is entitled to step into the shoes of his judgment-debtor in liquidation proceedings. (1907) 30 M 533 (534, 535) (DB).

——Ss. 171 and 203 — (Ss. 136, 177 of 1882 Act) — Stay of Suits, effect of — Set-off — Liquidation — Injunction by court against creditors to restrain from suing — Suit by company — Set-off.

A company went into voluntary liquidation. At the time there was a debt due to it by the defendant which it had advanced on the security of a deposit by the defendant with the company falling due at some time after the date of liquidation. After the liquidation, an injunction was issued by the High Court restraining all creditors from suing the company.

Held, in an action brought by the liquidators against the defendant for the recovery of the debt, that the defendant was entitled to a set-off of the amount of his deposit against the sum claimed, irrespective of the injunction order.—Reference under the Presidency Small Cause Courts Act, S. 69. (1905) 28 M. 240 (243).

7. Proceedings under S. 145 Cr. P. C.

——S. 171 — — Applicability — Conditions — Criminal proceedings against manager of bank in respect of alleged criminal acts as manager—Subsequent winding up order and appointment of liquidator — Effect on proceedings.

In order to invoke the operation of S. 171, Companies Act, as a bar to the continuance of proceedings in Court, there must be pending in Court proceedings against the company in respect of which a winding up order has been made and a liquidator appointed.

Where criminal proceedings are instituted against the manager of a Banking Company in respect of certain acts of his as manager thereof alleged to be criminal, the proceedings so pending cannot be regarded as proceedings against the bank or company itself, so as to make S. 171 applicable to the case. 1940 Comp. C. 46 : AIR (Vol 36) 1949 Cal. 689.

——S. 171 — Criminal Procedure Code, S. 145 — Proceedings against Liquidator under S. 145 — Necessity of leave of Court.

Section 171 does not prohibit a Magistrate from drawing up proceedings under S. 145, Criminal P. C., against the Liquidator of a company, without obtaining the leave of the Court especially where the Liquidator is also responsible for the proceedings being initiated. AIR (Vol 20) 1933 Cal 433 (2) : 34 Cr LJ 640 (2) : 37 CWN 932 : 143 Ind Cas 795.

8. Waiver.

——S. 171 — Waiving of bar.

There is no authority for holding that the liquidators can waive the bar created by S. 171 in such a way as to require them to admit a claim under decree rendered inoperative by that bar. 109 Ind Cas 22 : 50 All 419 : 26 ALJ 131 : AIR (Vol 15) 1928 All 165.

——S. 173.

——S. 173 — Applicability.

Petition for compulsory winding up by creditors — Opposition by other creditors — Petition was stayed to enable Company to sell assets to new company. 88 Ind Cas 138 : 2 Bur. LJ 296 : AIR (Vol 11) 1924 Rang. 108.

——Ss. 173 and 215 — Voluntary winding-up — Order staying proceedings.

Courts in India have the power to make an order for the stay of the proceedings under a voluntary winding-up under S. 215 read with S. 175. The court has to see whether a stay of the proceedings will be conducive or detrimental to commercial morality and to the interest of the public at large. (1903) 2 Ch 174, Foll. Having regard to the fact that the company in question was insolvent and that the resolution of the company to be wound up was passed with a view to the Bank being started after the claims of the creditors had been satisfied, proceedings should be stayed subject to the condition that all the shareholders should be given the option of retiring from the company or continue to be its members. 24 PWR (1919) : 49 Ind Cas 412 : AIR (Vol 6) 1919 Lah 305.

——S. 174.

——S. 174 — **Winding up — Majority of share-holders showing confidence in company's management and faith in its future prospects — Court's interference.**

Subsequent to the filing of a petition for winding up of a company by one of its share-holders, the share-holders at the meeting, unanimously passed a vote of confidence in the board of directors and in their management and expressed satisfaction with the progress of the company. The Counsel who out of a total of 1696 share-holders represented 1246 share-holders who were opposing this petition stated on behalf of his clients that he had every confidence in the present management and future progress of the company :

Held, that the Court would not order the winding up by overriding the considered opinion of the share-holders who were present at the meeting, and of the share-holders who were represented by the Counsel as regards the future prospects of the company in favour of the petitioner who held only five shares. AIR (Vol 29) 1942 Bom. 231 : 44 Bom LR 387 : 203 Ind Cas 116.

——S. 174 — **Scheme — Alteration of scheme passed at meeting —Court's powers.**

When at a meeting of creditors, a scheme has been approved, the Court cannot either at the time of sanction or at any time thereafter, alter the terms of the scheme without consulting those who agreed to it and without their sanction. The Court has no power, either at the time of sanction or at any time thereafter, to expunge any part of the scheme or to modify it any way without consulting those who passed it originally and without obtaining their consent. All that the Court can do is to refuse to sanction the scheme, or possibly to withdraw the sanction which has already been given. The latter, however, would, be a serious step to take unless taken within a very short time after sanction had originally been given. AIR (Vol 24) 1937 Cal. 401 : 172 Ind Cas 717.

——S. 174 — **Scheme sanctioned by one Judge — Another Judge with equal jurisdiction, if can declare it a nullity.**

Where one Judge of the Court has sanctioned a scheme, it is clearly not within the power of another Judge exercising equal jurisdiction to declare in effect that the order sanctioning the scheme is, to the extent that it affects a particular person a nullity. AIR (Vol 24) 1937 Cal 401 : 172 Ind Cas 717.

——S. 174 — **Liquidation — Creditors and share-holders — Necessity if protection in India — Court, whether bound to follow opinion of share-holders and creditors regarding liquidation.**

The rule as generally applied in England, that the opinion of the creditors and share-holders in meeting, regarding the carrying on of the liquidation, should be followed, should not apply so strictly to India. Limited liability companies in India are in their infancy. Share-holders and creditors are easily misled. Fraudulent directors have no difficulty in this country in deceiving share-holders and creditors. While the opinion of share-holders and creditors undoubtedly ought to be taken into consideration, these classes of persons in India at present require to be protected against themselves. Consequently, even though the creditors and share-holders have agreed that the liquidation should be carried on by certain directors who themselves are indebted to the company, the compulsory liquidation by the Court can be ordered where it finds that those directors are not doing their work of collecting debts properly. AIR (Vol 22) 1935 Lah 779 : 38 PLR 166 : 16 Lah 1029 : 158 Ind Cas 816 (SB).

——S. 174 — **Winding up of solvent company — Wishes of contributories.**

In the winding up of a solvent company, the Court as well as the Official Liquidator should have particular regard to the wishes of the contributories in all matters affecting them as a class. AIR (Vol 19) 1932 PC 1 : 61 MLJ 783 : 54 CLJ 439 : 36 CWN 54 : 35 MLW 1: (1932) MWN 171 : 34 Bom. LR 321 : 58 IA 316 : 55 Mad 180 : (1932) ALJ 825 : 136 Ind Cas 114.

——S. 174 — It will be extremely unwise for the Court to determine that a Bank should be closed down by compulsory liquidation in the circumstances obtaining on the date of the petition, before the wishes of the creditors as a whole had been formally ascertained. AIR (Vol 19) 1932 Rang 75 : 10 Rang 143 : 137 Ind Cas 638 (DB).

——S. 174 — **Winding-up by Court — Creditor's petition — Fully paid-up share-holder — Right to appear and to be heard — Refusal to hear — Appeal by company, competency of.**

A fully paid up share-holder is entitled to appear and to be heard upon an application to wind up the company.

But it is entirely improper to allow the company to come in and fight the battle or the grievances of any individual share-holder, and the company is not competent to appeal from a compulsory winding-up order upon the ground that a fully paid up share-holder who was desirious of being heard at the time the winding up order was made, was not heard. AIR (Vol 18) 1931 Cal 391 : 58 Cal 62 : 132 Ind Cas 633 (DB).

——Ss. 174, 202 — **(Ss. 140 and 169 of 1882 Act) — Jurisdiction of Court.**

The court has full discretion in spite of S. 140 in appointing an Official Liquidator while trying a suit to wind up a business. The Appellate Court can interfere in special circumstances. (1911) 5 Bur LT 193 : 17 Ind Cas 853 (856, 857).

——S. 174 — **(Case under 1882 Act) — Liquidation — Scheme of management for paying off its debts and for managing its affairs — Court — Sanction.**

In an application for sanctioning a scheme approved of by a statutory majority of the creditors of a company in liquidation for payment of its debts and management of its affairs in future, the court has to see whether the provisions of the statute have been complied with, whether the majority are acting bonafide, whether they are coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and whether the scheme is a reasonable one. (1910) 12 Bom. LR 525 : 7 Ind Cas 452 (454).

——S. 175.

——S. 175 (2) — **Provisional Liquidator — When may be appointed — Notice to company — Necessity for.**

Where a company is carrying on business in the ordinary course, placing its entire management and conduct in the hands of a Provisional Liquidator it is in effect to put a stop to its business and it is well settled law that before such drastic step can be taken, the Court must be satisfied that it is absolutely necessary to do so. Where there is no opposition to the winding up of the company, a Provisional Liquidator may be appointed as a matter of course.

The words used in S. 175 (2) of the Companies Act are emphatic and are liable to the construction that unless the Court for reasons to be recorded deems it proper to dispense with the notice, no appointment of a Provisional Liquidator can take place before notice is given to the company. 50 PLR 268 : 1948 Comp. C. 274 : AIR (Vol 36) 1940 EP 139 (DB).

——S. 175 — Appointment of provisional liquidator — Circumstances justifying.

Where a company is commercially insolvent and has never paid any dividend on its shares and no interest on the debentures issued and there is no opposition either from the trustee for the debenture-holders or the managing agents of the company, it would be a fit and proper case for the appointment of a provisional liquidator on the application of a creditor of the company who has not been paid his debt in spite of the statutory notice served on the company. An objection by a shareholder on the ground that the company might be successful if it were suitably and properly managed, is not a relevant matter in the consideration of the petition for the appointment of a provisional liquidator. 1948 Comp. C. 8 : 61 LW 237 : AIR (Vol 36) 1949 Mad 107 : 1948 MWN 209 : (1947) 2 MLJ 563.

——S. 175 — Liquidation — Official Liquidator representing company — Position of — Whether bound to call claimants before him and make enquiry.

The Official Liquidator representing a company is in no different position from any one else against whom a stranger or a third party makes a claim. His only duty is to consider and if he thinks it is an admissible claim, to admit it, and if he thinks it an inadmissible claim, to reject it : and accordingly the Official Liquidator is not bound to call on the claimant to appear before him and make enquiry. AIR (Vol 26) 1939 Rang 46 : 180 Ind Cas 69 (DB).

——S. 175 (6) — Winding up — Suit by secured creditor — Appointment of Receiver — Legality — 'Assets', meaning of — Competition between liquidator and Receiver — Preference to liquidator.

Section 175 (6), precludes the appointment of a Receiver at the instance of a secured creditor to oust the possession of the Liquidator. The word 'assests' in the said clause includes property subject to a mortgage or charge.

Where there is a question of competition between a Liquidator and a Receiver appointed by the Court at the instance of the debenture holders or mortgagees the Court will ordinarily, in the exercise of its discretion, give preference to the Liquidator.

Where after the appointment of a Liquidator a Receiver was appointed in a suit instituted by a secured creditor to enforce his mortgage and the creditor applied to the liquidation Court for leave to proceed with the suit and for an order that the Liquidator do make over the properties mortgaged to the Receiver :

Held,, that the application so far as it asked for leave to proceed with the suit could be allowed but should be refused so far it related to possession by the Receiver. AIR (V 19) 1932 Cal 76 : 58 Cal 946 : 133 Ind Cas 186.

——S. 175 — Joint liquidators.

Where two persons are appointed liquidators jointly the refusal of one of them to act renders abortive the resolution appointing them. One of them cannot take up the work alone, it clearly being the intention of the shareholders that they should act jointly and not separately. AIR (V 15) 1928 All 165 : 109 Ind Cas 22 : 50 All 419 : 26 ALJ 131.

——S. 175 — Discretion.

The appointment of a liquidator is a matter purely in the discretion of the trial Court and that decision should not be interfered with except under very special circumstances. AIR (V 15) 1928 Rang 36 : 107 Ind Cas 860 : 5 Rang 685 (DB).

——S. 176.

——S. 176 (1) — Liquidator can resign only on "due cause" shown — "Due cause," meaning of.

The words "on due cause shown" in S. 176 (1) govern the words "may resign or be removed by the Court." The absence of the word "may" before the words "be removed" suggests that the acts of resignation or removal are linked together and subject to the same condition. An Official Receiver can therefore resign only on due cause shown

It is quite unreasonable, that the Official Receiver should be expected to carry on the affairs of the company at his own expense when there is no prospect whatever of recovering the costs from the petitioner who cannot be traced. In such a case, the Liquidator should be allowed to resign as "due cause" is shown. AIR (V 30) 1943 Sind 84: ILR (1942) Kar 501: 206 Ind Cas 360 (DB).

——S. 176 — Liquidator, removal of "Due cause" how to be measured — Removal of Liquidator, propriety of.

The "due cause" in S. 176, is to be measured by reference to the real, substantial, honest interest of the liquidation and to the purpose for which the Liquidator is appointed. Of course, fair play to the Liquidator himself is not to be left out of sight but the measure of due cause is the substantial and real interest of the liquidation.

Where after taking all matters into consideration it appears that it is not in the real substantial and honest interest of the liquidation that the Liquidators should be removed, the Court will not pass orders for their removal even if it is found that they have been negligent in carrying out the specific orders of the Court and the specific rules which have been laid down in the company's rules. (1936) 165 Ind Cas 108: 40 CWN 857.

——S. 176 — Liquidator — grounds for removal.

An Official Liquidator must maintain a position of complete impartiality between all persons involved in the winding up. Where this is not done the Judge in charge of the winding up may remove such Liquidator and appoint in his place a person from whom an attitude of unqualified detachment can be expected. AIR (V 19) 1932 PC 1: 61 MLJ 783: 54 CLJ 439: 36 CWN 54: 35 MLW 1: (1932) MWN 171: 34 Bom LR 321: 58 IA 416: 55 Mad 180: (1932) ALJ 825: 136 Ind Cas 114.

——S. 176 — (S. 142 of 1882 Act) — Official Liquidator — Resignation without leave of liquidating court — Validity — Court's acceptance of resignation — Legality.

An official liquidator cannot resign at will without securing the concurrence of the liquidating court. He cannot resign on caprice or resentment at enquiries regarding the nature of his past operations and if he does so, he is liable to forfeit pay. AIR (V 6) 1919 Lah 182: 51 PR (1919): 53 Ind Cas 649 (DB).

——S. 177.

——Ss. 177 and 177-A — Liability to proceedings under — Voluntary liquidation — Resignation of liquidators — Subsequent liquidation by Court and appointment of new liquidator — Refusal by the former liquidators to submit statement of information required by the new liquidator — S. 177, if applies — Construction of S. 177-A.

The liquidators appointed in a voluntary winding up of a company resigned and the name of the company was removed from the Register. Subsequently a new liquidator was appointed and he got the name of the company restored in the Register. The Court directed that the company should be wound up under the Companies Act and appointed an official liquidator. The latter called upon the liquidators who had resigned under S. 177 (a) if the Companies Act to furnish information which they refused, whereupon they were prosecuted and convicted. On a contention that the provisions of S. 177 could not be availed of.

Held, (1) that though the company was originally wound up voluntarily, at the time the proceedings were taken it was under liquidation by order of Court and hence the provisions of S. 177 of the Act would apply. (2) The words "subject to the direction of Court" in S. 177-A of the Act cannot be taken to indicate that persons who had been officers of the company can be called upon to submit the statement only if there is a direction by the Court to such officers to submit the account. AIR (V 34) 1947 Mad 247: (1946) 2 MLJ 241: 59 LW 527: 1946 MWN 618: 1946 Comp. C. 169: 228 Ind Cas 12: 48 Cr. LJ 14.

——Ss. 177 and 232 — Sale — Assets of a company — After winding up order — Validity.

A sale of the assets of a company after the winding-up order, in execution of decree passed before the order, without permission of court is voidable at the instance of the Liquidator. AIR (V 3) 1916 Pat 47 : 2 Pat LJ 77 : 1 Pat LW 241 : (1917) Pat HCC 315 : 38 Ind Cas 91 (DB).

——S. 177-A.

——S. 177-A — 'Subject to the direction of the Court' — Meaning of.

The words "subject to the direction of the Court' cannot be taken to indicate that the persons who have been the officers of the company can be called upon to submit the statement under S. 177-A (1) only if there is direction by Court to such officers to submit the statement. AIR (V 34) 1947 Mad 247: 1946-2 Mad LJ 241 : 59 MLW 547.

——S. 179.

1. Clause (a).

2. Clause (b).

See also Companies Act S. 212 (1) (b).

3. Clause (c).

4. Clause (f).

5. Clause (g).

6. Clause (i).

1. Clause (a).

——S. 179 — Costs — Successful litigant against Liquidator.

A successful litigant against a company in liquidation is entitled to be paid his full costs in priority over other ordinary creditors except where there are other creditors in the same position as himself when they and he will rank pari passu as regards the funds available for discharge of their debts. AIR (V 29) 1942 Lah 10: 43 PLR 648: ILR (1942) Lah 742: 197 Ind Cas 858.

——S. 179 — Liquidator — Right of audience.

The Liquidator has no right of audience in any proceedings in a suit brought by the company, in the ordinary original jurisdiction of the High Court. (1937) ILR (1937) 2 Cal 173: 41 CWN 424.

——S. 179 — Decree obtained by Bank transferred to another Court for execution — Bank going into liquidation — Decree can be executed by Official Liquidator by an application to the transferee Court, on behalf of the Bank. AIR (V 23) 1936 Lah 152: 161 Ind Cas 662.

——S. 179 — Compulsory winding up — Demand by Liquidator before call by Court — Payment by contributory — Subsequent call by Court it not competent. AIR (V 19) 1932 Cal 691: 36 CWN 409: 59 Cal 1099: 139 Ind Cas 882 (DB).

——S. 179 — Binding in execution — Judge in winding up has no jurisdiction to allow liquidator to bid in execution — He should seek permission of the execution Court.

A Judge in winding up has no jurisdiction to make any order giving the liquidator leave to bid. He can of course give any direction to him to take such legal steps as he desires to take, in accordance with the general provisions of the law, in a matter in which he is a litigant like any other ordinary litigant, but the granting or refusing of permission to bid at a sale is clearly a matter for the execution Court.

But the Judge has power to sanction his applying to the execution Court either in a particular case, or generally in all cases in which he thinks it desirable for leave to bid as a decree-holder under O. 21, R. 72. It is clearly covered by Cl. (a) of S. 179 which deals with the institution of any suit in the name of a company, and Cl. (b) which deals with the carrying on of the business of the company so far as it may be necessary for the winding up. AIR (V 14) 1927 All 681: 103 Ind Cas 293: 25 ALJ 891.

——S. 179 — Suits against contributories.

Cause of action for the liquidator to realize contributions from the contributories arises only on the appointment of the liquidator. AIR (V 13) 1926 All 550 : 95 Ind Cas 927 : 48 All 580 : 24 ALJ 691.

——S. 179 — Litigation without leave — Appeal by liquidator.

Liquidators are officers of the Court and not ordinary litigants at all. A liquidator appointed in winding up by the Court ought not to appeal in any case without the permission of the winding-up Court, and if he does so, he runs considerable risk, in the event of failure, of having to pay the costs out of his own pocket. AIR (V 8) 1921 All 149: 60 Ind Cas 763: 43 All 433: 19 ALJ 262 (DB).

——S. 179 — (S. 144 Old) — Application by vendees.

Application under S. 150 by vendees of a Company as attorneys of the liquidator praying for an order to recover debts and calls due from the contributories which were sold to them, is incompetent inasmuch as in reality it is not made "in the name" and on behalf of the Company. AIR (V 8) 1921 Lah 140 : 59 Ind Cas 588 : 3 LLJ 80 : 24 PLR 1921 (DB).

2. Clause (b).

See also Companies Act S. 212 (1) (b).

——Ss. 179 and 207 — Liquidator in voluntary winding up — Power to refer disputes to arbitration.

A liquidator in a voluntary winding up has no inherent power to refer disputes on behalf of the company to arbitration, nor can any such power be claimed for him as an incidental power in relation to any of his express powers under the Companies Act.

The general words employed to define the executive and residuary powers of a liquidator in S. 179 Cls. (d) and (i) of the Act must be construed ejusdem generis with the preceding words in the clauses in which they appear, as well as in the whole section, and when they are so construed, and full effect is given to the absence of express mention of arbitration in the section, and to the fact that in relation to the powers of the company, it is expressly mentioned in S. 152, the conclusion cannot be escaped that the relevant power has been withheld from the liquidators by the Legislature. AIR (V 34) 1947 Lah 355 : ILR (1947) Lah 704 : 49 PLR 257 : 1947 Comp. C. 195 (FB).

——S. 179 — Powers of Liquidators.

It is the duty of the Liquidators to decide what is properly due from the company to various claimants and they are entitled to go behind decrees which they consider were not properly obtained. AIR (V 27) 1940 All 514: (1940) ALJ 739: 1940 AWR (HC) 494: ILR (1940) All 730: 192 Ind Cas 72.

——S. 179 — It is necessary for a Liquidator to be given express powers to exercise powers which the law gives him under the Companies Act. AIR (V 19) 1932 All 342: (1932) ALJ 354: 54 All 541: 140 Ind Cas 502 (DB).

3. Clause (c).

——S. 179 — Sale of property — Official Receiver advertising sale of business concern by tenders — No statement that highest tender would be accepted, nor reserve price fixed — Fresh tenders, legality of — Procedure in case of sale by tender.

An order was passed by the Court that the assets of a certain company which was in the process of being wound up under an order of the Court should be sold by tender. The intention was to sell the business as a going concern. In pursuance of this order, the Official Receiver caused an advertisement to be published in the newspapers inviting tenders for the purchase of the business. The advertisement directed that the tenders should be sent to him by registered post so as to reach him on or before certain date. It was not stated that the highest tender would be accepted and there was no reserve price fixed. When the tenders were opened, it was found that A had submitted the highest bid. The Official Receiver took out a Judge's summons in which he asked for an order approving of the date fixed by him for the submission of the tenders and for directions as regards the offers submitted by A and other person B. The Official Receiver also reported that B had expressed willingness to raise his offer to more than that of A. The Court directed that a week's further time should be given for the receipt of fresh offers or "for increase of offers already made." It also directed that the offers should be made in sealed covers addressed to the Official Receiver and that they shoud be opened in Court;

Held, that when the matter came before the Court on the Judge's summons taken out by the Official Receiver, it was not a question of the confirmation of a sale as no sale had taken place. B was entitled to make a further offer in the circumstances, and hence the Court's order would stand.

(Course to be followed in case of sale of property by Court where it decides that sale shall be by tender, indicated.) AIR (V 30) 1943 Mad 365: 56 MLW 41 : (1943) 1 MLJ 123 : 1943 MWN 58 : ILR (1943) Mad 790: 212 Ind Cas 541 (DB).

——S. 179 — Sale of property — Sanction of Court — Contract of sale entered into — Sanction — Subsequent revocation of.

One of the principal. functions of the Liquidator is to discharge the debts of the company. For that purpose he may have to sell the company's property, and he can do this with the sanction of the Court. It follows that any sales or contract of sales effected by the liquidator in pursuance of the Court's sanction previously obtained are not mere conditional agreements subject to subsequent confirmation by the Court.

Where, therefore, the District Court has given the Official Liquidator a general permission to sell the properties (provided that a certain price was obtained) and has expressly sanctioned the contract of sale entered into by the Official Liquidator for a sum considerably in excess of the stipulated price, the Court cannot subsequently revoke its own sanction so as to nullify the contract of sale. AIR (V 27) 1940 Mad 179 : 50 MLW 879 : (1940) 1 MLJ 107 : (1940) MWN 584 : 190 Ind Cas 67 (DB).

——S. 179 — Sale of property — Decree sold by auction by Official Liquidators — Assignment to auction purchaser — Subsequent application for setting aside sale incompetent.

A company was being wound-up as a result of a compulsory winding-up order of the Court. Three Official Liquidators were appointed by the Court who decided to sell by auction one of the assets, a decree standing in the name of the directors. It was sold by auction with the permission of the Court and was subsequently assigned by the Liquidators to the auction-purchaser. One of the Liquidators subsequently applied to the Court to set aside the sale:

Held, that the Court had no right to set aside the sale. AIR (V 25) 1938 Mad 176: 46 MLW 925: (1937) 2 MLJ 926: (1938) MWN 24 (1): 175 Ind Cas 22 (DB).

——S. 179 — Lessee as buyer.

Where the higher bidder for the purchase of a mill wanted immediate possession free from all disputes, but unfortunately the lessees had got the the whiphand and the purchaser had to take the property with all the burden of the lease and the further burden of any subsequent rights which the lessees have obtained, the sale to the lessees themselves for a lesser price is valid. AIR (V 9) 1922 PC 361: 47 MLJ 322: 69 Ind Cas 356: 32 MLT 15: 27 CWN 509: 1923 MWN 388.

——S. 179 — (S. 144 old) — Exercise of sanction.

The sanction of the Court required under S. 144 has to be exercised with judicial discretion having regard to the interest of the Company and its creditors. Wherever, property is authorised to be sold by private contract it is the duty of the Court to satisfy itself that the price fixed is the best that could in human probability be expected to be offered. Unless satisfied of this, the only safe and proper course is an auction sale. AIR (V 8) 1921 Mad 286: 97 Ind Cas 295: 24 MLW 35 (DB).

——S. 179 — (S. 144, old) — Ex parte order of sanction — Madras High Court Rule 80 applies.

No order sanctioning a sale to the prejudice of contributors or creditors shall be made ex parte on the application of the Official Liquidator. AIR (V 8) 1921 Mad 286: 97 Ind Cas 295: 24 MLW 35 (DB).

——S. 179 — (S. 144 old) — Finality of contract.

Where a man depends for the validity of his contract of purchase on a sanction granted which in law is subject to be set aside in appeal, and possibly in review also, he cannot plead that he has carried out his part, in bar of the Court's power to deal with that sancion. He must be deemed to have taken the risk of the sanction being set aside for good cause shown and of his purchase failing in consequence. AIR (V 8) 1921 Mad 286: 97 Ind Cas 295: 24 MLW 35 (DB).

——S. 179 — (S. 144 old) — Inherent powers.

A Court has inherent power to recall his order granting sanction passed without notice and without hearing parties to correct the serious injustice done to them. AIR (V 8) 1921 Mad 286: 97 Ind Cas 295: 24 MLW 35 (DB).

4. Clause (f).

——S. 179 (f) — Indorsement of pro-note — Delegation of such power, validity — Indorsement by Liquidator's agent void ab inito — Ratification by Liquidator — Effect.

The Liquidators have no power whatever to delegate their powers to any one else. The power of the Liquidators themselves is derived from S. 179, and so far as indorsements of promissory notes are concerned, from Cl. (f) of the sanction. In other words, the power given to the Liquidator to indorse promissory notes is a power given by the statute, and a statutory power cannot be delegated in the absence of a statutory provision for such delegation.

Hence the indorsement of a promissory note by agents appointed by the Liquidators conveys no title in law to the assignees. The assignment of a promissory note by the agent being void ab initio,

no subsequent ratification by the Liquidator can validate it. AIR (V 27) 1940 Mad 882: (1940) M WN 796: (1940) 2 MLJ 309: 52 MLW 342: 192 Ind Cas 103.

5. Clause (g).

——S. 179 — Offers when binding.

Where on an order of Court for winding up a company, K offered to purchase or to take a mortgage and the offer as to mortgage was accepted, but on the settlement of the terms, K being dissatisfied appealed to the P. C. and the P. C. directed the whole scheme to be placed before the shareholders but when the matter came back before the Court K applied stating that he was unwilling to keep the offer made by him open any longer.

Held, that K, who had induced the liquidators of the company to act on the assertion that he was going to act in a particular manner, should not be allowed to act otherwise than in the way promised, as the liquidators had acted in the manner suggested, and had thereby changed their position.

Held also, that the offer that was accepted by the Court was accepted on behalf of he Official Liquidators and the offer and acceptance should be regarded as a valid and binding contract between K and Official Liquidators although the Judge himself took great interest and an active part in the settlement. AIR (V 17) 1930 All 330 : 1930 ALJ 305 (DB).

6. Clause (i).

——S. 179 — Official Liquidator, procedure of — Fixing period of employment of employees.

Liquidation proceedings may be expected to come to an end at any time : but this does not excuse the Liquidator from fixing the period of employment in the case of an employee and if no term is fixed, an employee on a monthly rate of salary is entitled to notice when his services are to be terminated. AIR (Vol 22) 1935 Lah 917 : 161 Ind Cas 315.

——S. 181

——S. 181 — Orders, which may be termed ministerial and not subject to appeal under S. 202, Companies Act may be passed by a Judge when dealing with a company in liquidation. AIR (V 30) 1943 Sind 82 : ILR (1942) Kar 496 : 206 Ind Cas 177 (DB).

——S. 181 — Legal adviser — Order fixing remuneration — Appeal.

The position of a legal adviser to the company in liquidation,appointed under S. 181, is not different from any other employee employed by the Liquidators. An order by the liquidation Judge fixing remuneration of the legal adviser for services performed to the Liquidators is not one made in the matter of winding up of the company but is of the nature of a ministerial order settling a dispute as between the Liquidators and their employee and hence is not appealable under S. 202 AIR (Vol 30) 1943 Sind 82 : ILR (1942) Kar 496 : 206 Ind Cas 177 (DB).

——S. 181 —Considerations in selecting solicitors for Official Liquidator.

The interests of the creditors of the company are involved in the selection by the Liquidator of a firm of solicitors which was not previously concerned in the proceedings. The selection of a solicitor for the Official Liquidator is always a matter of some importance, and the Court will accede to an invitation to reconsider its ex parte decision on significant facts being brought to its notice, which were not previously within its cognisance.

The question whether the petitioning creditors' solicitors should for any reason be deferred to another firm of solicitors depends on the facts of each case. Where however, the proceedings have been complicated and have gone on for some time and the petitioning creditors' attorneys are acquainted with the proceedings and it appears that a new firm of solicitors would require the expenditure of considerable time and labour in becoming familiar with them to anything like the same extent, the petitioning creditors' solicitors are in a better position to assist the Liquidator than a new firm and they should be employed. AIR (Vol 22) 1935 Bom 337: 37 Bom LR 401: 157 Ind Cas 1093.

——S. 181 — S. 146 of 1882 Act — Sanction to appoint pleader — Omission to obtain — Effect obtained to file the suit.

The omission of the official liquidator to obtain sanction under S. 146 of the Act for the payment of a pleader might possibly render them personally liable for the payment of the pleader's fee, but it would not affect the validity of the acts done by the pleader in instituting or conducting the case if they had obtained sanction of the Court to institute the suit. AIR (Vol 12) 1925 Lah 222: 84 Ind Cas 510 : 5 Lah 414 (DB).

——S. 183

——S. 183 (5) —Application by contributory objecting to claims included in list filed by liquidator — Competency—Contributory, if a "person aggrieved" — Act of Liquidator in drawing up list of claims and debts—If an "act" or "decision" of Liquidator—Nagpur High Court Rules and Orders (Civil), Rr. 338-A and 102.

A contributory is entitled to apply under S. 183 (5) of the Companies Act objecting to the inclusion of certain claims in the list of claims and debts filed by the Official Liquidator as required by Rr. 338-A and 102 of the Rules and Orders (Civil) issued by the Nagpur High Court. A contributory is entitled to share in the division of the assets after all claims and liabilities of the company have been met and the action of the Liquidator in including the claims challenged by the contributory in the list of claims deprives him of his right to demand a share in the amount of those claims. Therefore the contributory is a "person aggrieved" and so has a right to apply under S. 183 (5). The fact that he does not come under Rr. 338-A, 102 or any of the other rules framed by the High Court cannot take away his basic right which has been conferred by the Act itself. The rules are made under S. 246 which states that they shall be consistent with the Act. Therefore, even if the Rules endeavoured to exclude a "person aggrieved" (Which they don't) they would be ultra vires to that extent. The act of the Liquidator in drawing up a list of creditors is not only an "act" but also a "decision" of the Liquidator within the meaning of S. 183 (5) and so attracts that provision. Rr. 338-A and 102 show that the Liquidator has to make an investigation of all claims and, when he has completed it, to file a list. He has therefore to decide whether to include a claimant in the list or not and that cannot but be a "decision." AIR (Vol 38) 1951 Nag 275 : ILR (1950) Nag 783 : 1950 NLJ 376 (DB).

——S. 183—Person aggrieved, right of.

The debenture-holders are entitled to have their debentures declared valid in the winding up proceedings if the Liquidators sought the instructions of the Court as to how these debenture-holders should be ranked. AIR (Vol 27) 1940 All 458: (1940) ALJ 449: 1940 AWR (HC) 413: ILR (1940) All 568: 192 Ind Cas 367.

——S. 183 — Applicability.

Section 183 (5), cannot apply to a case in which the act or decision of the Official Liquidator has been performed or made in pursuance of the Court's express sanction. AIR (V 27) 1940 Mad 179: 50 MLW 879: (1940) 1 MLJ 107: (1940) MWN 584: 190 Ind Cas 67 (DB).

——S. 183 (5) — Petitioning creditors — Whether can apply for reviewing ex parte order appointing particular firm as attorneys.

The petitioning creditors are persons interested in the appointment of the solicitors for the Official Liquidator and ought to be deemed to be persons aggrieved by the act of the Official Liquidator under Section 183 (5). The petitioning creditors are entitled to see that the liquidation proceedings are carried on not only efficiently but (consistently with efficiency) as economically as possible. The appointment of a firm of solicitors whose services would necessitate heavier costs is a grievance under S. 183 (5), unless this additional expense is compensated for by enhanced efficiency. They can, therefore, apply for review of an ex parte order appointing a particular firm as attorney, if they satisfy the Court that there is greater expense but not an additional efficiency. AIR (V 22) 1935 Bom 337: 37 Bom LR 401: 157 Ind Cas 1093.

——S. 184.

1. Applicability and scope.
2. Assets.
3. Civil P. C., S. 86, application of.
4. List of contributories.
5. Notice.
6. "Power to rectify register of members."

1. Applicability and scope.

——S. 184 — Balance sheet — Court's power to go behind balance sheet.

In a petition for winding up of a company, the Court will not go behind the balance sheet duly audited by the auditors, the more so when it was open to the petitioner share-holder to question the same in other proceedings. AIR (V 29) 1942 Bom 231: 44 Bom LR 387: 203 Ind Cas 116.

——S. 184 — (S. 147, old) — Interest out of surplus — Surplus — Creditors can claim subsequent interest — The words existing at the date of the said order in S. 147 if departs from English Law.

In the case of there being a surplus, creditors can claim subsequent interest. The words "existing at the date of the said order" in Section 147 of the Companies Act of 1882 were hardly necessary. They did not exist in the English Act of 1862, but it was always taken for granted that the liabilities to be discharged were then existing at the time when the winding up order was made. The inclusion of these words in the Indian Act, does not in any way detract from the value of English decisions. Insolvency Law can be applied to companies in liquidation. AIR (V 8) 1921 Lah 346: 53 PLR 1921 (DB).

——Ss. 184, 186 — Ss. 147 and 150 — Suit by Liquidator — Set off.

In a suit by liquidator of a Bank for recovery of a sum of money from the defendant, the latter claimed a set off on account of a fixed deposit. Held, the suit was an ordinary suit to which Sections 147 and 150 of the Companies Act (VI of 1882) did not apply and the set off could be pleaded. AIR (V 2) 1915 Lah 204: 69 PWR 1915: 89 PLR 1915: 63 PR 1915: 28 Ind Cas 975 (DB).

2. Assets.

——S. 184 — Assets — Money deposited as security for good behaviour of employee.

Money deposited with a Bank by a person, as security for the good behaviour of the employee, constitutes trust money in the hands of the Bank and does not form part of the assets of the Bank divisible among its creditors. AIR (V 28) 1941 Oudh 126 : 1940 OWN (CC) 1022 : 1940 AWR (CC) 433 : 16 Luck 241 : 191 Ind Cas 178 (DB).

——S. 184 — Assets — Realization subsequent to liquidation.

Where the realizations subsequent to the liquidation of a Bank were really only the previously existing assets changed into different form and not fresh funds which were not part of the assets:

Held, that they were liable to charge in respect of trust moneys in the hands of the Bank. AIR (V 28) 1941 Oudh 126 : 1940 OWN (CC) 1022 : 1940 AWR (CC) 433: 16 Luck 241: 191 Ind Cas 178 (DB).

——S. 184 — Duty of Court — All assets of company should be brought into winding up — Action should not be vexatious or oppressive.

A Judge in winding up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers, to see to it that all assets of the company are brought into the winding up.

In authorising proceedings, especially if they may or involve some drain upon the assets, he must satisfy himself as to their probable success; where they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the Company's name under his authority is not vexatious or merely oppressive. AIR (V 23) 1936 PC 322: 44 MLW 770: 165 Ind Cas 695.

——S. 184 — Application of assets — Rent of premises — Distinction between amounts due for rent before winding up and after winding up — Right of owner of premises continued to be occupied for purpose of liquidation proceedings, to rent in full.

According to established practice in England, there is a well defined distinction between amounts due for rent before the date of a winding-up order or a resolution for voluntary winding-up, and amounts that become due after that date. In respect of amounts that have become payable before the above date, the creditor is entitled only to rateable distribution, on the same footing as other creditors, out of the assets realised.

As regards the amounts falling due after that date, however, the owner of premises occupied by a company, and continuing to be occupied for the purposes of the liquidation proceedings by the Liquidator, is entitled to receive those amounts in full. In the absence of anything in the Companies Act, that is in conflict with the English principle, it should be adopted by Indian Courts. AIR (V 23) 1936 Oudh 11 : 1935 OWN (CC) 1110 : 11 Luck 515 : 158 Ind Cas 577 (DB).

3. Civil P. C., S. 86, application of.

——Ss. 184, 187 — Proceedings, whether in a Court of civil jurisdiction — S. 86, Civil Procedure Code, whether applies to such proceedings.

Section 86, Civil P. C. does not apply to proceedings under S. 184, Companies Act but it does apply to all proceedings under Ss. 186 and 187, Companies Act.

Under S. 184, there being a statutory duty on the Court to settle the list of contributories, it follows necessarily that there is no option but to settle such list. It cannot be said that when such a list is to be settled, the Court is starting any proceeding analogous to that of a suit brought by a private person against a sovereign prince or a ruling chief, for which the previous consent of the Governor-General in Council is required under S. 86, Civil P. C. AIR (V 23) 1936 All 826 : (1936) ALJ 1134 : 58 All 742 : 166 Ind Cas 98 (FB).

4. List of contributories.

——S. 184 — Application for shares by father as guardian of minor daughter — Shares issued in minor's name — Father, if can be placed in list of contributories.

Where an application is made by the father as guardian of his minor daughter for shares and the

company issues and registers shares in the name of the daughter describing her as a minor, the transaction is void. The father of the minor who has signed the application cannot be deemed to have contracted for the shares and cannot be placed on the list of contributories. AIR (V 29) 1942 Mad 470 : 55 MLW 200 : 1942 MWN 252 : (1942) 1 MLJ 425 : ILR (1942) Mad 875 : 201 Ind Cas 731 (DB).

——**S. 184 — Shares purchased in minor's name.**

Father purchasing shares for minor sons — Benami transaction — Father is contributory. AIR (V 26) 1939 Lah 515 : 41 PLR 739 : ILR (1939) Lah 299 : 185 Ind Cas 176 (DB).

——**S. 184 — Signatories to Memorandum of Association — Agreement to become members — No shares allotted — Liability of being placed on list of contributories.**

Signatories to the Memorandum of Association of a Company become the first members of the Company as from the date of incorporation mentioned in the Registrar's certificate. They are deemed to have agreed to become members of the Company and on its registration are to be entered as members in its register of members.

But neither this entry nor the allotment of shares is a condition precedent. Each subscriber at once by subscribing irrevocably agrees to take from the Company the number of shares placed opposite his signature unless all its share capital has been allotted to other persons.

The fact that no shares are allotted to him and that he has ceased to be treated as a member for a considerable time does not relieve him from liability of being placed on the list of contributories. AIR (V 25) 1938 Sind 187 : 32 Sind LR 167 : 177 Ind Cas 577.

——**S. 184 — Subscriber to Memorandum — Failure to pay for shares — Removal from list of members— Liability as contributory — Mere removal, whether affects liability as member — Power to exempt from liability for interest.**

A subscriber to the Memorandum of Association remains a member of the company until such time as either the company, which, being authorised to do so by the Articles of Association, accepts a surrender of the shares for valid reason, or the subscriber himself pays for the shares and validly transfers them to some-body else. The mere fact that he had failed to pay for his shares in spite of repeated demands and was informed by the company that he had on account of his default ceased to be a member of the company will not exempt him from being included in the list of contributories.

(Where a subscriber was removed from the list of members for failure to pay and both the company and the subscriber believed that he had ceased to be a member, the Court exempt him from liability to pay interest on the amounts outstanding. AIR (V 18) 1931 All 701 : 133 Ind Cas 424.

——**S. 184 — Contributory — Liability, nature of — Legal representative's liability.**

The liability to contribute to the assets of the Company on winding up is quite distinct from the liability to pay calls and the fact that the calls on the shares were barred by time as against the Company is, therefore, no defence to a claim for contribution.

The legal representative of a share-holder is only liable to contribute to the extent of the assets if any, which has come into his hands from the deceased share-holder. AIR (V 18) 1931 Pat 44 : 10 Pat 249 : 12 PLT 215 : 130 Ind Cas 534 (DB).

——**S. 184 — Variation.**

There is nothing in the Court of Wards Act which conflicts with the Companies Act in the matter of allowing an application for the varying of the list of contributories by placing upon it the name of the Collector in lieu of the name of person whose estate has been taken over by the Court of Wards. AIR (V 17) 1930 All 617 : 124 Ind Cas 726.

——**S. 184 — Finality of order.**

An order passed by Court bringing the name of a person as a contributory on the list of contributories if not appealed against becomes final and the question as to the liability of such person as contributory cannot be re-opened. AIR (V 13) 1926 Lah 414 : 8 LLJ 240 : 27 PLR 842 : 95 Ind Cas 252.

——**Ss. 184 and 186 — Liquidation — Suit by Official Liquidator to recover money due on promissory note — Set off — Summary procedure.**

Held, the defendants who were debtors on promissory notes were creditors in respect of the money deposited as security and were therefore entitled to raise the plea of set off. The defendants were not contributories of the Bank and the court conducting the liquidation had no jurisdiction to recover by a summary process the money due from them on the promissory note. An opinion expressed by the Liquidation Judge with regard to the plea of set off did not operate as res-judicata. AIR (V 6) 1919 Lah 242 : 53 Ind Cas 653 (DB).

——**S. 184 — Contributory — Shareholder — Liability of.**

If a person has been treated as a shareholder, though there may have been irregularities in the issue of shares to him, and the shareholder has acted like a shareholder such as attending meetings, accepting dividends, he will be bound by his acts and will be estopped from denying that he was a shareholder.

A shareholder who seeks to be discharged, should have repudiated the contract and taken some proceedings before the commencement of the winding-up order, to show his intention.

A person cannot be settled on the list of contributories if, before the beginning of the winding-up proceedings, he has not only repudiated his shares but has asserted his right in an action by the company to enforce calls upon him. AIR (V 2) 1915 Lah 405 : 22 PLR 1915 : 54 PR 1915 : 235 PWR 1915: 28 Ind Cas 53.

——**S. 184 — (1882), S. 147—Company under liquidation — Liability of shareholder — If arises after liability of Directors.**

The proposition, that before the appellant, who had agreed to purchase shares in the company under liquidation can be held liable as a contributory, the late Directors of the company should be called upon to liquidate the demands of the company's creditors, is not based on any authority. Where shares are pledged with the company the legal owner thereof is the shareholder and not the company; he alone must be held liable for all unpaid calls thereon. AIR (V 1) 1914 Lah 480 : 165 P L R 1914 : 69 PR 1914 : 113 PWR 1914 : 24 Ind Cas 236 (DB).

5. Notice.

——**S. 184 — Bank appointed Liquidator — Manager's notice to contributory — Validity.**

Where a Bank is appointed Liquidator and the manager of the Bank sends notice signed by him, to a person that his name was included in the list of contributories, the notice is valid. AIR (Vol 22) 1935 Lah 645: 159 Ind Cas 1044 (1).

6. "Power to rectify register of members".

——S. 184—Powers of Court—Rectification of register — When may be done. See Companies Act, Ss. 38, 184 and 156. 52 Bom LR 40: AIR (Vol 37) 1950 Bom 217.

——**Ss. 184, 38—Power of Court to decide title of aggrieved party to have his name omitted from register of share-holders—Direction.**

Section 184, incorporates S. 38, under which inter alia if the name of a person is fraudulently or without sufficient cause entered in the register of members of a company the person aggrieved or any member of the company may apply to the Court for rectification of the register.

On an application under that section the Court has power to decide any question relating to the title of the aggrieved person to have his name omitted from the register, and generally to decide any question necessary or expedient to be decided for rectification of the register. The exercise of the jurisdiction given by this section is discretionary having regard to the person who is the applicant before the Court, and to all the facts and circumstances of the case. AIR (Vol 23) 1936 Bom 24: 37 Bom LR 904: 60 Bom 297: 160 Ind Cas 638.

——S. 185.

——S. 185 — Ss. 185 and 216 — Dispute between Liquidator and third parties — Adjudication of — Power of Court. AIR (Vol 37) 1950 EP 204.

——S. 185——Order for delivery of property under S. 185, reversed on appeal — Restitution ought to be granted under S. 151 Civil P.C. AIR (Vol 31) 1944 Pat 192: 23 Pat 24: 10 BR 594: 213 Ind Cas 340 (DB).

——Ss. 185, 188 — Court, power of.

Section 185, does not give the Court any power to pass orders against persons other than those mentioned in the section. Similarly S. 188 does not give the Court power to direct payment from any person other than those mentioned in S. 185. AIR (Vol 27) 1940 All 514: (1940) ALJ 739: 1940 AWR (HC) 494 : ILR (1940) All 730 : 192 Ind Cas 72.

——S. 185 — Claim contested — Power of Court.

Though S. 185 does not contemplate an elaborate enquiry, the discretion must be left to the Court to decide whether any particular claim can or cannot be conveniently dealt with under that section. The fact that the claim is contested will not prevent the Court from passing an order under that section. AIR (Vol 24) 1937 Mad 401: 45 MLW 119: (1937) MWN 24: (1937) 1 MLJ 219: 168 Ind Cas 555 (DB).

——S. 185 — Managing agent ceasing to be so — Action, if barred — Test.

The mere fact that the managing agent of a company had ceased to be an agent before the commencement of the liquidation proceedings will not exclude action being taken against him under S. 185. The test is whether the moneys in question claimed came into his hands in his character as agent or not. AIR (V 24) 1937 Mad 401 : 45 MLW 119: (1937) MWN 24: (1937) 1 MLJ 219: 168 Ind Cas 555 (DB).

——S. 185— Managing agent—Retention of amounts due to him — Contract Act, 1872, S. 217.

In making an order against a managing agent under S. 185, it is only fair that the managing agent should be allowed to retain such amounts as he is entitled to retain under the terms of S. 217, Contract Act, or the terms of the managing agency agreement or the Articles of Association and the balance alone out of the amounts claimed by the Liquidator should be directed to be paid by the agent as the amount prima facie payable by the agent. It will not be proper to drive the managing agent to a separate suit in respect of the claims that he may have against the company. AIR (Vol 24) 1937 Mad 401: (1937) MWN 24: 45 MLW 119: (1937) 1 MLJ 219: 168 Ind Cas 555 (DB).

——S. 185—Court's power to order recovery of money from persons other than those mentioned in section.

There is no provision in the Companies Act which enables the Court directing the winding up to recover or authorise the recovery of moneys in the hands of the persons other than those expressly mentioned in S. 185 by summary process, and the only course open to Official Liquidator in such a case is to institute suits in the regular way. AIR (Vol 23) 1936 All 808: (1936) ALJ 741: 1936 AWR (HC) 537: 58 All 925: 165 Ind Cas 790 (DB).

——S. 185—"Purchaser", meaning of.

A purchaser does not mean any person who had purchased any goods from the Liquidator or from the company. The word must be taken to refer to the word 'contributory' which immediately precedes it and it means the purchaser of the interest of a contributory. AIR (Vol 23) 1936 All 808: (1936) ALJ 741: 1936 AWR (HC) 537: 58 All 925: 165 Ind Cas 790 (DB).

——Ss. 185, 188 — Persons entering into contract with Liquidator, liability of.

Persons entering into contract with the Liquidator during the course of liquidation do not come under S. 185 and, therefore, an order directing them to pay the Liquidator cannot be enforced under S. 185 or under S. 188. AIR (Vol 23) 1936 All 808: (1936) ALJ 741: 1936 AWR (HC) 537: 58 All 925: 165 Ind Cas 790 (DB).

——Ss. 185, 188—Realisation of assets — Jurisdiction of Company Judge.

The Company Judge has jurisidction for the purpose of carrying out the liquidation, that is, the realization of the assets of the company and the payment of the creditors, etc. But judicial decision of matters which may arise with third parties owing to the transactions entered into by the Liquidator is not foreign to the jurisdiction of the Company Judge and an order cannot be made with regard to these matters either under S. 185 or S.188. AIR (Vol 23) 1936 All 808: (1936) ALJ 741: 1936 AWR (HC) 537 : 58 All 925 : 165 Ind Cas 790 (DB).

——S. 185 — Unauthorised conversion — Liquidator can follow property.

Where the chairman of a bank took money from the bank in a way which amounted to the taking of the money wholly illegally & without any authority and converted this money to his own use by purchasing property in his own name:

Held, that the chairman being a trustee of all the moneys of the bank, the Liquidator was prima facie entitled to be given possession of the property under S. 185. AIR (Vol 23) 1936 Lah 408: 38 PLR 1103: 163 Ind Cas 378 (DB).

——Ss. 185, 186, 235—Winding up — Power of Court to order delivery of property.

Section 185 authorises the Court to make an order to deliver property to the Liquidator if it thinks that the company is prima facie entitled to it, though its title is not admitted. The final decision as to title may be made subsequently under S. 186 or S. 235. AIR (Vol 23) 1936 Lah 408: 38 PLR 1103 : 163 Ind Cas 378 (DB).

——S. 185 — Power to require managing agent to produce cash balance in Court — Power to make interim order where agents claim lien — Inherent power of Court to preserve property in dispute.

When a winding up order has been made, if the books of the company show that there is a cash balance in the hands of the managing agents, the Court has ample power under S. 185, to make an order against the managing agents to deposit such amount in Court.

Where the managing agents claim a lien, it is not necessary for the Court to enter into an elaborate enquiry into the merits of their claim before making such an order but the Court may in the interests of justice pass an interim order against them for depositing the amount in Court pending the final adjudication of their claim on the merits.

Even apart from S. 185 the Court possesses ample powers ex debito justitiae to pass interim order for

protection and preservation of the subject-matter in dispute, pending the result of the litigation. AIR (Vol 20) 1933 Lah 437: 14 Lah 68: 34 PLR 388: 142 Ind Cas 766.

——**S. 185 — Liquidation—Payment to creditor before orders of winding-up but after resolution to stop payments—Right of Official Liquidator to recover the amount by summary order.**

An Official Liquidator is not entitled by summary order to a refund of money realized by a creditor of the Bank before the order of winding up was passed but after the Bank had passed a resolution stopping payment of debts. The Liquidator has to file a regular suit like other claimants to recover the amount realized by such creditor of the Bank. AIR (Vol 2) 1915 Lah 223: 90 PLR 1915: 46 PR 1915 : 71 PWR 1915 : 29 Ind Cas 265 (DB).

——**S. 185 — (S. 149 of 1882 Act) Contract Act, S. 221—Limitation under S. 221 not affected by winding up order under S. 149**

S. 149 of the Companies Act 1882 does not authorise the Court to deprive a secured creditor of possession of his security; nor does it affect the lien of one created by S. 221 of the Contract Act or an agent's rights to remain in possession and continue to make the necessary disbursements. Disbursements made after the winding up order and those made before it stand on the same footing, and the lien is good with regard to both. (1907) 31 Mad 123 (124) : 18 MLJ 251 : 3 MLT 247 (DB).

——**S. 185—(S. 149 of 1882 Act) — Orders for delivery of property — Ex parte orders — Practice — Procedure.**

It should not be laid down as a rule of procedure that ex parte orders should ordinarily be passed where proceedings are taken under S. 149 of the Companies Act 1882 Exparte orders should be granted with the greatest caution and where rapid action is desired, it is always possible under the rules of the Court to serve with leave short notice of any application to the Court. (1904) 6 Bom LR 790 (795) (DB).

——**S. 186.**

1. **Applicability and scope.**
2. **Liability of contributory.**
3. **Limitation.**
4. **Powers of Court.**
5. **Set-off**
6. **Transferee of order of payment.**

1. Applicability and scope.

——S. 186 — Applicability and scope — Summary procedure — Conditions for resort to. See Company's Act, Ss. 156 and 186. AIR (Vol 37) 1950 Bom 386 : 52 Bom LR 559.

——**S. 186 (1) — Order under — Method of enforcement.**

A company which holds an order under S. 186 (1) may resort to any procedure for its enforcement which would be open to it if the order had been a decree made in the suit with the result that the method of enforcement provided by S. 73, Civil P. C., is open to the company and an application by the company for its execution must rank as an application for the execution of a decree for the purposes of that section. AIR (Vol 32) 1945 PC 60 : 20 Luck 162 : 58 MLW 236 : 11 BR 406 : 47 PLR 318 : ILR (1945) Kar (PC) 148 Sup : 1945 MWN 193 : 47 Bom LR 640 : (1945) 1 MLJ 309 : 1945 ALJ 338 : 49 CWN 337 : 72 IA 85 : 219 Ind Cas 149.

(Reversing AIR (V 27) 1940 Oudh 237 : 15 Luck 332.)

——S. 186 — **Payment order — Decree — Execution.**

A payment order under S. 186, must be regarded as equivalent to a decree in view of S. 199 and enforceable as such and the provisions of the Civil P. C., relating to the execution of decrees are applicable to the execution of such order. Hence a decree-holder is entitled to claim rateable distribution against the Official Liquidator as a holder of the payment order under S. 186. AIR (Vol 28) 1941 Lah 273 : 43 PLR 310 : ILR (1942) Lah 460 : 195 Ind Cas 386 (DB).

——**S. 186 (1) — Nature of — Application for ordering contributory to make payment — Court's powers — Remedy of Liquidator.**

The provisions of S. 186 (1), are not mandatory. It is open to the Court exercising jurisdiction in the winding up of a company in its discretion to grant or to reject an application under S. 186. If the Court refuses in a particular case to make an order under S. 186 (1), the Liquidator to enforce his claim, must proceed by way of a Civil suit against the contributory and in this suit, the contributory would be permitted to maintain the ordinary legal defences to such a claim. AIR (Vol 27) 1940 All 544 : (1940) ALJ 826 : 1940 AWR (HC) 639 : ILR (1941) All 153 : 192 Ind Cas 357 (FB).

(Overrules AIR (V 25) 1938 All 613 : (1938) ALJ 925 : 1938 AWR (HC) 621 : ILR (1938) All 957 : 178 Ind Cas 458.)

——**Ss. 186, 187 — Procedure.**

Proceedings under Ss. 186 and 187 — Provisions of S. 86, Civil P. C., are applicable. AIR (Vol 23) 1936 All 826 : (1936) ALJ 1134 : 58 All 742 : 166 Ind Cas 98 (FB).

——**S. 186 — Applicability — Memorandum of Association — Company authorised to manage estates — Company acting as Liquidator — Legality — Legality of appointment, if can be questioned in proceedings in respect of payment order under S. 186.**

Where the Memorandum of Association of a banking company shows that one of the objects of the Bank is to manage estates, it can act as Liquidator of another company. When the Bank has been appointed a Liquidator and having accepted the position, the legality of the appointment cannot be questioned in proceedings in respect of a payment order under S. 186. The manager of the Liquidator Bank will be entitled to present an application for a payment order. AIR (Vol 23) 1936 Lah 276 : 162 Ind Cas 306.

——**S. 186 — (S. 150 old) — Third party.**

S. 150 confers certain special privileges of which apparently a third party cannot take advantage. AIR (V 8) 1921 Lah 140 : 3 LLJ 80 : 24 PLR 1921 : 59 Ind Cas 588 (DB).

——**S. 186 — (S. 150 old) — Payment order.**

If the payment order is a nullity it may be disregarded by a Court whose assistance is sought for its execution. A payment order made after the assets of the Company are sold is a nullity. AIR (Vol 8) 1921 Lah 57 : 60 Ind Cas 506 : 3 LLJ 178.

2. Liability of contributory.

——**S. 186 — Compromise with contributories.**

Compromise with contributory, though it might be binding upon the Liquidator personally, would not be binding upon the Bank until sanctioned by an extraordinary resolution of the Company, as provided in S. 234 of the Companies Act. AIR (Vol 11) 1924 Lah 148 : 77 Ind Cas 338 : 4 Lah 239 (DB).

——**S. 186 — Principal partner.**

Where the principal partner signed the promissory notes.

Held, although the firm is not settled on the list of contributories the principal partner being

so settled it is open to the liquidator to select him from among the partners and call upon him as a contributory to liquidate the whole debt. AIR (V 11) 1924 Lah 148 : 4 Lah 239 : 77 Ind Cas 338 (DB).

——**S. 186 — Applicability — Finality of list — Debt must be due in personal capacity.**

Where on liquidation of a company, a shareholder is settled on the list of contributories, he cannot, in proceedings under S. 186, plead that he was improperly so settled. In order to make a contributory liable, under S. 186 for payment of debts other than calls, the said debts must be due by the said contributory in his own personal capacity and not as a member of a firm, which is not a contributory. AIR (Vol 10) 1923 Lah 85: 71 Ind Cas 724.

——**S. 186 — (1882), S. 150 — Debts due from contributory.**

Under S. 150 Companies Act, a contributory can be required not only to meet calls made on him, but also to pay debts owing by him to the company, for recovery of which the court is not bound to proceed under S. 150, but may direct the liquidator to sue for it. AIR (Vol 2) 1915 Lah 198: 59 PR 1915: 139 PWR 1915: 31 Ind Cas 54.

3. Limitation.

——**Ss. 186, 187 — Call, date from which call is owing — 'Money owing' or 'money due' — Meaning of — Limitation — 'Recoverable in law' significance of.**

The terms 'money owing' or 'money due' in their primary sense denote an existing debt, whether or not the right to recover the same is barred under the Lim. Act, though either expression may bear the secondary meaning of "recoverable in law" if the context so requires. A call is owing from the date when it is made, although it may be payable at a future date. AIR (Vol 21) 1934 Bom 97: 36 Bom LR 32: 150 Ind Cas 645 (DB).

——**S. 186 —Winding-up — Claim by Liquidator against contributory — Limitation — Principles — Article applicable — Claim barred on date of application — Power of Court — 'Money due', meaning of — Claim, whether suit.**

In order that a Court may make an order under S. 186, against a contributory, it is necessary that the money claimed by the Liquidator should have been 'money due' at the date of the application, and consequently, the Court has no power to make an order under that section if the claim is such that if the Liquidators had on the date of their application under S. 186 instead of proceeding in their own name as applicants under S. 186, had, in pursuance of their powers under S. 179 (a), instituted a suit in the name of the Company by the presentation of a plaint, the Court must of necessity have dismissed that suit under the Lim. Act.

In considering the meaning and effect of S. 186, three features of the section call for notice: (1) It is concerned only with moneys due from a contributory, other than money payable by virtue of a call in pursuance of the Act. A debtor who is not a contributory is untouched by it.

Moneys due from him are recoverable only by suit in the Company's name. (2) It is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights. (3) The power of the Court to order payment is discretionary. It may refuse to act under the section, leaving the Liquidator to sue in the name of the Company, and it will readily take that course in any case in which it is made apparent that the respondent under this procedure, if continued, would be deprived of some defence or answer open to him in a suit for the same moneys.

In a proceeding under S. 186, every objection is just as open to the person sought to be charged as it would have been if a suit had been filed.

In England, the corresponding section does not operate as to deprive a man of a defence to a claim made by the Liquidator which would have been effective against the same claim if brought against him by an action in the Company's name and the position in India is the same.

The view that once the winding up commenced, there could be no further application of the rule of limitation in regard to any debt due to the company and not then already time-barred is erroneous. In this respect there is no analogy between the position of a debtor to, and a creditor of, a Company in liquidation. AIR (Vol 20) 1933 PC 63: (1933) MWN 190: (1933) ALJ 175: 35 Bom LR 319: 37 MLW 445: 64 MLJ 403: 37 CWN 379: 57 CLJ 166: 54 All 1067: 60 IA 13: 142 Ind Cas 7.

——**S. 186 — Order of contribution.**

In making an order of contribution the Court is not subjected to rules of limitation. As soon as the list of contributories is settled the liability of the contributory is founded on a different footing from the one on which it rested till then. Before the order of contribution is passed, the liability is contractual liability. Subsequent to that order it is a new liability which may be described as a statutory liability. (20 Bom 654; 38 All 347 and 31 Mad 66, Foll.) That the making of an order of contribution is not controlled by any rule of limitation does not lead to the conclusion that the enforcement of the same order is equally not so controlled. Steps taken for the enforcement of the order are controlled by the general law of limitation. AIR (Vol 13) 1926 Oudh 289 : 93 Ind Cas 631 : 1 Luck 153 : 3 OWN 237: 13 OLJ 49 (DB).

——**S. 186 — 'At any time' — Meaning of.**

Section 186 (1) does not over-ride the provisions of the Limitation Act, nor does it enable a Court to enforce by a summary order the payment of a debt which it could not have enforced in an action at law e.g., a time-barred debt. The words "at any time" can only mean at any time in the course of liquidation proceedings, commencing from the date of the winding up order. AIR (V 11) 1924 Lah 53 : 4 Lah 109 : 5 LLJ 569 : 74 Ind Cas 600 (DB).

4. Powers of Court.

——**S. 186 — Scope — Power of Court.**

In proceedings under S. 186, the Court will not go into the question of the validity of the liquidation. That question should be raised in proper proceedings. AIR (Vol 29) 1942 All 136: (1942) ALJ 47: ILR (1942) All 26: 1942 AWR (HC) 4: 199 Ind Cas 663.

——**Ss. 186, 187 — Calls validly made by directors prior to liquidation — Date of payment expiring — Call, whether debt realisable by liquidator — Jurisdiction of Court.**

A call, once it has been validly made by the directors prior to liquidation and once the date for its payment has passed, becomes a debt due from the share-holder to the company and is indistinguishable from any other debt.

When subsequently the company goes into liquidation, that debts, or those debts, become assets of the company which have to be realized

by the Liquidator. They lose their character as calls and become debts and, as such, are realisable by the Liquidator just as any other debt or asset is realised.

Under S. 186, the Court has not even any jurisdiction to ask the Liquidator what he wants it for and still less to withhold the payment of it from him. When, of course, a Liquidator comes to the Court under S. 187 and asks for leave to make a call after the liquidation has intervened, the position is quite different.

There the Court has jurisdiction and indeed it is the very object of its being brought to the Court at all to consider whether the Liquidator really needs the money he says he needs it or not. AIR (Vol 29) 1942 All 136: 1942 AWR (HC) 4: ILR (1942) All 26: 199 Ind Cas 663.

——S. 186 — Registered office of company situated within jurisdiction of District Judge — Power of District Judge to pass orders in liquidation proceedings — Certain contributories living outside British India — Whether amenable to jurisdiction of District Judge within whose jurisdiction registered office is situated.

Where the registered office of a company is situated within the jurisdiction of the District Judge, by virtue of S. 3, he is the Judge who has jurisdiction to pass orders in liquidation proceedings. He has jurisdiction to pass orders for payment of any amount that may be due from the contributories to the company on account of the arrears in the calls under S. 186 of the Companies Act, and if there is any dispute between the parties, he can adjudicate on it under S. 215.

The fact that certain contributories reside outside British India is immaterial, as by their agreeing to become members of a company with its registered office in British India and within the jurisdiction of the District Judge, they are amenable to his jurisdiction. AIR (Vol 21) 1934 Lah 362: 36 PLR 467: 15 Lah 302: 147 Ind Cas 739.

——S. 186 — (1882), S. 150 — 'Debt due on a pro-note by contributory (meaning of) — Enforceability.

Under S. 150 the court has summary power to direct the contributory to pay all moneys due from him whether as a contributory or in his private capacity, to the company. 'Debt due on a pro-note by contributory' comes under S. 150 Companies Act. The jurisdiction under the Act is permissive and ought not to be refused in the absence of cogent reasons, when a fit case is made out for its exercise. AIR (Vol 2) 1915 Lah 271: 4 PWR 1916: 36 PR 1916: 45 PLR 1916: 31 Ind Cas 746 (DB).

5. Set-off.

——Ss. 186, 187 — Contributory — Set-off, claim of.

The Court will not allow a person to whom the company is indebted to set-off that indebtedness against what is due from him as a contributory in respect of calls. It is otherwise where the two debts are of a purely commercial nature. But where the debt to the company is in respect of calls, the set-off is never available to a contributory. AIR (Vol 29) 1942 All 136: (1942) ALJ 47: (1942) AWR (HC) 4: ILR (1942) All 26: 199 Ind Cas 663.

——S. 186 — Contributory — Set-off, claim of.

There is nothing in S. 186, which can reasonably be construed as a general deprivation of contributories to companies in liquidation, of the right of set-off. AIR (Vol 27) 1940 All 544: (1940) ALJ 826: 1940 AWR (HC) 639: ILR (1941) All 153: 192 Ind Cas 357 (FB).

(Overrules AIR (V 25) 1938 All 613 : (1938) ALJ 925 : 1938 AWR (HC) 621 : ILR (1938) All 957 : 178 Ind Cas 458.)

6. Transferee of order of payment.

——S. 186 — (S. 150, old) — A person, to whom the liquidator has transferred a payment order made by the Court under S. 150 against a contributory, is entitled to invoke the summary jurisdiction of the Court for the purpose of recovering the money due from the latter, and the circumstance that the Company has been finally dissolved does not prevent the assignee from seeking relief from the liquidation Court. AIR (Vol 8) 1921 Lah 78: 67 Ind Cas 443: 3 LLJ 382 (DB).

——Ss. 186, 199, 200 and 201 — Order of payment of under S. 186 — Right to enforce of transferee — Application for recognition — C. P. C. O. 21 R. 16 — Applicability.

In the case of orders of payment under S. 186 of the Companies Act, the person to apply for the enforcement of an order or decree is the person in whose favour the order or decree has been made or passed.

An assignee or transferee cannot make such an application and until his name has been substituted for that of the person in whose favour the decree or order has been passed or made. Ss. 200 and 201 of the Companies Act, must be held to be subject to the special provisions of R. 15 of O. 21 of the C. P. Code. Therefore a transferee of an order under S. 186 of the Companies Act must, in the first instance, apply to the court which made the order. AIR (Vol 5) 1918 Lah 211: 92 PR 1918: 168 PWR 1918: 47 Ind Cas 997.

——S. 187.

See also Companies Act, S. 186.

——S. 187 — Foreign company — Liquidation — British Indian share-holder — Liability.

In a personal action a decree pronounced by a Court of a foreign state in absentem, the defendant not having submitted himself to its authority is by international law a nullity.

The defendant was a share-holder in a company registered in a Baroda State and a resident in British India. Liquidation proceedings in respect oi the company were started before Baroda Liquidation Court. The defendant did not submit to its jurisdiction but still that Court made a call order on the defendant in absence of an express agreement in the Articles of Association that the disputes with the share-holders should be settled by the State Court:

Held, that the call order against the defendant made by the Baroda Liquidation Court was made without jurisdiction and could not be enforced as such in British India. It was, therefore, necessary that the Liquidator suing the defendant in British India should prove all the facts necessary to establish the liability of the defendant. In order to allow the plaintiff to succeed, it must also be established that the call order for the particular amount was necessary and just. The mere fact that a call order was made did not amount to such proof. AIR (Vol 25) 1938 Lah 559: 40 PLR 819: 181 Ind Cas 392 (DB).

——S. 187 — The only Court which can make an order under S. 187 is the winding up Court. AIR (Vol 23) 1936 All 826: (1936) ALJ 1134: 58 All 742: 166 Ind Cas 98 (FB).

——S. 187 — Compulsory winding up — Demand by Liquidator before call by Court — Payment by contributory — Subsequent call by Court — Validity of payment.

Where after an order for the compulsory winding up of a company was made money due by a contributory was demanded by the Official Liquidator and it was paid to him as such :

Held, that although the demand and payment were made before a formal 'call' was ordered by the Court under S. 187, and there was no evidence to show that the Official Liquidator had applied the money for the benefit of the company, the contributory could not be asked to pay again in compliance with a 'call' by the Court made subsequently and at the instance of the successor of the Liquidator who had received the money. AIR (Vol 19) 1932 Cal 691: 59 Cal 1099: 36 CWN 409: 139 Ind Cas 882 (DB).

——S. 187 — Liability of members — Liquidator — Better position of.

A member of a company in liquidation is liable to official liquidators in respect of unpaid calls even though as against the company the realization of such calls may have become barred by limitation. 38 All 347, Foll. Liquidation gives the official liquidators a cause of action which the company may not itself have possessed. Just as a claim, if brought by the company, might be held to be barred by limitation, but not, if brought by the official liquidators, in the same manner a claim which might be held to be barred by the C. P. Code if brought by the company can be preferred by the official liquidators under the provisions of the Companies Act. AIR (Vol 15) 1928 All 272: 50 All 476: 113 Ind Cas 91: 26 ALJ 256.

——S. 187 — Sale of shares by Managing Director — Default of director — Winding-up — Call money.

A shareholder contracts to contribute a certain amount, to be applied in payment of the debts and liabilities of the company and it is inconsistent with his position as a share-holder, when he remains as such, to claim back any of that money, on the plea that the Managing Director falsely told him that the shares were sold. AIR (Vol 4) 1917 Bom 132: 42 Bom 264: 19 Bom LR 615: 41 Ind Cas 261 (DB).

——S. 187 — Limitation Act — Art. 112.

The right enforced by a court in making calls from the contributories on the list prepared by the liquidator or an insolvent company is a statutory right of the creditors to enforce against the shareholders of the company, on its insolvency and not a right of the company being enforced by the liquidator. The calls are recoverable even though they are time-barred under Art. 112 Limitation Act. AIR (Vol 3) 1916 All 317: 38 All 347: 14 ALJ 349: 35 Ind Cas 159.

——S. 187 — (1882, S. 151) — Scope of.

S. 151 is not restricted to original calls but includes unpaid calls before the winding up also. The balance of the price of shares, for which a call has been made before liquidation, can be recovered by a summary action by the Official Liquidator. (1911) 67 PR 1911: 218 PWR 1911: 12 Ind Cas 958 (959) (DB).

——S. 188.

——S. 188 — Payment of debt due to some creditors at date of winding up petition, resulting in loss to other creditors who are treated equally with those who have been paid — Payment, if should be validated.

The ordinary principle is that all creditors to whom money is due at the date of the petition for winding up shou'd be treated equally with certain exceptions in favour of those who have priority under the express provisions of the Act. Where the company or its officers make preferential payments to some creditors, they are obviously acting in contravention of this rule. On the other hand, where the business of the company is continued in good faith either because it is hoped that it may not be necessary eventually to wind up the company or because in the interests of all concerned, it is better that the company should on being wound up be transferred as a going concern, it is necessary for the company to enter into various transactions and it would be impossible for it to do so if it was not able to make any transfers. It is not possible to make a definite rule to meet all circumstances because these may be extremely varied, but generally speaking it would not be just for the Court to validate a transaction which amounted to no more than the payment of a debt which was due to one creditor or some creditors at the date of the petition for winding up, if that would result in loss to other creditors who should be treated equally with those who have been paid. AIR (Vol 27) 1940 All 514: 1940 AWR (HC) 494: ILR (1940) All 730: (1940) ALJ 739: 192 Ind Cas 72.

——S. 188 — Section 188 does not give Court power to direct payment from any person other than those mentioned in S. 185. AIR (Vol 27) 1940 All 514: (1940) ALJ 739: 13 RA 293: 1940 AWR (HC) 494: ILR (1940) All 730: 192 Ind Cas 72.

——S. 188 — Persons entering into contract with Liquidator, during liquidation do not come under S. 185 and hence an order directing them to pay the Liquidator cannot be enforced under S. 185 or under S. 188. AIR (V 23) 1936 All 808 : 1936 AWR (HC) 537: (1936) ALJ 741: 58 All 925: 165 Ind Cas 790 (DB).

——S. 188 — Judicial decision of matters which may arise with third parties owing to the transaction entered into by the Liquidator is not foreign to the jurisdiction of the company Judge and an order cannot be made with regard to these matters either under S. 185 or S. 188. AIR (Vol 23) 1936 All 808: 1936 AWR (HC) 537: (1936) ALJ 741: 58 All 925: 165 Ind Cas 790 (DB).

——S. 188 — "Any such order.....Liquidator", effect of on persons other than contributories.

The words "and any such order may be enforced in the same manner as if it had directed payment to the Official Liquidator" in S. 188, do not give jurisdiction to enforce an order against persons other than contributories, or persons mentioned in S. 185. The natural construction to place on these words that if an order can be enforced, which is an order directing payment to an Official Liquidator, the same order can be enforced if it directs payment to a bank. AIR (Vol 23) 1936 All 808 : (1936) ALJ 741 : 1936 AWR (HC) 537 : 58 All 925: 165 Ind Cas 790.

——S. 188 — Agent's power to sign for principal.

Where the question is whether the act of an agent is to be deemed the act of his principal, the Court will apply the common law rule, qui facit per alium facit per se, unless it is satisfied, having regard to the terms of the particular statute or agreement under consideration, that it was the intention of the Legislature or of the parties, as the case may be, that the act should not be performed by an agent. AIR (Vol 18) 1931 Rang 306 : 9 Rang 323 : 133 Ind Cas 483 (DB).

——S. 189.

——Ss. 189 and 235 — Powers of Court with regard to estate of a contributory or debtor — Cannot be exercised in a summary proceeding under S. 235 of the Act. See AIR (Vol 33) 1946 Mad 304 : (1946) 1 MLJ 53.

——S. 189 — (1882, S. 153) — Arrangement among creditors — Retrospective effect.

An arrangement, arrived at, in a meeting of three-fourths of the creditors of a company and subsequently sanctioned by High Court, takes effect from the date of meeting and not the date of sanction. AIR (Vol 3) 1916 Oudh 276 : 18 OC 272 : 32 Ind Cas 451 (DB).

(Affd. O. A. by Privy Council 41 All 566 : 50 Ind Cas 429 : AIR (V 6) 1919 PC 9.—Ed.)

——S. 191.

——S. 191 — Delay in filing proof of claim — Claimant may be paid dividend without disturbing previous dividends.

The only penalty for failure to come in within the time stated in the notice for proving the claim is that the claimant is excluded from the benefit of any distribution made before such debts are proved, that is, he can only claim a proportionate share in such assets as may remain undistributed at the time when the proof is claimed and without disturbing any distribution made before such proof.

Consequently an application for excusing delay in filing proof of a claim should be allowed and so long as justice can be done to a creditor without disturbing the dividend already declared or paid, there is no reason why he should be prevented from getting his dividend. AIR (Vol 29) 1942 Mad 349 : (1942) 1 MLJ 182 : 55 MLW 99 : 1942 MWN 347 : 204 Ind Cas 164.

——S. 191 — (S. 156 of 1882 Act) — Exclusion of creditors — Notice to creditors to prove claims — Omission to come in — Proof at later stage — Effect of.

Omission to come in and prove one's claim within the time fixed in the notice published under S. 156 of the Act does not preclude the creditor from coming in at a later stage to prove his claim, nor does it necessitate his resorting to a suit to be instituted with special leave of the Court under S. 136 of 1882 Act. The only penalty for failure to come in within the time fixed in the notice is that the claim is "excluded from the benefit of any distribution made before such debts are proved, i.e., he can only claim a proportionate share in such assets as may remain undistributed at the time when he proves his claim and without disturbing any distribution made before such proof. L. R. 7 Ch. 646 foll. Notice of appeal under S. 169 (1882 Act) may be extended. (1903) 27 Mad 496, 497 (FB).

——S. 192.

——S. 192 — Holder of fully-paid shares — 'Contributory' — Adjustment of rights.

Fully paid share-holders are contributories and are entitled to have their rights adjusted under S. 192. But a transferee of shares whose name has not been entered on the register is not a contributory. AIR (Vol 21) 1934 Mad 476 : (1934) MWN 554 : 40 MLW 99 : 67 MLJ 599 : 57 Mad 955 : 150 Ind Cas 591 (DB).

——S. 193.

——S. 193 — (1882, S. 158) — A charge in equity was created where a lease provided for payment of arrears of rent with interest from buildings erected on land. Although not amounting to a transfer or a mortgage, the charge gave a priority right to the landlords over the company's unsecured debtors. AIR (V 1) 1914 Bom 267 (2) : 16 Bom LR 643 : 27 Ind Cas 34 (2) (DB).

——S. 194.

——S. 194 — Dissolution — The form of order under the Companies Act for dissolution of a company in compulsory liquidation laid down. AIR (Vol 7) 1920 Cal 1002 : 76 Ind Cas 678 : 47 Cal 620.

——S. 195.

——S. 195 — Company Judge conducting proceedings under S. 195, Companies Act, is a Court within the meaning of S. 476, Criminal P. C. AIR (Vol 28) 1941 Lah 52 : ILR (1940) Lah 669 : 42 Cr LJ 351 : 193 Ind Cas 170.

——S. 195 — Depositions made under S. 195 and obtained by Official Liquidator under R. 174 of Chap. XXXI, Original Side Rules, (Calcutta) are private documents — Liquidator, use by.

The depositions were made under the provisions of S. 195, Companies Act, and obtained by the Official Liquidator under R. 174 of Chap. XXXI, of the Original Side Rules made by the Calcutta High Court under the Companies Act. The Official Liquidator filed a petition asking that a receiver be appointed and stated in it that the facts elicited by such examinations clearly indicated a well-designed conspiracy to defraud the creditors of the company and also to keep the business away from their reach.

Held, that the depositions so obtained were to be regarded as private documents and the Liquidator, therefore, was not entitled to use them for making the allegations made by him in his petition. AIR (Vol 27) 1940 Cal 488 : ILR (1940) 1 Cal 28 : 44 CWN 512 : 191 Ind Cas 879.

——S. 195 — Deponents' right to copy of deposition.

Each of the defendants who has deposed under S. 195, is entitled to have a copy of his own deposition upon his Counsel undertaking on his behalf to prevent communication of his deposition to his co-defendants or their solicitors or Counsel. AIR (Vol 27) 1940 Cal 488 : ILR (1940) 1 Cal 28 : 44 CWN 512 : 191 Ind Cas 879.

——Ss. 195, 196, 202 — Examination, object and scope of — Power to direct examination by Liquidator with help of Counsel — Appeal from order directing examination.

On the motion of the Official Liquidator of a Company in liquidation, the Court passed an order on April 5, 1930, directing summonses to issue for the examination of the Managing Directors under S. 195, with all the documents of the Company in their possession. The Managing Agents appeared in Court and raised certain objections to their being examined and also to the Official Liquidator conducting their examination through the agency of Counsel. The objections were rejected on June 21, 1930, and the Managing Agents appealed on July 14, 1930.

Held, (i) that inasmuch as the first order was merely a preliminary order and was apparently subject to any objection that might be raised by the appellants and such objections were actually raised by them and decided against them, the only order which really infringed the rights of the appellants if at all, was the order of June 21, 1930, and the appeal was not, therefore, incompetent on the ground that no appeal was preferred from the order of April 5;

(ii) that the order of June 21, 1930, finally decided the liability of the appellant to be examined in Court with reference to the property, etc., of the Company and as such was a final order as opposed to being a merely interlocutory or formal order, and was, therefore, appealable under S. 202.

The persons mentioned in S. 195, Companies Act, may be examined for the purposes specified therein even if they are suspected to have in their possession any property of the Company or are supposed to be indebted to the Company

The powers of the Court given by S. 195, are very wide and it is not necessary that the Court must first determine that the person called upon to furnish information does actually possess that information.

The Court has power to direct that an examination under S. 195 shall be conducted by the Official Liquidator with the help of Counsel. Whether the services of Counsel should or should not be allowed is a matter entirely within the discretion of the Company Judge.

The scope of an examination under S. 195, is to seek information on matters which may be just or beneficial for the winding-up of the Company. If the conduct of persons connected with the formation or management of the Company is to be investigated, that must be done under S. 196, Companies Act and not under S. 195. AIR (Vol 18) 1931 Lah 8 : 130 Ind Cas 407.

——Ss. 195 and 202 — Appeal — Order finally deciding dispute between parties or depriving party of substantial right, but not formal or interlocutory order, is appealable.

Section 202 is wide enough to cover appeals against any order made in the matter of winding-up of a company, provided such an order finally decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal or interlocutory order.

On an application by the Official Liquidator of a company under compulsory liquidation an order was passed on 5th April 1930 for issuing summonses for the examination of the managing agents under S. 195 with all the documents of the company under their custody and directing them to produce all the property and cash in the Court. The managing agents appeared in the Court and raised certain objections to their being examined and to the Official Liquidator conducting their examination through a counsel. The District Judge disallowed these objections by an order, dated 21st June 1930. An appeal against the order was presented on 14th July 1930.

Held, that the appeal against the order dated 21st June 1930, was competent in view of the order passed on 5th April 1930. There could be no valid objection on that score as the order of 5th April 1930 was merely a preliminary order and was subject to objection by the managing agents. The only order which really infringed their rights was that of 21st June 1930. The appeal therefore was in time.

Held also, that the order, dated 21st June 1930, was a final order as it finally decided the liability of the managing agents to be examined in the Court and was therefore appealable. AIR (Vol 18) 1931 Lah 8.

——S. 195 — Counsel for Official Liquidator.

It is a matter entirely within the discretion of the District Judge whether the services of a counsel should be allowed to an Official Liquidator in an inquiry under S. 195. AIR (Vol 18) 1931 Lah 8.

——S. 195 — Examination — Scope of — Person whom Court thinks to be in possession of information useful for winding-up company can be called and examined in Court.

The powers of the Court given by S. 195 are very wide and it is not necessary that the Court must first determine that the person called upon to furnish the information does actually possess that information. If the Court has reason to think, or even an allegation is made that a certain person is in possession of information which would be useful for the purposes of the winding-up of the Company, the Court is entitled to call upon him to appear in Court and to examine him. AIR (Vol 18) 1931 Lah 8.

——Ss. 195 and 196 — Examination — Scope of — S. 195 is intended to promote liquidation proceedings — S. 196 is intended to investigate conduct of those charged with its affairs.

The scope of an examination under S. 195 is to seek information on matters which may be just or beneficial for the winding-up of the company. If the conduct of persons connected with the formation or management of the company is to be investigated that must be done under S. 196. The two sections (195 and 196) have quite different scopes. S. 195 is intended to be used for the purpose of promoting the liquidation proceedings, while S. 196 is primarily intended to investigate the conduct of those who have been charged with its affairs. AIR (Vol 18) 1931 Lah 8.

——S. 195 — Inspection by public officers.

In the interests of the administration of criminal justice, Courts should allow a public officer charged with the investigation of criminal offences, such as the Deputy Superintendent of Police, to inspect the depositions of a person, who is believed to be involved in a criminal offence, made under S. 195, Companies Act, and to inform himself of anything that may come to light on such inspection. He cannot, however, take copies of the depositions but only notes of them. AIR (Vol 17) 1930 Cal 521 : 57 Cal 424.

——S. 195 — Appeal — An order under S. 195, Companies Act, made by a Court directing the directors of a company to appear before the Court for examination as to their dealings in respect of the affairs of a company is not a judgment within the meaning of Cl. 15, Letters Patent (Calcutta) and therefore is not appealable. AIR (Vol 15) 1928 Cal 295 : 109 Ind Cas 764 : 55 Cal 262 (DB).

——S. 195 — Permission to creditor to attend — Discretion to allow creditor to attend should be exercised in very extreme cases.

Obiter.—Where the Liquidator refuses to act or where he has not the means to act, then the Court can give the conduct of the examination to petitioning-creditor, and Court has a discretion to allow a creditor to attend even where the official Liquidator has the conduct of the examination, but that discretion, ought not to be exercised except in very extreme cases. The examination under S. 195 is a private one, and it would be an invasion of this privacy if petitioning-creditors and others were allowed to attend, particularly so when the petitioning-creditor, who seeks to attend is engaged in litigation with the company in liquidation. AIR (Vol 11) 1924 Rang 24 : 1 Rang 384 : 83 Ind Cas 3.

——S. 195 — (1882, Ss. 162 and 163) — Director and Manager — Order for examination.

An order for the discovery and inspection of the books and papers of a company in liquidation and for the examination of its Directors will be made only if the Court is satisfied that the course is likely to lead to some benefit to the creditors and was not merely intended to harass and annoy the Directors. It is in the discretion of the court, in charge of the winding-up to determine whether it will exercise its powers under the sections; but the discretion should be exercised judicially. An appeal lies against an order if the appellant can show that the order impugned is vexatious or oppressive so far as he is concerned and that it is not just or beneficial for the purpose of the winding-up. AIR (V 2) 1915 Lah 109 (2) : 40 PR 1915 : 132 PWR 1915 : 77 PLR 1915 : 28 Ind Cas 286 (DB).

——S. 196.

——S. 196 — Jurisdiction — Public examination — Order for — When to be made.

It would be open to the Court to make an order for the public examination of the director of a company under S. 196, Companies Act, if the Official Liquidator applies under that section and states in his application that in his opinion a fraud has been committed by any person whom he wants to get examined. The section, however, only aims at those persons who are charged with fraud and not those who may be concerned with the working of the company and are not charged by the liquidator with fraud. AIR (Vol 36) 1949 Bom 339 : 51 Bom LR 510 : 1950 Comp C 8 (DB).

——S. 196 — Practice — Ex parte order — Propriety — Proper procedure.

When an order is sought under S. 196, Companies Act, the Official Liquidator should take out a chamber summons which should be served on the person affected so that the Court before it makes an order will have all the materials before it. It is not a sound practice to make an order ex parte. AIR (Vol 36) 1949 Bom 339 : 51 Bom LR 510 : 1950 Comp C 8 (DB).

——Ss. 196 and 216 — Voluntary winding up — Public examination of director — Application for — Whether can be made.

In a voluntary winding-up an application for public examination of a director cannot be made under the provisions of S. 196 of the Companies Act. None of the conditions laid down by that section for the exercise of jurisdiction conferred by it can possibly be fulfilled in the case of a voluntary liquidation.

By S. 216 of the Act powers have been given to the Court at the instance of a voluntary liquidator to enforce calls, stay proceedings or help him in any other matter, which can only mean matters similar to the enforcing of calls, etc. These words can only be read ejusdem generis with the enforcing of calls and the matters following it. The public examination of a promoter or director of a company cannot be said to be a matter similar to the enforcing of calls or staying of proceedings, etc. It is the exercise of ordinary functions of a company judge and not the exercise of his extraordinary functions that seem to have been contemplated in S. 216 of the Act. In any case, S. 216 has to be read in the light of the phraseology employed in S. 196 (1) and (2) and in S. 177-B (2) of the Act. AIR (Vol 34) 1947 Lah 283 : 49 PLR 175 : 1947 Comp C 157.

——S. 196 — Public examination of directors after resignation.

A director who was a party to the issue of shares in consideration of promissory notes can be publicly examined although he has resigned prior to the notice. Issue of such shares is a circumvention of the provisions of the Act and is contrary to the provisions of the Articles of Association. This in itself would not be sufficient to prove fraud; but it suggests fraud and would, therefore, justify the public examination of the director concerned. Such a director, however, would not be liable for anything that happened subsequent to the resignation. AIR (Vol 31) 1944 Mad 87 : 56 MLW 648 : (1943) 2 MLJ 499 : 1943 MWN 716 (2) : ILR (1944) Mad 540 : 211 Ind Cas 436 (DB).

——S 196 — An order directing that a person should be examined under S. 196 is not a judgment within Cl. 13, Letters Patent (Rang) and hence no appeal lies against the order. AIR (Vol 23) 1936 Rang 166 : 14 Rang 15 : 161 Ind Cas 749 (1) (DB).

——S. 196 — Absence of extraordinary resolution to wind up — Notice of general meeting not specifying intention to propose extraordinary resolution.

It cannot be said that the company is in voluntary liquidation in accordance with the provisions of the Act and hence the Court has no power to order the directors to be examined under S. 196. AIR (Vol 21) 1934 Rang 271 : 151 Ind Cas 987.

——S. 196 — Scope — Official Liquidator's application — Allegation of fraud — Contents of application — Specification of charge — Objection as to jurisdiction.

While the Court must consider judicially the application of the Official Liquidator under S. 196, and only pass an order on being satisfied that there is reasonable ground for the allegation of fraud upon facts stated in the application, there is no necessity to specify the charge of fraud with the same particularity as would be necessary in a criminal charge under the I. P. C. It is impossible to lay down in each particular case what should be the contents of an application under this section. Each application depends on the facts in the particular case. The person against whom there is an allegation of fraud should be clearly named and some facts stated in the application itself to show that a prima facie case exists against that person. Once the Official Liquidator has made out any prima facie case of fraud against an officer, the examination is not to be confined to the particular fraud mentioned in the application. The only objection which an official of the company can make to an order of the Court passed ex parte against him for his public examination is one of jurisdiction. He is not entitled at that stage to endeavour to show that the charge of fraud is incorrect.

Section 196 is designed for a thorough investigation of the affairs of the company and the actions of the officers. AIR (V 20) 1933 All 366 : (1933) ALJ 229 : 55 All 493 : 143 Ind Cas 482 (2).

——S. 196 — Examination under — Person examined is not protected under Evidence Act, S. 132.

S. 196 (5), Companies Act, was enacted in order to enable the Court in charge of the liquidation proceedings to examine the persons mentioned therein inter alia to ascertain their conduct with regard to the management of the Company and to find out its financial condition and its assets. In these proceedings there is no contest between two parties and therefore the proviso to S. 132 of the Evidence Act does not confer any special privilege on the persons so examined. AIR (Vol 13) 1926 Lah 385 : 27 Cr LJ 1383 : 98 Ind Cas 599.

——S. 196 — "In civil proceedings".

The intention of the Legislature in using the words "in civil proceedings" in S. 196 (7) was to make the statement admissible against the person examined unconditionally so far as civil proceedings are concerned and in criminal proceedings subject to the provisions of S. 132 Evidence Act. S. 196, Companies Act, was not intended in any way to override the provisions of the Indian Evidence Act. AIR (V 13) 1926 Lah 385 : 27 Cr LJ 1383 : 98 Ind Cas 599.

——S. 196 — Who can inspect.

It is only a creditor or contributory or some party to the proceedings which are pending who would be entitled to the inspection of notes of examination. AIR (Vol 13) 1926 Lah 246 : 26 PLR 432 : 96 Ind Cas 755 (DB).

——S. 199.

——Ss. 199 and 202 — Distinction between an order having force of decree and an order that may be enforced in the same manner as a decree — Executable order under S. 199 is not an order having force of a decree — Memorandum of appeal

under S. 202 — Court-fee payable — Court Fees Act (VII of 1870), Sch. II, Art. 11.

There is a distinction, both real and practical, and not merely artificial, between an order that has, by statute, the force of a decree and an order that may, by statute, be enforced in the same manner as a decree. An order that is given by statute the force of a decree is an order that proprio vigore stands as a decree whatever the consequences, whereas an order that may, by statute, be enforced as a decree is an order that may be of little or no effect, proprio vigore, and only becomes effective, when executed by the method by which a decree may be executed. In other words, it is a mere shadow unless and until life is infused into it by an application for execution. It is a well-recognised rule of interpretation of statutes that there is a presumption that the Legislature means different things by different phraseology; and when it describes an order as having the force of a decree, it must mean something different from the description of an order which may be in the same manner as a decree. Hence an executable order of the Liquidation Judge made under Companies Act which, under S. 199, Companies Act can be enforced in the same manner as a decree is not equivalent to an order having force of a decree under Sch. II, Art. 11, Court Fees Act.

(Per Blacker, J., in Order of Reference) — Section 202, Companies Act, clearly differentiates between appeals against orders and appeals against decisions and S. 199 applies only to orders. A decision to overrule preliminary objections and proceed with the case on the merits and a refusal to grant leave to proceed with a suit in another Court are decisions and not orders coming within the ambit of S. 199 and, therefore, memoranda of appeal under S. 202 have to be stamped under Sch. II, Art. 11, Court Fees Act.

(Per Marten, J.) — In view of the distinction between orders having the force of a decree within the meaning of Art. 11, Sch. II, Court Fees Act and orders enforced in the same manner in which decrees may be enforced, it follows that if any order made under the Companies Act is intrinsically of the nature of an order having the force of a decree, it will not fall under Sch. II, Art. 11, Court Fees Act, even though it may be enforceable by virtue of S. 199, Companies Act, and appealable under S. 202 of that Act. It will, therefore, be necessary for the appropriate authority to decide in each case whether or not the order has the force of a decree in order to determine the amount of court-fee to be affixed. AIR (Vol 32) 1945 Lah 146 : 221 Ind Cas 114 (FB).

——S. 199— Under S. 199, all orders made by a liquidation Court though they are not decrees may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced. Consequently a call order passed by a Liquidation Court in Baroda is not a foreign judgment and a suit on it in British India, therefore, is governed by Art. 120 and not by Art. 117, Lim. Act. AIR (Vol 22) 1935 Lah 975: 17 Lah 341: 38 PLR 662: 160 Ind Cas 346 (DB).

——S. 199 — Execution outside jurisdiction — Procedure pointed out.

Where applications are made to the High Court for directing the District Courts concerned to enforce the payment orders made by another High Court in the matter of the winding up of the Company, the proper procedure as indicated by the conjoint effect of Ss. 199 and 200 of the Companies Act is that the order that is filed should be treated in the same manner as a decree passed by the High Court in which it is filed and transferred for execution to the respective District Courts concerned and it is not competent for the High Court to authorize the official liquidator to apply to the District Courts concerned for enforcing the order under S. 164. 54 Ind Cas 384, Diss. from. AIR (V 14) 1927 Mad 271 : 25 MLW 113 : 38 MLT 377 : 100 Ind Cas 744.

——S. 199 — Reading Ss. 199 and 200 together, the Court mentioned in Ss. 200 and 201, as the Court entitled to take requisite steps is not a District Court but a High Court. Hence a decree of the Allahabad High Court in liquidation proceedings cannot be sent direct for execution to the District Court of Gaya (within Patna High Court's jurisdiction). AIR (Vol 14) 1927 Pat 182: 6 Pat 132: 101 Ind Cas 750: 8 PLT 577 (DB).

——S. 199 — (S. 166 of 1882 Act) — Payment order.

A payment order though not a decree is to be executed in the same manner in which a decree can be executed. AIR (V 8) 1921 Lah 78 : 3 LLJ 332 : 67 Ind Cas 443 (DB).

——S. 200.

——S. 200 — Applicability.

Section 200 applies to a case where an order made by the High Court of one Province is to be enforced in another Province, it can only be enforced by the High Court of that other Province. AIR (Vol 17) 1930 Mad 74: 53 Mad 147: 1929 MWN 879: 30 MLW 849: 57 MLJ 723 (DB).

——S. 200 — Execution of order.

An order was made by the High Court under S. 187 ordering the payment of a contributory in respect of a call. He had property in the District of Tanjore against which the liquidator could proceed. The latter accordingly produced the order before the District Judge and applied for its execution. The Judge overruling the objection of the contributory held that he had jurisdiction to enforce the order.

Held, that by reading S. 200 with S. 3 it followed that the only Court that could enforce the order against property at Tanjore was the High Court. AIR (Vol 17) 1930 Mad 74: 53 Mad 147: 1929 MWN 879: 30 MLW 849: 57 MLJ 723 (DB).

——S. 201.

——S. 201 — Order of one Court — Enforcement of, by another, procedure.

An order passed by a Court under the Companies Act can be enforced by another Court on a mere production of a certified copy of the order. The order need not be transferred for execution under S. 39, Civil P. C. AIR (Vol 30) 1943 Sind 89 : ILR (1942) Kar 504 : 207 Ind Cas 275.

——S. 202.

1. Applicability and scope
2. **District Court — Order of — Appeal against.**
3. **Limitation for appeal**
4. **Parties to appeal**
5. **Orders**
6. **Right to appeal**
7. **Rehearing.**
8. **Review.**
9. **Revision.**
10. **Separate suit, if barred.**

1. Applicability and scope.

—Ss. 202, 196—Appeal from ex parte order for examination of directors.

Section 202, is wide enough to cover the order directing the public examination of the directors. It is immaterial that the order is passed ex parte AIR (V 31) 1944 Mad 87 : (1943) 2 MLJ 499 : 1943 MWN 716 (2): ILR (1944) Mad 540: 56 MLW 648: 211 Ind Cas 436. (DB).

——S. 202 — Scope — Order holding petition under S. 235, maintainable — Appeal.

Section 202, is very wide in its terms and permits appeals "from any order or decision made, or given, in the matter of the winding up", provided such order finally decides a dispute between the parties or deprives the appellant of substantial and important right and is not a mere formal and interlocutory order, the last part of the section merely regulates the procedure to be followed in the presentation and hearing of such appeals.

Where the High Court passes an order holding the application under S. 235, presented by the Liquidator against certain persons to be maintainable, the order is not of a merely formal or ministerial character but finally decides points between the parties relating to substantial and important rights and is therefore appealable under S. 202, and the aggrieved party is entitled to appeal to a Division Bench under Cl. 10 of the Letters Patent (Lah).AIR (V 25) 1938 Lah 658 : 180 Ind Cas 254 (DB).

——Ss. 202, 225 — Appeal from orders passed in winding up proceedings under supervision of Court.

Under S. 225 the orders passed by the Court in winding up proceedings under the supervision of the Court stand for all purposes on the same footing as orders passed during such proceedings when the winding up is by the Court. Hence in view of the language of S. 225 the appeal is competent from an order passed in winding up proceedings under supervision of the Court. AIR (Vol 22) 1935 Lah 174 (1) : 38 CWN 433 : 158 Ind Cas 853.

——S. 202 — Winding up order on April 5, 1930, on motion of Official Liquidator, directing public examination of Managing Directors under S. 195 — Managing Agents appearing in Court and raising objections to their being examined and also to the Official Liquidator conducting their examination through the agency of Council — Objections rejected on June 21, 1930 :

Held, that (i) the appeal was not incompetent against order of June 21, 1930 on the ground that no appeal was preferred on order of April 5, 1930.

(ii) order of June 21, 1930 finally determined the liability of the managing agents and was final order and hence appealable under S. 202. AIR (Vol 18) 1931 Lah 8 : 130 Ind Cas 407.

——Ss. 202, 237 — Order directing Official Liquidator to prosecute officer, whether appealable.

The wording of S. 202, is wide enough to include an order under S. 237 directing the Official Liquidator to prosecute for a criminal offence, and such an order is, therefore, appealable. AIR (Vol 18) 1931 Sind 120 : 132 Ind Cas 474.

——S. 202 — Test.

The language of S. 202 is wide enough to cover appeals against all orders made in the matter of the winding up of a company, provided such an order finally decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal or interlocutory order. 117 Ind Cas 895 : 30 PLR 525 : 10 Lah 806 : 11 LLJ 417 : AIR (Vol 16) 1929 Lah 707 (FB).

——S. 202 — Certain latitude should be allowed.

In the application of section 169 of 1882 Act (S. 202 of 1913 Act) a certain amount of latitude was allowed because in matters of winding up the previous orders of the Court are not based upon issues which have been formulated, as they are in an ordinary suit with pleadings, and the time for appealing is very short. AIR (V 10) 1923 All 429 : 4 LRA Civ 154 : 72 Ind Cas 106 (DB).

——S. 202 (S. 169, old) — Construction — If the literal construction of S. 169 is the proper and necessary construction, the section is unworkable in practice because it can very seldom happen that an appeal can be filed and notice of it served through the Court within three weeks of the date of the judgment under appeal. 63 Ind Cas 607 : 19 ALJ 371 : AIR (Vol 8) 1921 All 107 (DB).

——Ss. 202, 284 — (1882), S. 169 — Order directing preferential payment to creditor.

Every company, the winding-up of which commenced before the Companies Act of 1913 came into operation, must be wound up in the same manner & with the same incidents as if the new Act had been passed. An order directing a preferential payment to be made to a creditor of a Bank in liquidation relates to & is an incident of the winding-up. In the case of a Bank winding-up of which commenced, before the coming into operation of the Act of 1913, an appeal against such an order without coming with the provisions of S. 169 of Act VI of 1882 is incompetent. 16 ALJ 70: 43 Ind Cas 642: AIR (Vol 5), 1918 All 342 (DB).

——S. 202 — (1882), S. 169 — Three weeks notice of appeal — Essential — Appellant's duty to be prompt.

An appellant desiring to contest an order passed under the Companies Act, must conform strictly to the provisions of S. 169 of the Act and should give notice of any appeal he may file within three weeks after the order complained of has been made. 100 PLR 1914 : 68 PR 1914 : 22 Ind Cas 795 : AIR (V 1) 1914 Lah 252 (DB).

——S. 202 — (1882), S. 169 — Appeal, notice.

An appeal, against an order in the matter of the winding-up of the company, is incompetent without a notice as required by S. 169. (1911) 33 All 641 (644) : 8 ALJ 719 : 10 Ind Cas 908 (DB).

——S. 202 — (S. 169 of 1882 Act) — Notice of appeal.

Notice of appeal against an order made in the course of winding up of a company should strictly be given within 3 weeks from the date of order and an appeal will not be heard in the absence of such notice, (1903) 30 C. 758 (760).

——S. 202 — (S. 169 of 1882 Act) — Appeals from orders in winding up — Ex parte application for extension of time — Service of notice within the extended time — Extension made on ex parte application valid — Rights of respondents to raise objections at hearing of appeal.

By S. 169 of the Indian Companies Act, 1882, appeals are provided for against orders and decisions made in the winding up of companies. If further provides that such appeal shall not be heard unless notice of the same is given within three weeks after any order complained of has been made in manner in which notices of appeal are ordinarily given under the Code of Civil Procedure unless such time is extended by the court of appeal. Certain applicants, under S. 214 for an order against delinquent directors and officers of a company, appealed to the High Court against the order of the District Court dismissing their petitions. An ex parte application was made for extension of time, and was granted, and notice was given within the extended time.

Held, that notice of the application was unnecessary ; but as the order for extension was made ex parte, the respondent could object to it at the hearing. Such an appeal must, under S. 169, be filed within three weeks of the date of the order at the latest. Bhashyam Aiyangar, J. Obiter :— S. 169 of the Companies Act is probably complied with by lodging the memorandum of appeal. (1902) 25 M. 576 (578, 579) (DB).

2. District Court — Order of — Appeal against.

——S. 202 — Order dismissing objections — An order of the District Judge as a Liquidation Officer, dismissing certain objections to the attachment of

property is not appealable under S. 202. 101 Ind Cas 751 : 28 PLR 209 : AIR (V 14) 1927 Lah 282.

——Ss. 202 and 165 — (1882), Ss. 169 and 219 — Appeal — Return of — Extension of time — Objections.

When an appeal against the order of the District Judge was lodged in the Divisional Court within time which returned the appeal for want of judgment after a long time and was finally presented to the Chief Court (Punjab).

Held, that this was a fit case for extension of time under section 169, as it was filed within time in the Divisional Court in the bona fide belief that that Court had jurisdiction. 138 PLR 1915 : 56 PWR 1915 : 28 Ind Cas 142 : AIR (Vol 2) 1915 Lah 269.

——S. 202 — (1882), S. 169 — Cause of appeal — Determination — Only one appeal — Limitation.

Appeals on the winding-up of a company are governed by the same conditions in which appeals may be had from the decision or order of District Judge in cases within his ordinary original jurisdiction : the condition being that there is only one appeal. The limitation for appeals under S. 169 of the Companies Act, is three weeks from the date of the order of the District Judge. 34 PR 1913 : 45 PLR 1914 : 22 Ind Cas 250 : AIR (Vol 1) 1914 Lah 39 (DB).

3. Limitation for appeal.

——S. 202 — Appeal under S. 202, from order of single Judge of High Court passed on Original Side, if governed by Art. 151, S. 12, Limitation Act.

Appeals from the orders passed by the High Court in the exercise of its original jurisdiction are governed by Art. 151, Lim. Act, which is subject to S. 12, Lim. Act and, therefore, the appellant is entitled, as of right, to deduct the time requisite for obtaining copies. Section 12, Lim. Act, therefore, governs an appeal preferred under S. 202, from an order of a Single Judge of the High Court exercising original jurisdiction where the forum of appeal (as distinct from the right of appeal) is provided by the Letters Patent ; and hence the appellant in such cases is entitled to exclude the "time requisite" for obtaining a copy of the judgment appealed against, even though under the rules and orders of the High Court, no copy of the judgment is required to be filed with the memorandum of appeal. AIR (Vol 28) 1941 Lah 257 : ILR (1941) Lah 191 : 43 PLR 297 : 195 Ind Cas 452 (FB).

(Overrules AIR (Vol 8) 1921 Lah 26 : 61 Ind Cas 327.)

——S. 202 — (S. 169 old) — Appeal — Where an appeal was filed on the twenty-second day from the date on which the order appealed against was guilty of negligence in that he filed memorandum of appeal together with documents improperly stamped.

Held, that no extension would be allowed. 73 Ind Cas 211 : AIR (Vol 11) 1924 Lah 379.

——S. 202 — (S. 169 old) — Extension of time — In the absence of any marked want of diligence the appeallants should be granted an extension of time. 53 PLR 1921 : AIR (Vol 8) 1921 Lah 346 (DB).

——S. 202 — Service of notice of appeal after three months — Mistake of the officer of Court — Extension of time.

Where a notice of appeal in the matter of the liquidation of a company was served upon respondents after the expiry of the prescribed period of three weeks, owing to an error on the part of the copying department and beyond the control of the appellant, time for the service of notice of appeal should be extended. 7 PWR 1919 : 48 Ind Cas 919 : AIR (Vol 6) 1919 Lah 359.

——Ss. 202 and 284 — Liquidation — Commencement before new Act — Appeal — Limitation.

Where the liquidation of a limited company has begun before the Companies Act of 1913 came into force, all the proceedings in the winding-up including the course of appeal are governed by the old law as provided for by S. 284 of the Act. An appeal is barred by time if notice of appeal is not served on the respondent within three weeks as provided for by S. 169 of the Companies Act of 1882. Once an appeal is presented within the prescribed period, the Appellate Court can extend the time, if required, for service of the notice. 113 PLR 1915 : 183 PLR 1915 : 43 PWR 1915 : 28 Ind Cas 600 : AIR (Vol 2) 1915 Lah 415.

——S. 202 — (1882), S. 169 — Extension of time — General Principles governing it.

Extension of time ought not to be granted except under special circumstances, the object of act being to secure speedy settlement of matters and to curtail prolongation of winding-up proceedings. An appellant will not be granted an extension of time under S. 169 unless the court is satisfied that he was diligent in the prosecution of the appeal and that delay was due to respondent's conduct, or action or inaction of the Lower Court. 5 PWR 1916 : 42 PLR 1916 : 31 Ind Cas 725 : AIR (Vol 2) 1915 Lah 246 (DB).

——S. 202 — (4 of 1882), S. 169 — Delay in appealing — Excuse of.

Where the appellant showed due diligence but failed on account of circumstances beyond his control such as the court being closed on account of the vacations extension may be granted. A respondent is entitled to contest an ex parte order excusing delay. 90 PLR 1951 : 46 PR 1915 : 71 PWR 1915 : 29 Ind Cas 265 : AIR (Vol 2) 1915 Lah 223 (DB).

——S. 202 — Order in winding-up proceeding — Appeal — Limitation how completed — Cross-objection — Service of notice — Letters Patent, Clause 15.

The period of limitation of three weeks is to be completed from the date on which the order appealed against was actually pronounced though it might have been drawn up late. The sending of a memorandum of appeal to a respondent is not a proper notice, not being one given in the manner prescribed by the Civil Procedure Code: a right of objection to such a notice is not affected by the respondent filing cross-objection. Section 169 in no way derogates from the provision in Clause 15 of the Letters Patent, but it merely directs that an appeal from an order made in the matter of a winding-up of a company, shall not be heard unless notice is given in a certain manner. (1911) 13 Bom LR 558 : 11 Ind Cas 562 (564) (DB).

——S. 202 — (S. 169 old) — Carelessness of pleader.

Carelessness or ignorance of the pleader is not a sufficient cause for extending the period of three weeks for the notice as laid down by S. 169 of the Companies Act. 100 PWR 1911 : 176 PLR 1911 : 10 Ind Cas 433.

——S. 202 — (4 of 1882), S. 169 — Good cause to be shown.

Under S. 169 the Court of Appeal can extend the time for giving notice, only on good cause shown. Appeals under the Act should be filed within three weeks from the date of the order appealed against. (1909) 19 MLJ 511 : 4 Ind Cas 872 (873).

——Ss. 202, 38, 184 — (Ss. 169, 58, 147 of Act 1882) — Appeal — Notice of intention to appeal — Proper court to give notice.

An order passed under S. 58 read with S. 147 of the Indian Companies Act, 1882, is still an order

to which the limitation imposed by S. 169 of the Act applies. No appeal against such order can, therefore, heard unless the notice provided by S. 169 has been given. Notice of an appeal under S. 169 should be given to the opposite party through the appellate court and not through the court whose order is sought to be appealed against. (1905) 27 A 509, 510 : 2 ALJ 311 : 1905 AWN 75 (DB).

4. Parties to appeal.

——**S. 202 — Order setting aside voluntary liquidation — Liquidator's right to appeal.**

A liquidator cannot file an appeal on his own behalf against an order setting aside an order of winding up under the supervision of the Court or an order holding that there has been no proper and valid voluntary liquidation. The person really interested in such a case is the company and not the liquidator. AIR (V 37) 1950 EP 355 (DB).

——**S. 202 — Order winding up Company — Locus standi to appeal — Director of Company shown as creditor in list attached to petition for winding up but not served.**

A director of a Conmpany who is shown as a creditor in a list attached to a petition for winding up of the Company but not served in the ordinary way, is still a party to the proceedings although he may not have appeared before the Court, either deliberately or because he was prevented from doing so. An appeal against the winding up order filed by him on his own behalf, and not on behalf of he Company, is therefore competent. AIR (Vol 37) 1950 EP 142.

——**S. 202 — Appeal against compulsory winding-up order — Official Liquidator, if party.**

The Official Liquidator is not a necessary party to an appeal against a compulsory winding up order. On the other hand, it is desirable that as a general rule, the Official Liquidator should be made a party to such appeals in order prevent possible collusion amongst interested parties and to ensure that all the necessary facts are laid before the Court and that the proceedings are conducted according to law. AIR (Vol 28) 1941 Lah 134 : 43 PLR 33 : ILR (1941) Lah 680 : 195 Ind Cas 511 (DB).

——**S. 202 — Pending appeal by some directors, order for compulsory winding up stayed — Neither company nor Official Liquidator made party — All directors, who were sole share-holders joined — Appeal competent.**

The directors of a private limited company were its sole share-holders. Against the order of compulsory winding up, some of the directors went in appeal. Neither the Company as such nor the Official Liquidator was made a party. The rest of the directors were impleaded while the Official Liquidator though not a party had attended two hearings and had been permitted to address the Court as amicus curiae. The order for compulsory winding up was stayed pending the appeal :

Held, that the Official Liquidator could not be said to be "interested" in the result of the appeal because after the winding up order the property did not vest in him but remained vested in the company and also because the order had been stayed pending the appeal. Although the company as such had not been impleaded as a party, the company was in fact substantially represented by its director share-holder, all of whom were parties to the appeal. Consequently the failure to implead the company as such or the Official Liquidator did not make the appeal incompetent. AIR (Vol 28) 1941 Lah 134 : 43 PLR 33 : ILR (1941) Lah 630 : 195 Ind Cas 511 (DB).

——**S. 202 — Petition by creditor for compulsory winding up — Company passing resolution for voluntary winding up — Company Judge passing order for compulsory winding up — Creditors satisfied with voluntary winding up — Appeal against order by one of directors against whom misfeasance proceedings were in progress — Order for compulsory winding up, held should be set aside.**

The directors who were the sole share-holders of a private limited company passed a resolution for voluntary liquidation, after the petition for a compulsory winding-up by a creditor. Voluntary Liquidator was also appointed. The matter was almost compromised before the Company Judge who passed an order for compulsory winding up with a view to a speedy payment of the debts. The order was supported by the dissentient director. Pending the appeal by him against the order, all the creditors were satisfied by vlountary liquidation :

Held, that the fact that the misfeasance proceedings against the appellant might be in progress before the Company Judge was no reason for maintaining the order for compulsory winding up. In these circumstances, the voluntary liquidation which was accepted by all the creditors should be allowed to continue and the order for compulsory winding up set aside. AIR (Vol 28) 1941 Lah 134 : 43 PLR 33 : ILR (1941) Lah 680 : 195 Ind Cas 511 (DB).

——**S. 202 — Winding up — Appeal in name of company.**

Where the directors of a company intend to appeal against a winding up order they should prefer the appeal in the company's name even though an Official Liqidator has in the meanwhile been appointed by the Court. If the majority of the contributories concur in the filing of such appeal, the appeal is in truth that of the contributories. AIR (Vol 19) 1932 PC 1 : 61 MLJ 783 : 54 CLJ 439 : 36 CWN 54 : 35 MLW 1 : 55 Mad 180 : (1932) MWN 171 : 34 Bom. LR 321 : 58 IA 416 : (1932) ALJ 325 : 136 Ind Cas 114.

5. Orders.

(a) Appealable.
(b) Non-appealable.

(a) Appealable.

——**S. 202 — Order rejecting application by contributory objecting to claims included in list filed by liquidator — Appeal.**

An order of Court rejecting an application by a contributory objecting to certain claims included in the list of claims and debts filed by the liquidator as required by Rr. 338-A and 102 of the Rules and Orders (Civil) issued by the Nagpur High Court, on the ground that the contributory had no locus standi to apply, is a decision given in the matter of winding up by the Court, and an appeal from the order is, therefore, competent under S. 202 of the Companies Act. AIR (V 38) 1951 Nag 275 : ILR (1950) Nag 783 : 1950 NLJ 376 (DB).

——S. 202 — An appeal lies from an order under S. 153 rejecting a scheme, both under S. 202, of the Act and Cl. 13 of the Letters Patent. AIR (V 19) 1932 Rang 154 : 10 Rang 438 : 140 Ind Cas 133 (DB).

——S. 202 — Order refusing inspection — An order refusing an application for the inspection and copies of statements of persons examined under S. 196 is appealable. AIR (V 13) 1926 Lah 246 : 96 Ind Cas 755 : 26 PLR 432 (DB).

——S. 202 (S. 169 old) — An order granting sanction as well as one revoking a sanction are both appealable under S. 169. AIR (V 8) 1921 Mad 286 : 97 Ind Cas 295 : 24 MLW 35 (DB).

——**S. 202 — (1882), S. 169 — Winding-up proceedings bad creditor — Enforceability.**

Where the creditors demand is in respect of a claim which the company honestly believes to be fraudulent and unsustainable in law, the court has to see whether the defence is a genuine one or is

merely a cloak of the company's real inability to pay its first debts. A court should not allow a creditor to file in, a winding-up petition, with a view to bring the presence of insolvency proceedings to bear upon the company in order to make it pay cheaply and expeditiously, a heavy debt which the company desires to dispute in the Civil Courts. Such a petition must be dismissed under S. 169 of the Companies Act. An appeal lies from an order refusing to wind up a company (1882). AIR (V 1) 1914 Bom 251 : 39 Bom 47 : 16 Bom LR 692 : 27 Ind Cas 44 (DB).

——**Ss. 202, 207, 219, 221 — (Ss. 169, 177, 185, 189, 191 of 1882 Act) — Appeal from order refusing to make suspension order — Liquidators, position of — Delegation of powers.**

An appeal lies from any order or decision made by the court in the matter of the winding up of a company, whether the winding up be compulsory, voluntary or under supervision. An appeal lies from an order under S. 191 refusing to make a supervision order.

The liquidators appointed by a company under S. 177 (b) for the purpose of winding up the affairs of the company in voluntary liquidation and distributing its assets are bound to pay the debts of the company and to adjust the rights of the contributors among themselves and are not competent to delegate those duties to others. Once appointed, they could not be removed by the company, but can be removed only by the court under S. 185 on due cause shown. In the discharge of their duties the liquidators are not subject to the control of the company except in so far as the sanction of an extraordinary resolution of the company is required in the case of arrangements with the creditors or debtors of the company made by the liquidators under the supervision of the Court in a voluntary winding up. But where the petitioner, one of the liquidators, objected to the appointment of the liquidators and the objection was overruled by the court and there was no appeal from the order.

Held, that the appointment of the new liquidators must be taken to have been properly made. The business of the new liquidators, when appointed by the Court, is to take up the winding up at the point where the old liquidators had left off and not to call a meeting of the company to consider what fresh steps should be taken in the matter of winding up. It is not competent to the general meeting of the company to give any direction to the liquidators. (1906) 16 MLJ 537 : 30 M 22 (23, 24) (DB).

——**Ss. 202, 166 — (Ss. 169, 131 of Act 1382) — Appeal.**

Order holding that withdrawal of an application under S. 131 of the Companies Act does not operate as a withdrawal of the rest falls within the purview of S. 169 and is consequently appealable. (1903) 30 C 758 (760) (DB).

(b) Non-appealable.

——S. 202 — An order under S. 131 fixing remuneration of the legal adviser for services rendered to the Liquidators is not one made in the matter of winding up of the company but is of the nature of ministerial order settling a dispute as between the Liquidators and their employee and hence is not appealable under S. 202. AIR (V 30) 1943 Sind 82: ILR (1942) Kar 496: 206 Ind Cas 177 (DB).

——S. 202 — Appeal — An order refusing security for costs under S. 280 is not open to appeal. AIR (V 29) 1942 Mad 405 (2): (1942) 1 MLJ 180: 55 MLW 89 (1): 1942 MWN 80 (2): 202 Ind Cas 44 (DB).

——**S. 202 — Order for appearance — not a judgment.**

An order under S. 195, Companies Act, made by a Court directing the directors of a company to appear before the Court for examination as to their dealings in respect of the affairs of a company is not a judgment within the meaning of cl. 15, Letters Patent (Calcutta) and therefore is not appealable. AIR (V 15) 1928 Cal 295: 104 Ind Cas 764: 55 Cal 262 (DB).

——S. 202 — Order under S. 153 — There is no appeal under S. 202 of the Act from an order made on an application by the company under S. 153 which is not in the course of being wound up. AIR (V 12) 1925 Bom 442: 89 Ind Cas 108: 27 Bom LR 655 (DB).

——S. 202 — Order refusing restoration — An order passed under cl. (6) of S. 247 refusing to restore the Company on to the register cannot be construed into an order made or given in the matter of the winding up of a Company by the Court and hence is not appealable. But where the order is based on an erroneous view of the law it is open to revision by the High Court. AIR (V 12) 1925 Lah 443: 86 Ind Cas 652 : 26 PLR 68.

——**S. 202 — (1882), S. 169 — Appeal — Order of liquidation judge reducing remuneration.**

Section 169 of the Companies Act of 1882 is not applicable to an order of the Liquidating Judge reducing the remuneration of an employee of the Official Liquidators sanctioned by the predecessor of the Judge. No appeal from such an order can be entertained. AIR (V 7) 1920 Lah 433 : 1 Lah 73 : 90 PLR 1920 : 55 Ind Cas 928.

——**S. 202 — (1882), S. 169 — Notice of appeal — Power of Court.**

Where no notice is given under Section 169 of an intention to appeal against an order in the winding-up proceedings, the Appellate Court will not hear the appeal. (1913) 35 All 177 (178) : 11 ALJ 200 : 19 Ind Cas 53 (DB).

——**S. 202 — (1882), S. 169 — Framing of issues — Appeal.**

The framing of issues by a court in a petition for the winding-up of a company under the Companies Act 1882, is not an 'order' within S. 169 of the Act and no appeal lies therefrom. (1912) 16 Ind Cas 794 (795) (Mad) (DB).

6. Right to appeal.

——S. 202 — A creditor, contributory or a Liquidator only has a right of appeal under S. 202. A person who has no personal interest but only expects to be appointed secretary or agent of the company if it restarted under a scheme under S. 153 has no right of appeal. AIR (V 19) 1932 Bom 78: 33 Bom LR 1495: 56 Bom 16: 136 Ind Cas 491 (DB).

——**Ss. 202 and 246 — Appeal — Person not complying with R. 58.**

A creditor or a contributory who has not complied with Rule 58 of the rules of the Chief Court under S. 254 of the Act and had not entered his name in the book and had not in fact attended the proceedings cannot appeal against an order sanctioning a compromise between the liquidator and debtor. The Court did not think it proper to treat the appeal as a petition for revision. AIR (V 6) 1919 Lah 180 : 79 PR 1919 : 12 PWR 1919 : 49 Ind Cas 381 (DB).

——**S. 202 — (1882), S. 169 — Scope of.**

A right of appeal under S. 169 of the Companies Act is equal and similar to that under C. P. C. AIR (V 3) 1916 All 341: 38 All 537: 14 ALJ 722: 35 Ind Cas 6 (DB).

7. Rehearing.

——**S. 202 — Re-hearing — What is contemplated by.**

The word 're-hearing' as used in S. 202 of the Companies Act clearly means proceedings in the

nature of an appeal. The re-hearing contemplated is akin to an appeal and it follows it cannot be before the same judge but must be by way of an appeal to a Division Bench. AIR (V 36) 1949 Cal 69 : (1949) 19 Comp. Cas 61 : ILR (1948) 2 Cal 503 : 52 CWN 534.

——**S. 202 — (1882), Ss. 150 and 169 — Ex parte order — Re-hearing — Order for payment — Setting aside.**

The re-hearing of any order made in the matter of winding-up of a company can only take place before a court of appeal. But an order which has been obtained ex parte or which is in truth a nullity may be discharged by the court which made it. S. 169 of the Companies Act 1882, has no application to petitions for the setting aside of ex parte decrees. AIR (V 7) 1920 Lah 51: 1 Lah 187: 55 Ind Cas 820 (DB).

8. Review.

——S. 202 — Review — Obiter.— The Company Law does not affect the power of review, which is otherwise vested in a Judge of the High Court, especially as by S. 141, Civil P. C., the provisions of that Code are to be followed in all proceedings in any Court of civil jurisdiction. AIR (V 24) 1937 Lah 82: 171 Ind Cas 549.

9. Revision.

——**S. 202 — Revision.**

Where an objection being filed for the compulsory winding up of a company, the Court ordered that the winding up petition should be taken off the file on the company furnishing the security to the satisfaction of the Registrar and the Registrar being satisfied with the security accepted it:

Held, that the order could not be revised. AIR (V 21) 1934 Cal 603: 61 Cal 429: 151 Ind Cas 126.

——S. 202 — Order refusing restoration — An order passed under cl. (6) of S. 247 refusing to restore the Company on to the register cannot be construed into an order made or given in the matter of the winding up of a Company by the Court and hence is not appealable. But where the order is based on an erroneous view of the law it is open to revision by the High Court. AIR (V 12) 1925 Lah 443: 86 Ind Cas 652: 26 PLR 68.

——**Ss. 202 and 246 — Appeal — Person not complying with R. 58.**

A creditor or a contributory who has not complied with Rule 58 of the rules of the Chief Court under S. 254 of the Act and had not entered his name in the book and had not in fact attended the proceedings, cannot appeal against an order sanctioning a compromise between the liquidator and debtor. The court did not think it proper to treat the appeal as a petition for revision. AIR (V 6) 1919 Lah 180: 79 PR 1919: 12 PWR 1919: 49 Ind Cas 381 (DB).

10. Separate suit, if barred.

——**S. 202 — Company — Liquidation — Decision of Court — Suit to set aside.**

A question which has once been settled by the liquidating court cannot be re-opened by a regular suit. AIR (V 5) 1918 Lah 45: 40 PR 1918: 60 P WR 1918: 45 Ind Cas 84 (DB).

——**S. 203.**

——**S. 203 — Winding up — Liquidator's right to apply for compulsory winding up.**

There is no section of the Companies Act, which enables the Liquidator in a voluntary winding up to ask the Court to pass an order compulsorily winding up the Company. AIR (V 25) 1938 All 623: (1938) ALJ 898: 1938 AWR (HC) 576: ILR (1938) All 945: 178 Ind Cas 704.

——S. 203 — **Fraudulent winding up — Landlord entering into possession due to breach of covenant — Court declaring void resolution of winding-up — Effect — Lease granted by landlord — Validity — Purchaser at auction in execution of decree against company — Right to possession.**

Where a company is wound-up fraudulently and the landlord re-enters into possession of land leased to the company on ground of breach of covenant constituted by the winding up, and the resolution of members winding-up the company is subsequently declared to be void, any act done by the land-lord such as granting of leases to third persons will not be valid. In such a case the landlord's possession being wrongful, he is not entitled to possession of the property as against a purchaser at auction in execution of his money decree against the company, until his dues under the charge decrees are paid. AIR (V 24) 1937 Cal 129: 64 CLJ 280: ILR (1937) 1 Cal 203: 170 Ind Cas 214 (DB).

——**Ss. 203 (3), 196 — Absence of extraordinary resolution to winding-up — Notice of general meeting not specifying intention to propose extraordinary resolution — Company, if can be deemed in voluntary liquidation — Directors, examination of.**

Where a company has not passed an extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisible to wind up, as required by Sub-S. (3) of S. 203 and the notice calling the general meeting at which the question of liquidation was discussed did not specify the intention to propose the resolution as an extraordinary resolution, it cannot be held that the company is in voluntary liquidation in accordance with the provisions of the Act; and consequently, the Court has no power to order the directors to be examined under S. 196. AIR (V 21) 1934 Rang 271: 151 Ind Cas 987.

——S. 203 — Resolution — A resolution in which the voluntary winding up of the company is mixed up with other matters relating to the arrangement of amalgamation with another company is legal. AIR (V 12) 1925 Bom 49: 90 Ind Cas 580: 26 Bom LR 987 (DB).

——S. 203 (3) — If an extraordinary resolution passed under the section does not provide that, by reason of its liabilities, the company cannot continue its business and that it is advisable to wind up, the defect is very serious. If, in passing an extraordinary resolution under the section directing a voluntary winding up the company, an irregularity is discovered after the supervision order has been made, the order may be discharged on application to the Appellate Court and, if necessary, the time for filing the appeal may be extended. AIR (V 4) 1917 Lah 405: 13 PLR 1917: 35 PR 1917: 38 Ind Cas 943.

——**S. 205.**

——S. 205 — Liquidation pending suit — When pending a suit by a Company registered under Companies Act the Company goes into liquidation and a liquidator is appointed, all that happens in a certain internal change in the Company of which the result is that the powers of the directors in respect of the suit are transferred to the liquidator whoever he may be. But the plaintiff is still the Company, and there is no necessity to bring the name of person entitled to act on its behalf on the record. AIR (Vol 13) 1926 Nag 303: 94 Ind Cas 380: 9 NLJ 40.

——**S. 207.**

——**S. 207 — Non-compliance with provisions — Effect of.**

Where there is no proper affidavit making a declaration as to the solvency of the company as required by S. 207 (1) nor a report of the Auditor as required under S. 207 (2) of the Companies Act, the winding up cannot properly be called a member's

voluntary winding up and S. 207 (3) must therefore ap apply. If a voluntary winding up is bad in so far as it does not conform to the provisions of S. 207 then the appointment of the liquidator himself is bad and a fortiori the continuance of the voluntary liquidation with the voluntary liquidator. AIR (V 37) 1950 EP 188 (DB).

——S. 207 — Affidavit by one of directors — If sufficient.

Section 207, Companies Act, does not require that there should be an affiddavit by each of the directors making the declaration. The requirements of the section are met if the affidavit is sworn by one of them. AIR (Vol 35) 1948 Oudh 197: 23 Luck 210: 1948 OWN 172 (DB).

——S. 207 — Rights of creditors — When a company goes into liquidation, though a voluntary one, the remedy of the creditor is only to take what he can take under the scheme of liquidation and nothing more. A creditor who obtains a decree against the company going into liquidation cannot recover the whole amount due under the decree but only a share of the decree in the terms of the scheme of liquidation. AIR (Vol 17) 1930 Lah 299: 118 Ind Cas 387.

——S. 207 — Removal of liquidator — In the voluntary winding up of a company the Court can remove a liquidator on cause shown. Apart from personal unfitness also Court can remove a liquidator. The cause shown for the removal of the liquidator is to be measured by a reference to the real, substantial, honest interest of the liquidation itself and to the purpose which necessitated the appointment of the liquidator. AIR (V 11) 1924 Bom 339 : 80 Ind Cas 515 : 48 Bom 471 : 26 Bom LR 237 (DB).

——S. 207 (1) — Bar to execution proceedings.

Section 207 (1) does not bar execution proceedings against a company gone into voluntary liquidation, unless a competent court has granted leave for winding-up of stay of proceedings. A liquidator, or dissatisfied creditor can move the court. AIR (V 3) 1916 All 174 : 38 All 407 : 14 ALJ 513 : 36 Ind Cas 397 (DB).

——Ss. 207, 203 and 186 — (Ss. 151, 173 and 177 of 1882 Act) — Revision of order — Jurisdiction of Court.

An application, by the liquidator of a company voluntarily wound up, to call upon a contributory for payment of call money was dismissed by the District Judge who later on revised his order suo motu and directed the contributory to pay. Held, the District Judge had no power to revise his order suo motu. S. 151 did not apply to the case of a company which was being voluntarily wound up. AIR (Vol 2) 1915 Lah 291: 13 PLR 1915: 259 PWR 1915: 28 Ind Cas 281.

——S. 208.

——S. 208 — Liquidator — Validity of appointment disputed — Duties of Liquidator.

When a person is appointed liquidator of a company, however imperfect he may consider his appointment to be, if he is nominally a liquidator and acts as such, he must carry out the duties or exercise the rights of a liquidator. On acceptance of the appointment as liquidator he must give notice of it according to law; if he does not do so, then, unless there is some bona fide excuse he will be liable to a penalty. The penalty in the case was reduced to one anna. AIR (Vol 4) 1917 All 93: 39 All 412: 15 ALJ 346: 18 Cr LJ 510: 39 Ind Cas 478.

——S. 208A.

——S. 208A — Director — Appointment as Liquidator — Effect.

Although a director loses most of his powers on his appointment as Liquidator, he does not cease to be a director. AIR (V 29) 1942 Mad 702 : 55 MLW 410 : 44 Cr LJ 503 : (1942) 2 MLJ 140 : 1942 MWN 453 : 206 Ind Cas 362.

——S. 208-C.

——Ss. 208-C, 152 (3) — Arbitration contemplated in S. 208-C and in S. 152 (3), difference.

The arbitration contemplated in S. 208-C, is one between the company in liquidation & one or more of its members an arbitration to settle an internal dispute or difference. Section 152 (3) would not have covered such a case, as the arbitration contemplated there is one between a company and either another company or an individual, a third party, i.e., an arbitration to settle not an internal but an external dispute or difference. AIR (Vol 27) 1940 Cal 220: 71 CLJ 62 : 44 CWN 285 : ILR (1940) 1 Cal 358 : 188 Ind Cas 143.

——S. 208-E.

——S. 208-E — Under S. 217 (4) (present S. 208-E) where the Liquidator of a company in voluntary liquidation sends a return to the Registrar of the final meeting and dissolution of the company and the Registrar registers the return, the company is deemed to be dissolved on the expiration of the three months from the registration of the return. AIR (Vol 18) 1931 Lah 500: 13 Lah 190: 33 PLR 429: 131 Ind Cas 747.

——S. 209.

——Ss. 209, 209-A to 209-H — Provisions of Ss. 209 and 209-A not followed by oversight — Procedure to be adopted stated.

Where owing to oversight, in the winding up, the provisions of Ss. 209 and 209-A to H have not been followed, the best course to adopt is to order a meeting of the creditors and to send notices of the meeting by post to the creditors forthwith, and that the company should cause notice of the meeting of the creditors to be advertised in the manner specified in S. 206 (1) for publication of a notice under that subsection, and the directors of the company should cause a full statement of the position of the company's affairs together with a list of the creditors of the company and the estimated amount of their claims to be laid before such meeting of creditors, and the directors of the company should appoint one of their members to preside at the said meeting. At such meeting the creditors would consider the question of nomination of a Liquidator under the provision of S. 209-B, and the appointment of a committee of inspection under S. 209-C, and other questions dealt with in Ss. 209-D to H. AIR (Vol 28) 1941 Cal 30: ILR (1940) 2 Cal 325: 192 Ind Cas 222.

——S. 209 — Liquidator, removal of.

The condition precedent to moving the Court for the removal of the Liquidator is a meeting of the creditors held in pursuance of Sub-s. (1) of S. 209 in which the creditors shall determine whether an application shall be made to the Court for the appointment of any person as Liquidator in the place of, or jointly with the Liquidator appointed by the

company. AIR (Vol 23) 1936 Pat 468: 2 BR 420: 162 Ind Cas 218.

——S. 209 — Appointment of liquidator — No retrospective effect — Assumption of duties does not clothe the person with any rights.

The Court can extend the time for making an application for the appointment of a person as joint liquidator but the Court has no jurisdiction to make an appointment with retrospective effect. When an application is made under sub-cl. (2) of S. 209 of the Companies Act the Court is not required to register by a formal order the recommendation of the creditors of the Company as to the person to be appointed joint liquidator. The Court may or may not act under sub-cl. (3) of S. 209, on the resolution of the creditors. The matter is entirely discretionary with the Court. Till an order is made appointing a person to act as joint liquidator such person cannot take upon himself the duties of a joint liquidator and therefore the assumption of the duties of the joint liquidator on the part of such a person does not give him any rights whatever. AIR (Vol 12) 1925 Cal 809: 88 Ind Cas 905: 53 Cal 106: 41 CLJ 521.

——S. 209-A.

——S. 209-A (1) — Omission to convene creditor's meeting — If vitiates resolution winding up company.

An omission to convene the creditors' meeting as provided by S. 209-A (1) of the Companies Act is only an irregularity which can be cured and not an illegality which vitiates the resolution winding up the company. AIR (Vol 33) 1946 Nag 196: ILR (1946) Nag 286: 223 Ind Cas 52: 1946 Comp C 104: 1946 NLJ 473 (DB).

——S. 211.

——S. 211 — Applicability — Contributions received by company after it is prevented by law from carrying on business — If form part of its assets — Right of contributors to refund — Insurance Act, S. 3.

An Insurance Company which was governed by the new Insurance Act (IV of 1938) which came into force on 1st July, 1939, failed to obtain a certificate of registration within three months from the commencement of the Act and was therefore obliged under S. 3 of that Act to stop carrying on its business from 1st October, 1939. Its directors were, however, endeavouring to re-organise the company and bring it into line with the Insurance Act. Therefore they set apart all contributions received after 30th September, 1939, in a suspense account, and in order that these moneys should not get mixed up with the company's funds, opened a fresh and separate account in the names of the President and Secretory of the company. A question arose whether these sums could be claimed by the liquidator as part of the company's assets.

Held, that they could not be, and that S. 211 of the Companies Act did not apply to these sums because they did not form part of the company's legitimate assets, and that as they had been wrongfully received and had not become mixed up with other funds, they must be refunded intact to the contributors less legitimate charges. As the certificate of registration was not obtained, the company was prevented by S. 3 of the Insurance Act from carrying on its business. Part of its business was to obtain contributions from its members. Therefore it was prohibited from receiving these contributions. Accordingly, if it continued to receive these moneys in spite of this prohibition it could not claim the moneys as its own, and provided the moneys can be separated from the rest of the company's assets and traced, they will have to be kept apart from the company's funds, and apportioned according to the sources from which they came. The fact that those entitled to the first lot of assets, namely, those standing in the company's books on the 30th September, 1939, possibly cannot be paid in full, cannot make any difference to the principle because these claimants are in no worse position than they would have been in if the law had been punctiliously obeyed and nothing further received by the company after 30th September, 1939. AIR (Vol 33) 1946 Nag 196: ILR (1946) Nag 286: 223 Ind Cas 52: 1946 Comp C 104: 1946 NLJ 473 (DB).

——S. 212.

——S. 212 — Non-compliance with — Effect — The provisions of S. 212 are mandatory. Where they are not complied with, parties cannot seek to enforce the transaction by invoking the doctrine of part-performance. Where the original composition deed was modified at a meeting of the debenture holders but it appeared that the resolution was not acted to by three-fourths in number and value of the creditors.

Held, that the resolution was not binding on the creditors and the fact that the original scheme was modified by an application to the Court did not matter. AIR (Vol 18) 1931 All 59: 1930 ALJ 1157 (DB).

——S. 213.

——S. 213 — Amalgamation.

Every company has, under statute, a right of amalgamation with another company as authorized by S. 213 and a scheme of amalgamation does not depend for its validity upon the constitution of the company as contained in the memorandum and articles. AIR 1925 Bom 49, Affirmed.

But the issue whether the amalgamation is binding upon the transferee company depends not upon the section but upon the question whether that company is by constitution empowered to effect such an acquisition. AIR (Vol 15) 1928 PC 180: 110 Ind Cas 195: 52 Bom 571: 55 IA 274: 30 Bom LR 1115: 32 CWN 1038: 28 MLW 93: 48 CLJ 436: 55 MLJ 697.

——S. 213 — Restrictions on powers — Liquidators appointed for winding up and amalgamation — Resolution appointing them making them merely ministerial officers — Form of appointment deprecated.

Where at the time of amalgamation of company A with company B, the share-holders of the former passed a special resolution under S. 213, whereby certain persons were appointed liquidators in the winding up for the purpose of adopting the agreement of amalgamation and carrying the same into effect, with such, if any, modifications as liquidators may think expedient, under the supervision of the directors of both the companies, and the powers of the Directors of A were to continue for the purpose of carrying the said agreement into effect.

Held, that the form of appointment embodied in such a resolution under which in terms the liquidators become merely ministerial officers required to have regard to the supervision of the directors of the two companies in discharging their duties, is much to be deprecated. The Court, when it has the opportunity of doing so, will always cause it to be

clearly understood that a liquidator in a voluntary liquidation, which is an essential condition of such an amalgamation, must not by the resolution appointing him be restricted in the exercise of his statutory duties. AIR (V 15) 1928 PC 180 : 52 Bom 571 : 55 IA 274 : 30 Bom LR 1115 : 32 CWN 1038 : 22 MLW 93 : 48 CLJ 436 : 110 Ind Cas 195 : 55 MLJ 697.

——S. 213 — **Legality of resolution.**

A resolution in which the voluntary winding up of the company is mixed up with other matters relating to the agreement of amalgamation with another company is legal. AIR (Vol 12) 1925 Bom 49: 90 Ind Cas 580: 26 Bom LR 987 (DB).

——S. 213 — **Liquidator's authority — General words — Mere permission to authorise in terms the liquidators to receive compensation and distribute it among share-holders does not make a resolution illegal under the section where the resolution authorises the liquidators to carry into effect the arrangement under which the company is amalgamated with another company.**

The mere fact that in terms there are no words authorising the liquidators to receive compensation and distribute it among the share-holders does not make a resolution illegal.

Where the pertinent part of the resolution was "they (the liquidators) are hereby authorised pursuant to S. 213 of the Companies Act, to adopt the said agreement (relating to the amalgamation of the company with another) and carry the same into effect."

Held, that the resolution was legal. AIR (Vol 12) 1925 Bom 49: 26 Bom LR 987: 90 Ind Cas 580 (DB).

——S. 213 — **Appointment of liquidators.**

Per Fawcett, J. — The appointment of liquidator is not required to be by "special resolution", the latter being necessary only in regard to the proposed voluntary winding up of the Company and amalgamation under S. 213. If any liquidations are proposed in the special resolution, the proposed liquidators may be changed at the confirmatory meeting. Therefore where the resolution omits saying that such and such persons are hereby appointed liquidators for the purpose of the winding up, and instead of this the notice calling the meeting says that the confirmatory meeting would among other matters consider the question of appointing liquidators, the resolution is quite legal. AIR (Vol 12) 1925 Bom 49: 90 Ind Cas 580: 26 Bom LR 987 (DB).

——S. 215.

——S. 215 (Before Amendment) — **Court if can waive irregularities — Voluntary winding up — Creditor's application for appointment of Official Liquidator — Application, if can be treated as one for compulsory liquidation — Supervision order, when can be made.**

The Court has no power to waive any irregularity as regards the strict compliance with the law laid down in the Companies Act and the rules made thereunder and an Official Liquidator can only be appointed when compulsory winding up order is made. But where the application asks for the appointment of the Official Liquidator to voluntarily wind up company, the Court cannot treat the application as an application for compulsorily winding up the company. If it is treated as a petition for supervision or some such order as the Court might be empowered to make in the case of a compulsory winding up, it is obvious that in order to make such an order, the Court would have to be satisfied that the winding up had taken place. A supervision order can be made only where there is a valid winding up. But where the whole case of the petitioner is that the winding up was ultra vires and void, the petition cannot be treated as one for supervision. AIR (Vol 23) 1936 Pat 468: 2 BR 420: 162 Ind Cas 218.

——S. 215 (Before 1936 Amendment) — **Ss. 215, 207 — Voluntary winding-up — Power to stay execution of decree against company — Discretion.**

The voluntary winding-up of a Company does not by itself prevent a person who holds a money-decree against the Company from taking out or continuing execution proceedings against it. But the Court has a power under S. 215, to stay execution proceedings and the invariable practice of the Court is to stay execution proceedings in such a case unless there are exceptional reasons for exercising its discretion otherwise.

The mere fact that the decree-holder had attached certain properties of the Company before the Company went into liquidation is not a special circumstance justifying a departure from the ordinary rule. AIR (Vol 18) 1931 Lah 589: 131 Ind Cas 379.

——S. 215 (Before 1936 Amendment) — **Suits for enforcing calls — Section does not take away the ordinary power.**

The language of S. 215 does not indicate that assistance of Court is the only method open to the voluntary liquidator. The fact that he has been empowered to seek the assistance of the Court does not mean and cannot mean that ordinary powers that he may have under the law are taken away from him. A liability having arisen, when a list of contributories has been prepared, that liability must be open to enforcement in the ordinary way, unless there is some rule of law which prevents the ordinary way from being availed of. The reading of S. 215 leaves little room to doubt, the voluntary liquidator's power to enforce the calls by a suit. AIR (V 15) 1928 All 675 : 111 Ind Cas 654 : 51 All 406 : 1929 ALJ 103.

——S. 215 (Before 1936 Amendment) — **Stay of execution proceedings — Court has power under S. 215 of the Indian Act.**

Under S. 215, strictly construed, the Court cannot issue an order staying execution against the company, but there is a general practice of staying execution when a company is in voluntary liquidation for the reason that the execution, if allowed, would necessarily interfere with the distribution of the assets pari passu. This section gives the Court the power in a voluntary liquidation to stay further proceedings though that is a power which in a compulsory liquidation does not exist. S. 215 of the Indian Act being in the same words as S. 193 of the English Act, can be interpreted in the manner in which it has been interpreted by the Courts in England. AIR (Vol 15) 1928 All 265: 113 Ind Cas 12: 50 All 482: 26 ALJ 249.

——S. 215 (Before 1936 Amendment) — **Appeal — Order depriving creditor of all rights to take advantage of winding up proceedings.**

An order depriving a creditor, who has a claim which he has long ago put in the form of a proof of debt against a company, and which the liquidators are willing to admit, of the benefit of the company's winding up proceedings is an order which deprives

him, of a substantial and important right, and it cannot be held that such an order is not appealable by reason that it is not a judgment under cl. 15 of the Letters Patent. AIR (Vol 14) 1927 Cal 689: 103 Ind Cas 659: 31 CWN 894 (DB).

——S. 215 (Before 1936 Amendment) — Removal of attachment.

Where a Bank has gone into voluntary liquidation and a mortgage decree which it holds has been attached in execution of a decree passed against the Bank after its going into liquidation and the liquidators apply to the High Court under S. 215 of the Companies Act for the removal of the attachment, the High Court can and ought to order the removal of such attachment. AIR (Vol 12) 1925 Oudh 483: 92 Ind Cas 144: 2 OWN 508.

——Ss. 215, 196 (Before 1936 Amendment) — Company — Voluntary liquidation — Power to order public examination of Director.

A voluntary liquidator is entitled to ask the court, under S. 215 of the Act, to make an order for the public examination of Directors, etc., which the court may make on the application of an Official Liquidator under S. 190 of the Act. AIR (Vol 7) 1920 Bom 284: 44 Bom 659: 22 Bom LR 219: 55 Ind Cas 831 (DB).

——S. 215 (Before 1936 Amendment) — Winding-up proceedings in Courts against Company in liquidation — Stay of.

The fact that a resolution for voluntary winding-up is passed does not, like an order of winding-up, by or under supervision of the Court, stay or invalidate any proceedings, executions, etc., or prevent actions being brought or continued against the company without the leave of the court. On application, however, the court can stay any action, upon such terms as it thinks fit. A liquidator, therefore may obtain a supervision order to protect him against actions which are threatened and so save the expense of applying for the stay or restraint of proceedings against the company. AIR (Vol 2) 1915 Lah 393 (1): 182 PLR (1915): 124 PWR (1915): 30 Ind Cas 657 (1).

——S. 215 (Before 1936 Amendment) — Winding-up — Proceedings — Stay — Direction of Court.

In the case of a compulsory liquidation, the creditor is debarred from proceeding by way of action unless he can show special grounds why he should be permitted to do so. In the case of voluntary liquidation, the onus is on the liquidator to show that an order should be made staying an action brought against the company, since prima facie the ordinary tribunal is the proper one to decide upon a claim against the company. The proceeding may be stayed when liability is substantially admitted and the dispute is only as to what is the exact amount due. AIR (Vol 2) 1915 Lah 344: 19 PLR (1915): 31 PR (1915): 243 PWR (1915): 27 Ind Cas 685.

——Ss. 215, 228, 198 — (Ss. 182, 130, 165 of Act 1882) — Joint Stock Company — Liquidator — Calls on shares — Suit by the liquidator to recover calls — Civil Court — Jurisdiction.

A suit brought by the liquidator of a Joint Stock Company against its share-holders for the recovery of calls in liquidation, is one which can be entertained by the court of a Subordinate Judge. S. 182 of the Indian Companies Act presents no bar to the jurisdiction of the court. (1907) 9 Bom LR 825 (828, 829) (DB).

——S. 216.

——Ss. 216 and 185 (After 1936 Amendment) — Dispute between liquidator and third parties — Adjudication of — Power of Court.

The Companies Act does not give any power to the Court to adjudicate upon questions of title which are in dispute between liquidator and third parties. Under S. 216 of the Act, the powers of the Court are limited to determine questions mentioned therein. Again under S. 185 of the Act, the power of the Court can only be used against certain persons specified in that section and not against third parties. That section cannot be strained to bring in those persons who are not within its express words. AIR (Vol 37) 1950 EP 204: 1950 Comp C 141: 52 PLR 185 (DB).

——S. 216 — Registrar of Companies, if can apply to remove Liquidator.

Section 216 (S. 215 before 1936 Amendment), is exhaustive of the persons who are entitled to make applications, and the Registrar of Companies, not being one of them, has no locus standi to make an application to remove the Liquidator. AIR (Vol 28) 1941 Bom 25 : 42 Bom LR 1021 : ILR (1941) Bom 39 : 192 Ind Cas 595.

——S. 216 — S. 215 (Before 1936 Amendment) — Power of Court — Creditor, if can ask for order declaring winding up as void.

Exercise of powers under S. 215 (old) (S. 216 of the present Act) must be in cases which are just and beneficial — not only just and beneficial to the petitioner but just and beneficial to all parties. Under S. 215 (old) i.e., S. 216 of the present Act, the Court is empowered on the petition of persons named in the first sub-section, to exercise certain powers for the 'assistance' of the winding up. The first sub-section is very limited. It speaks of determining any question arising in the winding up, and under the second sub-section, the Court has to be satisfied that the determination of the question or the required exercise of power will be just and beneficial. Thus it is quite clearly indicated that a person has no right under S. 215 to come and say that there is no such thing as winding up in a particular case that is to say, the winding up is irregular or void for another reason. The powers of a Court under that section are strictly limited to what may be described as assistance to the winding up. Consequently, there is no power under the Companies Act for the creditors to come and say that the winding up resolution is bad. AIR (Vol 23) 1936 Pat 468: 2 BR 420: 162 Ind Cas 218.

——S. 216 — Scope — Voluntary liquidation — Effect — Decree against company — Proper Court to stay proceedings — Stay by executing Court — Legality.

The passing of a resolution for voluntary winding-up does not by itself, suspend the right to commence or continue legal proceedings against the company.

Where after commencement of a voluntary liquidation, an application is made to a Court, other than a Court under Companies Act for execution of decree obtained against the company before the liquidation commenced, the Court to which the application is made has no jurisdiction to stay the execution proceedings. Section 207 (now 216) is no bar by itself to the progress of execution in such cases unless and until an order has been obtained by the

Court having jurisdiction under the Companies Act, for stay.

The provision in S. 207 (now 216) that the assets of the company in voluntary liquidation shall be applied in satisfaction of its liabilities pari passu is intended for the guidance of the private liquidator and does not control the Court's power to entertain applications for execution against the assets of the company and realise the full amount to the detriment of the other creditors.

Executing Court has got no concurrent jurisdiction with the Court under Companies Act, to stay proceedings.

In the case of a voluntary liquidation, if the Liquidator is confronted with a decree which has to be satisfied out of the assets of the company before distribution of the assets among the creditors, his proper remedy is to approach the Court, meaning the Court within the meaning of S. 2 (3) under S. 215 (now 216) Companies Act for proper direction. AIR (Vol 18) 1931 Cal 569: 35 CWN 299: 58 Cal 913: 133 Ind Cas 566 (DB).

——Ss. 216, 215 (Before 1936 Amendment), 217 (4) (old) — Voluntary liquidation — Return of final meeting and dissolution — Refusal by Registrar to register return — Company, whether dissolved after three months — Procedure.

Under S. 217 (4), (S. 208-E of the present Act) where the Liquidator of a Company in voluntary liquidation sends a return to the Registrar of the final meeting and dissolution of the Company, and the Registrar registers the return, the Company is deemed to be dissolved on the expiration of three months from the registration of the return. But if the Registrar, rightly or wrongly refuses to register the return, the Company cannot be deemed to be dissolved. If the Registrar does not do his duty or the necessary preliminaries, which would justify registration have not been observed and he insists on something more being done before he can take action, time does not begin to run until he does take such action. If the liquidator is not satisfied with the decision of the Registrar, or if any contributory or creditor is dissatisfied with the conduct of the liquidator, either can go to the Court under S. 215 (S. 216 of the present Act) and claim that in the exercise of the powers conferred by that section, the Court shall take whatever action may be necessary but the failure of the Registrar to register cannot be treated as equivalent to registration. AIR (Vol 18) 1931 Lah 500: 33 PLR 429: 13 Lah 190: 131 Ind Cas 747 (DB).

——S. 218.

——S. 218 —Company in voluntary liquidation — Creditor's right to have it wound up by Court.

Per Chatterjee, J.—Under S. 218 of the Companies Act, as amended in 1936, the voluntary winding up of a company is no bar to the right of any creditor or contributory to have it wound up by the Court. A creditor of a company in voluntary liquidation on proving his judgment debt is entitled to an order for compulsory winding up of the company. The rule still prevails that the Court in such a case is bound to pay regard not only to the wishes of the petitioning creditor but also to those of all the creditors. But the majority in such a case means majority in value. (1950) 54 CWN 514.

——Ss. 218, 162 — Creditor, when entitled to ask Court to convert voluntary winding up into compulsory winding up.

A creditor is not entitled as of right to ask a Court to convert voluntary winding up into a compulsory winding up. Before he can obtain such an order he must show that he as creditor, could obtain, had there been no voluntary winding up, an order compulsorily winding up the company. A creditor on the other hand who could have asked in the first instance for a compulsory winding up order can always come to Court and ask that the voluntary winding up should be converted into a compulsory one. AIR(Vol 25) 1938 All 623 (1938) ALJ 898: 1938 AWR (HC) 576: ILR (1938) All 945: 178 Ind Cas 704.

——S. 219

—S. 219—Compulsory winding up when ordered.

Whether a company should be allowed to go into voluntary liquidation or the Court should wind it compulsorily depends upon the facts of each particular case. AIR (V 17) 1930 Sind 71 : 119 Ind Cas 539.

——S. 219—Partiality by Bank —Winding up by Court held desirable.

In this case there were certain allegations made against the Directors of the Bank. Further the fact was stated that while the vast majority of the depositors in the Bank were from places outside Karachi, the vast majority of loans given by the Bank were advanced to persons in Karachi. The documents put in the case made it clear that the majority of the creditors, particularly of the creditors from outside, Karachi, preferred official liquidation.

Held, that there was no legal bar to the winding up of the Bank by the Court and that on the facts it was eminently desirable that this should be done. AIR (V 17) 1930 Sind 71 : 119 Ind Cas 539.

——S. 219 — Where the rights of the creditors or the contributories are not shown to be prejudiced by a voluntary winding up the Court is not justified in ordering a compulsory winding-up though the application to that effect was filed before the company decided to go in a voluntary liquidation. AIR (V 12) 1925 Lah 527 : 89 Ind Cas 613 : 6 Lah 340 : 26 PLR 654 (DB).

——S. 221

——S.221 — Order for supervision made without jurisdiction — Power of Court to set aside.

Where the voluntary winding up of the company which is stated to be a member's winding up did not comply with the provisions of S. 207 of the Companies Act and this fact was deliberately kept concealed from the Court, and the Court was deceived into making an order for continuing the voluntary liquidation under supervision of the Court by representation being made to it that the registered office of the company had been transferred from Pakistan into India and a proper member's winding up had taken place notice whereof had been given to the Registrar in accordance with the Act the order is without jurisdiction and therefore it is a nullity. It is open to the Court on the fact being brought to its notice to hold that the judgment is null and void and to declare it so. AIR (Vol 37) 1950 E. P. 188 (DB).

——S. 221—Costs—Winding up under supervision of Court — Respondent creditor supporting winding up whether entitled to costs.

As a general rule, the successful party is entitled to costs in his favour and the unsuccessful party is is liable to have an order for costs against him. A creditor appearing in a winding up petition is not

entitled to his costs as a matter of right. To entitle him to them he must show reasonable ground for appearing.

The form of notice required to be advertised under R. 27 of the Rules of the Original Side of the Madras High Court under the Companies Act, shows that the Court only intended notice to issue to persons who wished to oppose the petition for winding up and not to those who wished to support it.

A creditor made a petition for an order for the winding up of a company under the supervision of the Court. A notice as required under the Rules was issued inviting creditors who wished to oppose the petition. The creditors appeared in answer to this notice and instead of opposing the petition, they supported it, but, when the petitioning creditor withdrew from the proceedings, none of the other creditors were willing to undertake the burden of the petition which was them dismissed by the Court:

Held, that the creditors who supported the petition were not entitled to costs. AIR (Vol 25) 1938 Mad 96: (1937) MWN 1106: (1937) 2 MLJ 825: ILR (1938) Mad 284 : 46 MLW 768 : 175 Ind Cas 851 (DB).

——S. 221 (1) — Contracts after petition.

Company contracts to purchase goods between dates of presentation of petition and winding up order, Court will confirm transaction if goods were purchased in ordinary course of business. AIR (Vol 17) 1930 Mad 1012 : 59 MLJ 826 : 32 LW 950.

——S. 221—Setting aside order.

Where a winding up order has been passed, an applicant, to have the order set aside must allege and prove fraud. AIR (V 15) 1928 PC 261 : 110 Ind Cas 299 : 29 MLW 72.

——S. 225

——S. 225—Appeal from orders passed in winding up proceedings under supervision of Court is competent.AIR (Vol 22) 1935 Lah 174 (1): 158 Ind Cas 853.

——S. 227.

——S. 227 (2)—Nature of—Test for exercise of discretion—Transaction held amounted to disposition of its property, what is.

Section 227 (2), is a discretionary section by virtue of the words "unless the Court otherwise order." That gives the Court discretion at any time to make an order in a proper case validating a disposition, notwithstanding that it is one made after the commencement of the winding up. The reason why the Court is given a discretion under S. 227 (2) is, that a company may not be completely paralysed by the presentation of a petition. In exercising the discretion, the Court must be guided by the fundamental principle which runs through the whole of the administration of an insolvent company's winding up, that the assets of the company shall be so far as is possible and subject to certain well recognized exception, distributed pari passu between the creditors and, subject as aforesaid, no creditors shall obtain an advantage over any other creditor. The test for the exercise of discretion under S. 227 (2) is whether the Court would have sanctioned the transaction or an application in that behalf.

One B was employed as a cashier of a bank, not as a servant of the bank but an employee of one R who was the treasurer of the bank. B had been required by R to give him security. That was done in this way; B had maintained a personal deposit account in the bank for Rs. 1,000 in his own name and had in, effect, charged that deposit account of his own in favour of his employer R, as security to answer for his good behaviour. Some time later, R's employment as treasurer came to an end with the result that he ceased to employ B. B then applied to the bank for employment as cashier and was so appointed but was required to furnish a security to the extent of Rs. 1,000. B. who had still standing in his own name the deposit account which had been charged to R as security obtained from R. a release of his charge over the fund with the result that the deposit account reverted to B in his own name and free from the charge of R. B, therefore satisfied his obligation to furnish a security deposit of a thousand rupees by offering the bank the deposit account in his own name which had been released by R. This was effected by certain alterations being made in the ledger account and in the pass book. The whole transaction took place between the date of the application for winding up the bank and before passing of the winding up order. B had entered into the transaction with the full knowledge that a winding up petition had been presented. The question was whether the transaction amounted to a disposition within the meaning of S. 227 (2) and was, therefore void:

Held. that the transaction amounted to a "disposition" by the bank of the property. At the moment after the release by R of his charge, the deposite account became the personal property of B. The Bank whether it was regarded as a notional repayment to B and a re-deposit by him or as a mere transfer, disposed of it in the sense that they put an end to the old rights relating to him and created an entirely new set of rights. The bank extinguished its existing debt by paying it off and took it back in the form of a trust fund. That being so, and the transaction having taken place after the commencement of the winding up was prima facie void as being disposition of its property by the bank within the meaning of S. 227 (2), Companies Act.

Held, further that although no question of fraud or fraudulent preference arose, the case was not fit for the exercise of discretion under S. 227 (2), inasmuch as if the bank had applied to the Court for sanction to employ B as its cashier upon the terms that it would convert his ordinary unsecured deposit account into a deposit security account, the Court would not have given the sanction and hence the principle of pari passu distribution among the creditors must prevail, the case not being one of salvage, of real necessity or of the transaction having been the only means of keeping the company going. AIR (Vol 29) 1942 All 141: (1942) ALJ 78: 1942 AWR (HC) 7: ILR (1942) All 86: 200 Ind Cas 61.

—S. 227 (2)—Payment to decree-holder after petition, validity of.

The payment made to a creditor on the basis of his decree after the presentation of the petition for winding up cannot be held to be valid merely because he could have recovered the money before the date of presentation of the petition for winding up if the company had not delayed execution. AIR (Vol 27) 1940 All 514 : (1940) ALJ 739 : 1940 AWR (HC) 494 : ILR (1940) All 730 : 192 Ind Cas 72.

——S. 227 (2) — Payments by insurance company to policy-holder after commencement of winding-up invalid.

Where between the commencement of winding-up and the date of order of winding up, an insurance company makes payments to some of its policy-holders in respect of their policies, the amount of which had become due, such payments being payments of debts by the company to its creditors, are not only void but cannot be validated as they clearly amount to dispositions of property within the meaning of S. 227 (2). AIR (V 26) 1939 Sind 196 : ILR (1939) Kar 460: 184 Ind Cas 428.

——S. 227 (2) — Transactions which Court would validate.

Transactions made after the commencement of a winding up which a Court would validate under S. 227 (2), are transactions bona fide entered into by a company for the benefit of the company and those interested in the assets of the company for preserving the business of the company as a going-concern, and not to the detriment of other creditors. AIR (Vol 26) 1939 Sind 196: ILR (1939) Kar 460: 184 Ind Cas 428.

——Ss. 227, 227 (2) — Difference between S. 227 and S. 57, Presidency Towns Insolvency Act, explained.

There is a vital difference between S. 57, Presidency Towns Insol. Act, and S. 227, Companies Act. While bona fide payments to creditors by an insolvent, subject to the very important foregoing section in the Insol. Act are permissible and valid and, may generally be quite proper, payments to creditors of debts previously incurred by a company from the moment of the presentation of a winding up petition, become improper alienation and void. It necessarily follows from this that while such payment by an insolvent made bona fide to his creditors may be regarded as payments made in the ordinary course of business, payments by a company of debts existing at the time of the presentation of a petition for winding up made after the presentation of the petition cannot be so regarded. Transactions which the law regards as improper and declares void, and which a company conducted with due care and attention ought to avoid, cannot be regarded as transactions in the ordinary course of business. Moreover for the purposes of S. 227, it is wholly immaterial whether the person making or receiving the payment had or did not have notice of the presentation of the petition for winding up, and the operation of that section is not in any way made to depend upon such notice, whereas it would be essential under S. 57, Presidency Towns Insol.Act or a person claiming the protection of that section to show that the transaction claimed to be valid was without notice of the presentation of any petition. AIR (Vol 26) 1939 Sind 196: ILR (1939) Kar 460: 184 Ind Cas 428.

—S. 227 (2) — Scope — Transfer of shares—Jurisdiction of Court to order that the transaction is good.

It is within the jurisdiction of the Court at any time after the transfer of the shares to order that the transaction is a good transaction and shall stand. The words "every transfer of shares, shall unless the Court otherwise orders, be void," clearly allude to a transfer of shares which has actually taken place. Complete discretion has been left to the Court to do whatever it may think just in a mater of this sort. The section cannot be construed to mean that every transfer of shares without the previous sanction of the Court is void. AIR (Vol 21) 1934 All 161: (1934) ALJ 195: 3 AWR (HC) 499: 148 Ind Cas 498 (2),

——S. 227 — Scope — Principles governing — Interference in appeal.

The object of S. 227 (2) is to prevent, during the period which must elapse before the petition can be heard, improper alienations and dispositions of the company's property in extremis. Dispositions of the company's property made after the winding up are void unless the Court otherwise orders. The court should however exercise a judicial discretion and the appellate Court can interfere in appropriate cases. Principles which should guide Courts in such cases stated with reference to English cases and applied.

Held on the facts that the dispositions not strictly necessary for the carying on of the business and shoud consequently be set aside. AIR (Vol 18) 1931 Bom 2 : 32 Bom LR 953 (DB).

——S. 227 (2)—Winding up—Effect of.

The effect of a winding up order under S. 227 (2) is to avoid all dispositions of the property of the company made between the date of the presentation of the petition for winding up and the winding-up order unless the Court otherwise orders and the practice of the Court is to allow them if made honestly and in the ordinary course of business. AIR (Vol 17) 1930 Mad 1012: 59 MLJ 826: 32 LW 950.

——Ss. 227 (2) and 168 — Scope — Contract for purchase of goods.

Once the winding-up order was made, the company becomes as from the date of the petition incapable of entering into contracts without the sanction of the Court.

The effect of a winding-up order is to avoid all disposition of property between the date of petition and the date of the order. It equally avoids payments made by the Company. S. 227 (2) does not in terms apply to a contract for purchase of goods which, if made honestly and in the ordinary course of business, may be sanctioned by the Court. AIR (Vol 17) 1930 Mad 1012: 59 MLJ 826.

——S. 228

——Ss. 228 and 229 — Holders of draft drawn by Bank in liquidation—Position of—Ordinary or preferential creditors — Bank collecting money and issuing draft in compliance with or contrary to instructions of principal.

Where a claim is made before the official Liquidators of a Bank based on a draft issued by the Bank, the claimant should be treated as an ordinary creditor and a mere statement in an affidavit filed in Court that the money was paid for being transmitted to another place and for being paid to a specified person would not suffice to hold that the holder was a preferential creditor and better evidence will have to be produced.

In cases where the Bank has collected money and issued a draft or drafts in compliance with the instructions of the party or in accordance with the ordinary course of business, the payee of the draft should be treated as ordinary creditor. AIR 1915 Lah. 214, foll.

Where the draft has been endorsed by the payee, the endorsee should be classed as an ordinary creditor. If there has been a re-endorsement in favour of the original payee, he should also rank as ordinary creditor.

In cases where the Bank acted as agent for collecting money and issued draft contrary to the instruct-

tions of the principle or did not issue any draft or pay order at all, the money collected should be treated as trust money and should be paid in full before payment is made to creditors. (1950) 54 CWN 744.

——S. 228—Company in liquidation turning out to be solvent—Surplus funds—Creditor whose debt does not carry interest—If entitled in winding up to payment of interest.

Where a company in liquidation turns out to be solvent, a creditor of the company whose debt does not carry interest by agreement or otherwise, is not entitled in winding up to payment of interest on his debt. AIR (Vol 35) 1948 Mad 64: (1947) 1 MLJ 242: 60 LW 222: 1947 MWN 187: 1947 Comp. C. 83.

——S. 228 —Liquidation—Debt not presently payable—Set off

A debt, although not presently payable can be set off against moneys owing to a company in liquidation. To allow such a set-off would not amount to a fraudulent preference. AIR (Vol 27) 1940 Mad 157: (1939) MWN 1096: 50 MLW 759: 187 Ind Cas 531.

——S. 228 — Share-holders —Rights of — Set-off.

A share-holder is not entitled to set-off what he might receive on a winding up, against moneys due by him. The company cannot be expected to await the winding-up for the recovery of the moneys due to it from the shareholder, AIR (Vol 25) 1938 Mad 962 : (1938) MWN 996 : 48 MLW 431 : (1938) 2 MLJ 568 : ILR (1939) Mad 36 : 181 Ind Cas 349 (DB).

——Ss. 228, 229—Law of insolvency, meaning of—S. 229, if imports all provisions of Provincial Insolvency Act (V of 1920) into Company Law.

It cannot be held that the expressions "rules.. under the law of insolvency" in S. 229 and "law of insolvency" in S. 228, Companies Act, should be widened so as to include the whole "law of insolvency", rather than that the expression in S. 228, should be narrowed so as to include only "rules" as given in S. 229. Section 229, Companies Act, does not import all the provisions of the Prov. Insol. Act into Company Law and S. 28 (2) of the Latter Act is not so imported. AIR (Vol 23) 1936 Pesh 57 : 160 Ind Cas 908 (DB).

——S. 228 — Winding-up — Interest on outstanding debts—Whether to be paid before paying preferential share-holders—Rate of interest.

Where a company has been wound up, the creditors of the company should be allowed interest from the date of the winding up to the date of payment, on the outstanding debts before the preferential share holders can get anything. Where there has been a contract, interest of 6 per cent, may be allowed when the contractual interest is equal to or greater than this rate. In the absence of a contract for interest, a rate of 4 per cent is proper. AIR (Vol 21) 1934 All 189: 56 All 423: (1934) ALJ 332: 3 AWR (HC) 560: 147 Ind Cas 682.

——Ss. 228 and 229—Company to be wound up—Interest on debts—When allowed.

Where a company has been ordered to be wound up, the interest upon debts which carry interest, ceases to run from the date of the winding up order unless the assets are enough to pay all debts in full.

Where the estate is insolvent, nothing should be allowed for interest, but the opposite rule applies where the estate is solvent, that is, where there is a surplus. In the latter case, in whatever manner, the dividends may originally have been made, if it turns out that there is an ultimate surplus, the account must be taken as between the Company and the creditors in the ordinary way; that is by applying each dividend in the first place to the payment of the interest due at the date of such dividend, and the surplus, if any to the reduction of the principal. AIR (Vol 17) 1930 Mad 1012: 59 MLJ 826: 32 LW 950.

——S. 229

1. Applicability and scope.
2. Debts — Proof of.
3. Floating charge.
4. Interest.
5. Power of winding up, judge to decide question of title.
6. Priority — Crown debts.
7. Priority — Trust money.
8. Secured creditor.
9. Set-off.

Applicability and Scope.

——S. 229—"Rules", meaning of.

The "rules" referred to in S. 229, should not be restricted to "rules made under an Act." but the word "rules" should be understood in the sense of "provisions." AIR (Vol 29) 1942 Oudh 417: 1942 OWN (CC) 319: 18 Luck 110: 200 Ind Cas 485.

——S. 229— General law of insolvency applies to the winding-up of an insolvent company. AIR (Vol 28) 1941 Mad 18 : (1940) MWN 1077 : ILR (1941) Mad 328: 52 MLW 635: (1940) 2 MLJ 697: 193 Ind Cas 818 (DB).

——S. 229 — There is no real inconsistency between Ss. 229 and 230. (1937) ILR (1937) 1 Cal 684 (688) : 41 CWN 458 : 169 Ind Cas 506.

——S. 229— Scope.

Section 229 does not import all the provisions of the Prov. Insol. Act into Company Law and S. 28 (2) of the latter Act is not so imported. AIR (Vol 23) 1936 Pesh 57 : 160 Ind Cas 908 (DB).

—Ss. 229, 230 — Winding-up— Law applicable—S. 61, Provincial Insolvency Act, whether applicable.

Section 229, makes the rules of bankruptcy applicable as far as may be to the winding-up of companies; where, however, there is a conflict between the Companies Act and the Insol. Act, the provisions of the former must be given effect to. AIR (Vol 18) 1931 Lah 351 : 32 PLR 367 : 12 Lah 678 : 134 Ind Cas 200 (DB).

——S. 229—"Rules" meaning.

The phrase "the same rules....as are in force for the time being under the law of insolvency" in S. 229 is wide enough to include rules contained in the sections of the Provincial Insolvency Act, rules made under any power conferred by that Act and rules of practice unless there is something in the Companies Act itself already providing for the matter in question or in conflict with the rule which it is proposed to import. AIR (V 16) 1929 All 353 : 119 Ind Cas 273: 51 All 695: 1929 ALJ 811 (FB).

2. Debts — Proof of.

——S. 229—Company in liquidation—Ex parte assessment of income-tax—Liquidation Court can go behind assessment— Burden of proving that assessment is incorrect.

It is not in accordance with justice, equity and good conscience to apply the rule enunciated in (1899) 2 QBD 145 (2) to India even if that case

be regarded as correctly decided in accordance with English Law. A liquidation Court can in proper cases go behind assessments though the latter are prima facie evidence that certain income was earned and that amount of tax is due. The onus, however, of proving that the assessment does not represent the real taxable income rests on the Liquidator. If he fails to discharge the onus, the assessment must stand. AIR (Vol 30) 1943 Lah 228: ILR (1943) Lah 706: 46 PLR 1: 209 Ind Cas 17 (DB).

——S. 229—Provincial Insolvency Act (V of 1920), S. 34 (2) —Assessment of Income Tax on Company before winding up and without working into accounts —Income Tax Officer claiming this as debt—Official Liquidator, if can call for proof of the debt.

The provisions of S. 34 (2), Prov. Insol. Act apply to all debts including judgment-debts and by S. 229 Companies Act, this provision is applicable to Insolvent Companies.

Where there has been a genuine contest between a claimant on the one hand and a Company which goes into liquidation later, on the other, and the parties have fought out the case bona fide, it should not be open to the Official Liquidator to re-open the case are to go behind the judgment and to look into the consideration for the same, but where a decree rests on some thing less than a real trial on the merits of the case or there are circumstances justifying the Official Liquidator to doubt the bona fides of the judgment or to suspect a miscarriage of justice, it would be open to the Official Liquidator to reject the decree and call for fresh proof of the claim.

Where, therefore, the assessment of the Income Tax on the Company before its winding-up, had been made on an estimated income without the accounts being looked into and these accounts show that the company did not make any profit during the year, but on the contrary it suffered a loss, under these circumstances, the assessment is clearly unjustified and the Official Liquidator can question the validity of the assessment debt and call for its proof. AIR (Vol 22) 1935 Oudh 451: 1935 OWN(CC) 791: 156 Ind Cas 708.

——S. 229 —Company—Voluntary winding-up — Judgment passed against company —Power of Insolvency Court to go behind—Liquidator.

The Liquidator in a voluntary winding-up, who occupies the same position of a trustee in bankruptcy is entitled to ask the Court sitting in insolvency jurisdiction to go behind a judgment that has been passed against a company. It is not necessary that fraud or collusion should be shown. It is sufficient if it can be shown that there ought not to have been a judgment. AIR (Vol 19) 1932 Bom 253: 34 Bom LR 411: 138 Ind Cas 442 (DB).

——S. 229 — Proof of debts — Principle explained.

Where there has been a genuine contest between a claimant or a creditor on the one hand and the company which goes into liquidation later on and the parties have fought out the case, bona fide, it should not be open to the official liquidator to reopen the case and to have, as it were, a fresh trial of strength. But, on the other hand where the decree rests on something less than a real trial on the merits of the case, the question would arise whether the official liquidator would not be justified in putting the decree aside & asking for what has been called the 'consideration for the judgment'. A judgment would always give prima facie proof of a debt. It is only when there are circumstances casting doubt on the correctness of the debt, as proved by the judgment, that the judgment may be set apart and independent proof may be called for. Where a judgment is obtained on the confession of the insolvent it is open to the liquidator to set apart the decree and to ask for proof of the claim. AIR (V 14) 1927 All 426 : 102 Ind Cas 756 : 49 All 728 : 25 ALJ 450.

3. Floating charge.

——S. 229—Floating charges.

S. 52, of the Pres. Towns Insolvency Act does not apply to cases of floating charges created by company registered under the Companies Act of 1913 before its liquidation in favour of its bank. Where the company under liquidation was an agent to another company for the sale of its goods and its duty was to sell the goods of the principal company and pay the sale proceeds to the latter in due course and return the goods not sold, the principal company was held to have priority in respect of the price of goods received from the agent company. AIR (Vol 12) 1925 Mad 271: 85 Ind Cas 626: 20 MLW 861.

4. Interest.

——S. 229 —Winding-up— Company turning out to be solvent—Interest payable after date of winding-up — Creditor's right to recover interest at contract rate.

Where the assets of a company are sufficient for payment in full of its liabilities existing at the date of the commencement of the winding-up it is not an insolvent company; S. 229, is not applicable to it, and the creditors are entitled out of the surplus assets of the company (if any) to receive interest upon such of the debts as carry interest, from the commencement of the liquidation until payment of such debts, at the rate at which by agreement or otherwise interest is payable.

Section 229 is only applicable to an insolvent company and in the winding-up of an insolvent company, interest accruing after the commencement of the liquidation is not a provable debt under the Companies Act. AIR (Vol 18) 1931 Rang 334: 9 Rang 318 : 133 Ind Cas 238 (DB).

——Ss. 229, 168 and 227 (2) — Winding-up by Court — Debts due from the company— Interest on when payable—Contracts by company subsequent to winding up — Validity.

When a company has been ordered to be wound up, the interest upon debts payable by the company ceases to run from the date of the winding-up order unless the company is solvent. The company's solvency is established if after payment of the principal and interest up to the date of winding-up there are some assets sufficient to meet the liability on account of interest accruing after the commencement of the litigation. AIR (Vol 17) 1930 Mad 1012: 59 MLJ 826.

5. Power of winding up, judge to decide question of title.

——S. 229 — Application for leave to proceed with the suit or other proceeding — Winding-up Judge can adjudicate upon question of title raised by unsecured creditor. AIR (Vol 29) 1942 Oudh 417: 1942 OWN (CC) 319: 18 Luck 110: 200 Ind Cas 485 (DB).

6. Priority — Crown debts.

——S. 229 — Priority of crown debts.

The priority of payment of all Crown debts